



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/29905/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Determination & Reasons**

**On 25 April 2017**

**Promulgated**

**On 3 May 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MANUELL**

**Between**

**Mr POOBALASINGAM PURUSHOTHAMARAJAN  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms B Jones, Counsel (instructed by Wimbledon Solicitors)

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

**DETERMINATION AND REASONS**

*Introduction*

1. The Appellant appealed to the Upper Tribunal with permission granted by Upper Tribunal Judge Kebede on 14 March 2017 against the decision and reasons of First-tier Tribunal Judge Monson who had dismissed the Appellant's appeal against the refusal on 14 August 2015 of his

application for further leave to remain on Article 8 ECHR grounds. The decision and reasons was promulgated on 12 August 2016.

2. The Appellant is a national of Sri Lanka, born on 7 April 1985. The reasons for refusal letter records the use of numerous aliases by him. He arrived in the United Kingdom on 3 June 2002 and claimed asylum. His claim was refused on 16 July 2002. On 25 February 2003 he was granted exceptional leave to remain for a limited period, unspecified. The Appellant's appeal against the refusal of his asylum claim was dismissed on appeal on 12 September 2003. The Appellant nevertheless remained in the United Kingdom.
3. On 4 April 2012, the Appellant was granted discretionary leave to remain for three years. Judge Monson surmised that this was likely to have been granted under the legacy scheme, i.e., for refused claimants against whom no enforcement action had been taken. The Appellant's application for a travel document was refused on 14 March 2014. On 2 April 2015 (within the currency of his existing leave) the Appellant made his Article 8 ECHR application, refusal of which gave rise to the appeal to the First-tier Tribunal.
4. The reasons for refusal given by the Respondent were that since the previous grant of discretionary leave to remain on 4 April 2012 the Appellant had been convicted of a number of criminal offences. His claim to having a child in the United Kingdom had not been proven. He did not meet the suitability requirements of paragraph 276ADE(1)(i) of the Immigration Rules. He had failed to disclose all of his convictions when he made the current application. Paragraph 276ADE(1)(vi) was not applicable as the Appellant could not show that there would be very significant obstacles to his integration in Sri Lanka. He spoke the language and had spent the majority of his life there. No exceptional circumstances had been shown. His family ties with his sister and two brothers were not above the normal. His character and conduct did not justify a further grant of leave to remain. He also had a poor record of compliance with reporting conditions.
5. In his grounds of appeal, the Appellant contended that he suffered from severe post traumatic stress disorder for which he was being treated. His mental health was being

monitored. Because of his mental health removal to Sri Lanka would constitute inhuman and degrading treatment. His Article 8 ECHR rights would also be infringed. The grounds of appeal were accompanied by a letter dated 28 August 2014 authorising the Appellant's solicitors to act on his behalf. A 106 page bundle was filed for the appeal hearing.

6. An application to adjourn was made to Judge Monson at the start of the appeal hearing. Counsel stated that her instructions were limited to the adjournment application. There was concern by her instructing solicitors as to whether the Appellant had capacity. Judge Monson set out the submissions at [25] onwards of his decision and reasons. A witness statement was provided by the Appellant's solicitor. The judge refused the application because he considered that it was not procedurally unfair to continue with the hearing in the Appellant's absence, given that evidence had been filed.
7. Judge Monson gave full reasons for his decision, referring to paragraph 2 of the Tribunal Procedure Rules 2014, the overriding objective. He considered that the grounds of appeal showed that that the Appellant's solicitors already had had access to the Appellant's mental health records, and had further been specifically authorised by the Appellant to obtain disclosure from third parties such as the Appellant's GP. The judge noted that the Appellant had legal aid: this was stated on the Notice of Appeal. The Appellant's sister had been at the tribunal and could obviously have given relevant evidence on material issues raised in the Notice of Appeal, including the Appellant's mental health. There had been no explanation of why such matters had not been addressed earlier. There had been an egregious failure to comply with the obligation to help the tribunal to further the overriding objective, and to cooperate with the tribunal generally. It is plain that the judge considered that the Appellant shared responsibility for that.
8. It should be noted that there was no current independent medical or psychiatric evidence placed before Judge Monson demonstrating that the Appellant lacks capacity. No such evidence has been produced since that date and none was placed before the Upper Tribunal. Yet the Notice of Appeal stated expressly that "the appellant suffers from severe post traumatic stress disorder for which the

appellant is taking treatment with the Consultants and attending counselling” and “We are currently in contact with the mental health team who is constantly monitoring the appellant.”

