Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05171/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 22 January 2019	**On 13 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

ATHULA INDIKA JAYARATNE
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Solomon of Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Sri Lanka born on 1 February 1971. He appeals against a decision of Judge of the First-tier Tribunal Young sitting at Hatton Cross on 23 May 2018 in which the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 5 April 2018. That decision was to refuse the Appellant's application for international protection.

2. The Appellant arrived in the United Kingdom on 10 October 2008 with a student visa issued on 11 September 2008. His leave as a student was extended until 14 March 2011. An application for leave to remain outside the rules was refused on 5 July 2013. After being served with form IAS 96 he made a claim for asylum on 5 July 2016 the refusal of which led to the present proceedings.

The Appellant's Case

3. The Appellant claimed asylum on the basis that he had a well-founded fear of persecution in Sri Lanka due to his political opinion. On return to Sri Lanka he would be killed because of articles he had written whilst working as a journalist. He had written an article about the illegal production and distribution of alcohol in Sri Lanka and had written articles whilst living in Dubai criticising the Sri Lankan government. He was arrested on 25 March 2008 and ill-treated by a group of unknown men. Since arriving in the United Kingdom his family continued to receive threats because he had continued with his critical articles after the incident in March 2008.

The Decision at First Instance

4. At [86] the Judge set out his conclusions. It was not clear how the Appellant would become known to and receive threats from alleged thugs at a time when he was said to be writing articles under a pseudonym in Dubai. There were no articles written by the Appellant produced for the hearing. He claimed he had given them to his previous solicitors who had lost them but there was no support for that proposition. There was no correspondence from any hospital in Colombo to confirm the treatment the Appellant received in 2008.

5. His account of the attacks upon him were inconsistent. He had made no mention of a subsequent incident in July 2008 in his substantive asylum interview. There was an inconsistency in the account of the March 2008 incident between what he said to the Respondent in interview and what he said in his subsequent witness statement. In interview he said he was taken away and beaten up whereas in his witness statement he said he was attacked in front of the attendees of a ceremony. The Appellant was inconsistent about what injuries he reported from the March 2008 incident.

6. An Article which the Appellant relied upon about the ceremony in question made no reference to anyone being attacked. The Appellant had delayed his claim for asylum having entered a course of study rather than making any asylum claim based on his past experiences. He had sought an extension to his student visa but still made no claim for asylum. There was no confirmation of his claim that he had given instructions for an

asylum claim to be made in 2011. Even on the lower standard of proof the Appellant's account was not credible and the Judge dismissed it.

The Onward Appeal

7. The Appellant appealed against this decision in grounds settled by counsel who appeared at first instance and who appeared before me. The grounds argued that the Judge had refused to adjourn the hearing for a medico-legal report in respect of the Appellant's physical scarring and mental health. The refusal was on the grounds that the Appellant had had considerable time to obtain a report. That was the wrong test. The correct test was whether an appeal could be fairly determined in the absence of an adjournment and the grounds relied on the Upper Tribunal authority of **Nwaigwe [2014] UKUT 418**.

8. The Judge's approach to the evidence was flawed in that he had rejected the Appellant's account because of a lack of supporting documentation when corroboration was not necessary, see **ST [2004] UKAIT 119**. The Judge had given no reasons why he rejected the evidence in support of the Appellant's claim to be a journalist which included a letter from a fellow journalist and a letter from a newspaper confirming the Appellant worked as a senior journalist. There were also photographs showing the Appellant with media persons at media events. The co-worker had confirmed the Appellant contributed news items criticising the then government and was attacked by the Deputy Labour Minister and his security team. The Appellant could not be expected to explain how the alleged thugs had found him.