9. Judge Monson proceeded to determine the appeal in the Appellant’s absence. He examined the evidence in the Appellant’s bundle. He inferred from Dr Nathan’s 2003 report stating that the Appellant suffered from post traumatic stress disorder from which it would take him “several years” to recover that it was unlikely that the Appellant still suffered from severe PTSD. Noting that the Appellant had a reasonable expectation of being granted further leave to remain provided that the circumstances which had led to the original grant of leave had not substantially altered, the judge examined the change of circumstances relied on by the Respondent and ultimately concluded that the final conviction dated 28 January 2015 could not be classified as “unspent” (adopting for these purposes the most favourable possible interpretation of the disclosure requirements) and that the Appellant had thus failed to meet the suitability requirements. In any event, the Appellant could not show that he would face very significant obstacles to his integration into Sri Lanka. Nor was there evidence showing that he would face an Article 2 or 3 ECHR risk on return because of his mental health. Nor, on the evidence available, did the Appellant’s mental health justify allowing his appeal on Article 8 ECHR grounds. The judge applied section 117B of the Nationality and Immigration Act 2002 and found that Appellant’s private life had been built up when his status was precarious. The Appellant, a repeat petty offender, had accrued three convictions for seven offences. The Appellant’s exclusion was proportionate. It was implicit in the judge’s decision that the Appellant had failed to show family relationships which engaged Article 8 ECHR. The appeal was thus dismissed.
10. Permission to appeal was refused by First-tier Tribunal Judge Colyer but was granted by Upper Tribunal Judge Kebede on 14 March 2017 on the renewed application because she considered that the procedural fairness argument that the judge should have adjourned the hearing for further medical evidence deserved further exploration. It was also arguable that the judge had failed to consider the Home Office discretionary leave policy.

Clearly Judge Kebede was by no means convinced that there was any material error of law.

11. The Respondent filed a rule 24 notice in the form of a letter dated 24 March 2017 indicating that the onwards appeal was opposed because the judge had directed himself properly when refusing the adjournment.

### *Submissions*

12. Ms Jones for the Appellant relied on the onwards grounds and submitted that the judge had misdirected himself in various ways. He had not taken account of C v First-tier Tribunal [2016 EWHC 707 (Admin)]. Capacity was in issue and it was wholly unfair of the judge to have refused an adjournment and to have heard the appeal in the Appellant's absence. The judge had been alerted to the difficulties by the witness statement of the Appellant's solicitor but had ignored the capacity problem which was nowhere addressed. There was no capacity and so the appeal could not proceed: there was no jurisdiction because the solicitor's retainer had ended for lack of capacity. There were no instructions. It was inevitable that there could not be a fair outcome in such circumstances. The judge indicated that he was aware of the possibility that the Appellant was suffering from mental illness, yet ignored the consequences. The judge had impermissibly made his own diagnosis that the Appellant had recovered from post traumatic stress disorder at [38] of the determination.
13. The judge had also erred substantively when determining the appeal because he had failed to consider the Home Office policy relating to discretionary leave to remain, the Asylum Process Instruction. Refusal was not the automatic consequence of a criminal record. The decision maker was required to consider the impact of the individual's criminal history before granting any leave. The decision had not been in accordance with the law for Article 8 ECHR purposes. The errors of law were material.
14. The combination of legal errors meant that the decision and reasons must be set aside. The appeal should be returned to the First-tier Tribunal so that a litigation friend could be appointed, and reheard before judge other than Judge Monson.

15. Mr Tarlow for the Respondent relied on the rule 24 notice. He submitted that there was no error of law and the determination should stand. The onwards appeal should be dismissed. The judge had considered all relevant facts and circumstances in detail. There was still no up to date medical evidence showing lack of capacity. This was nothing more than an attempt to have a second bite of the cherry. If there had been a failure to consider Home Office policy, any error of law was not material.
16. In reply, Ms Jones reiterated her earlier submissions. There had been some medical evidence before the judge. It was a serious error of law to deprive someone of a fair hearing. The judge had further erred in his Article 8 ECHR analysis by not taking into account the Home Office policy.
17. The tribunal indicated at the conclusion of submissions that it found that there was no material error of law and reserved its determination, which now follows.

*No error of law finding*

18. The submissions made on the Appellant's behalf were extravagant and misconceived. The fact that counsel had not been given a copy of the Appellant's Notice of Appeal, an obviously fundamental document, did not, of course, assist her. (The tribunal provided a copy for counsel's reference.) This appeal must be understood in its proper context, which is why the tribunal has set out the background in more detail than usual. Judge Monson necessarily gave much more detail and reference should be made to his decision for that. There was no challenge to his accuracy.
19. At [27] of his decision the judge referred to the witness statement made by the Appellant's solicitor. (Ms Jones supplied the tribunal with a copy.) The judge had seen no need to summarise the witness statement, but the contents no doubt informed his decision and so it is useful to record what was before him. The witness statement, dated 25 July 2016, was made by a solicitor who was five years qualified. She stated that instructions had been accepted on 28 August 2015. The Appellant had been accompanied by a friend but the solicitor did not have any record of the friend's name. The solicitor was instructed that the Appellant had suffered from mental ill health.

Notice of Appeal was completed as instructed by the Appellant. The Appellant was said to have been “not contactable due to his illness and mental health condition”, according to his brother and sister, until February 2016.

20. A request for the papers sent to the Appellant’s previous solicitors had not received a reply. When notice of the hearing was received, the solicitors contacted the Appellant and requested him to bring in his papers, which he did. The Appellant was fully aware of the hearing date. He failed to attend two scheduled appointments. The Appellant was eventually contacted on 20 July 2016. He refused to be assessed by a psychiatrist. The solicitor made an appointment for a psychiatrist to attend the solicitor’s office on 26 July 2016. On 22 July 2016 the Appellant attended the solicitor’s office. He was distressed and angry. The solicitor had serious concerns that the Appellant [mis]understood her role. She told the Appellant that he must see a psychiatrist and he finally agreed to do so.
21. The witness statement is silent as other evidence gathering, such evidence from the Appellant’s siblings and friends. No mention is made of contacting the Appellant’s GP pursuant to the wide authority signed by the Appellant.
22. As at the date the appeal stood before Judge Monson, the judge was entitled to conclude that the Appellant had capacity to instruct his solicitor. According to the Notice of Appeal, legal aid had been obtained on his behalf, as the judge noted. The firm’s notepaper records that they are accredited by the Law Society in immigration law. The Appellant had signed a formal retainer and his instructions had been followed. He had provided his solicitors with documents and a bundle of evidence had been submitted for the hearing. He was aware of the date of his appeal hearing. He was evidently not an easy client but the solicitors had not exercised their right to terminate their retainer. The solicitors must also be presumed to be aware of the widely reported decision in Re C (above), yet had made no application to the tribunal to seek the appointment of a next friend. Mental health issues do not of themselves mean that there is insufficient capacity to continue to give instructions.
23. The judge took great trouble over the exercise of his discretion and examined the relevant and competing

factors. As was obvious, this was the Appellant's appeal and it was his responsibility to pursue it. It is for the parties to assist the tribunal to complete its tasks in accordance with the overriding objective. As happens far too frequently in the First-tier Tribunal, and as Judge Monson rightly noted, there had been an egregious failure to comply with the overriding objective, for which the Appellant shared responsibility. The solicitors had been instructed for nearly a year, yet had done little to prepare for what was bound to be an appeal with limited prospects of success. There is a strong public interest in the judicial business of the Immigration and Asylum Chamber being despatched promptly, because appellants who enjoy "in country" appeal rights either have their existing leave extended (or their removal deferred) by section 3C of the Immigration Act 1971. This can result in a reward for delay.

24. The judge pointed out that the authority signed by the client was sufficient to enable them to obtain any necessary documents, including medical records, to support the case advanced in the Notice of Appeal. There were also family members available to give evidence. The tribunal considers that the judge was right to conclude that it was fair to proceed on the evidence provided. There had already been abundant opportunity to provide evidence.
25. Contrary to Ms Jones's submission, the judge did not engage in impermissible medical diagnosis concerning the Appellant's past severe PTSD. Dr Nathan had specifically stated as long ago as 2003 that the Appellant should recover over several years. It need hardly be said that 13 years is rather longer than several years, so the judge's inference was proper and logical. The judge made no finding that the Appellant could no longer be suffering from PTSD, merely that it would on Dr Nathan's prognosis no longer be severe. There was no medical or psychiatric evidence before the judge to cause him to take a different view.
26. Nwagwe (adjournment: fairness) [2014] UKUT 418 (IAC) was not mentioned expressly by the judge in his decision but there was no need to do so. That decision was based on the AIT Procedure Rules 2005 (as amended), with particular reference to the restrictions of rule 21(2), although at [9], the simplified adjournment provisions of the Tribunal Procedure Rules 2014 were foreshadowed and



briefly discussed. There is no rule in the 2014 rules which resembles rule 21(2) of the 2005 rules. The overriding objective of the 2014 rules differs from the 2005 rules, and may be seen as wider. The present appeal was governed by the Tribunal Procedure Rules 2014. The right to a fair hearing is, of course, a basic principle. There can be no doubt that it was very much in the experienced judge's mind. But fairness involves fairness to all stakeholders. The judge was entitled to conclude that there was no evidence of lack of capacity such as to have terminated the solicitor's retainer and that a fair hearing in the Appellant's unsatisfactorily explained absence was possible in all the circumstances.

27. As to the Home Office policy, this had not been raised in the Notice of Appeal and, of course, no submissions were made on the Appellant's behalf. The relevant facts for the exercise of the Secretary of State's discretion were the convictions the Appellant had accumulated, or at least those which were unspent. The judge considered paragraphs S-LTR.1.1, S-LTR.1.6, S-LTR.2.1 and S-LTR.2.2 of paragraph 276ADE(1)(i) of the Immigration Rules, as well as paragraph 276ADE(1)(vi). These paragraphs cover essentially the same grounds as the Home Office policy which was said to have been overlooked. There was no evidence that the Respondent unlawfully fettered her discretion or had misapprehended material facts. In any event, the tribunal no longer has "a not otherwise in accordance with the law jurisdiction". This appeal was, as the judge noted, under the new version of section 82. The old section 86(3) had gone. The Article 8 ECHR "not in accordance with the law" test under Razgar [2004] HL 27 tests means not that the decision in question was lawful but rather was there power to make it: Malone [1984] ECHR 10. Plainly there was such power. The second ground of appeal has no real merit. Any error of law cannot be shown to have been material.
28. The tribunal accordingly finds that there was no procedural unfairness and no material error of law in the decision and reasons. There is no basis for interfering with the judge's decision.
29. The tribunal adds, as Judge Monson hinted, this will doubtless not be the end of the Appellant's claims. He failed to leave the United Kingdom following the dismissal of his asylum appeal and the expiry of his ELR. The

reasons for refusal letter made no mention of specific enforcement action being taken by the Secretary of State (although a long list of aliases was given, suggesting familiarity with the Appellant). Much later, in 2012, the Secretary of State for the Home Department granted him discretionary leave to remain in what has been accepted as his true identity. No doubt yet another application will be made to the Home Office on his behalf following the dismissal of the present appeal. Those, however, are not matters for the tribunal, which has served its function by properly hearing and deciding the appeal before it.

### **DECISION**

The making of the previous decision did not involve the making of an error on a point of law and stands unchanged

**Signed**

**Dated** 28 April 2017

**Deputy Upper Tribunal Judge Manuell**