9. The Judge had given inadequate reasons for rejecting the claim that the Appellant had given papers to a previous solicitor who had lost them. The news article written by the Appellant was inflammatory because it referred to further enquiries revealing that a highly influential politician in the area had interfered in police raids. Further, the Judge had directed himself that the standard of proof was the balance of probabilities whereas the same standard applied for asylum as Article 3. There were inadequate findings about the risk of suicide given the clinical psychologist's reference to the Appellant's frequent feelings of suicide and his history of suicidal ideation.

10. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Povey on 1 October 2018. He referred to the determination as being both coherent and detailed and that the Judge had correctly directed himself on the law. In refusing permission, he wrote that the Judge's decision to refuse to adjourn disclosed no error of law and the credibility findings were based upon an exhaustive consideration of the evidence. Whilst Judge Young had misdirected himself on the standard of proof for Article 3 and its status as an absolute right those errors were immaterial. Given the Judge's findings of fact and the evidence on medical treatment available in Sri Lanka the misdirection

made no difference to the outcome namely that Article 3 was not breached.

11. The Appellant renewed his application for permission to appeal on similar grounds to those previously submitted. The renewed application came on the papers before Upper Tribunal Judge Kekic on 5 December 2018. She noted the Appellant's arguments, found them arguable and granted permission.

The Hearing Before Me

12. In consequence of the grant of permission the matter came before me to determine in the first place whether there was a material error of law in the decision of the First-tier Tribunal. If there was then the decision would be set aside and I would make directions for the rehearing. If there was not, then the decision at first instance would stand.

13. For the Appellant counsel relied upon the grounds of onward appeal. The Judge had failed to consider whether he could fairly determine the appeal without the medico-legal report sought by the Appellant. The report would have addressed the complaint about inconsistencies and omissions in the Appellant's account. The Judge had failed to reach a conclusion on the reasonableness of not obtaining supporting evidence. The Appellant had given supporting documents to Joy and co, they were lost and that firm had since folded. The Appellant been unable to obtain a report from hospital on the injuries he sustained in the March 2008 attack. 10 years have passed since then.

14. Counsel acknowledged the authority of **TK Burundi** but the Judge had failed to give adequate reasons for his rejection of the evidence which supported the claim. The Judge had not dealt with a letter from a fellow journalist and given no reason for rejecting that letter. The credibility findings could not be made in isolation, there were photographs showing the Appellant with media persons and showing the Appellant's injuries. There was inadequate consideration of Articles 2 and 3 of the Human Rights Convention.

15. For the Respondent it was submitted there was no material error of law. It was important to look at the timeline when considering the adjournment request. The Judge had dealt with the request for an adjournment at [14] to [17] of the determination and his conclusions were open to him. There had been significant delay by the Appellant in this case. The Judge had found it important that the articles submitted by the Appellant were not written by him. There was no evidence that the Appellant had made any complaint about or to his previous solicitors who it was said had lost his documents. There was nothing from the Appellant's father about the failure to obtain medical evidence of the Appellant's injuries in Sri Lanka. There was no evidence put forward of any claim under Article 8.

16. In conclusion, counsel argued that the challenge in the grounds was in relation to Articles 2 and 3 not Article 8. The issue was not whether the Tribunal acted reasonably in refusing to adjourn but the test was one of fairness. The report on the Appellant was expected in October 2018 but that was not the reason given by the Judge for the refusal to adjourn. The sole reason was that the Appellant had already had time to obtain a report. For the Respondent to argue that the Appellant should have got on with matters more quickly was for the pot to call the kettle black as the Appellant's asylum claim had been made in 2016 but was not decided by the Respondent for 21 months. The possibility of an adjournment application had been raised in the reply form at the PHR stage.

Findings

17. The appeal in this case is largely a reasons-based challenge to the Judge's adverse credibility findings. The first issue the Appellant relies upon is the refusal of the Judge to adjourn the appeal hearing. It is correct that the test of whether to adjourn is one of fairness. The Judge directed himself that he should have regard to the overriding objective and the need to deal with cases justly and expeditiously. Whilst the Judge did not refer by name to the Upper Tribunal authority of **Nwaigwe** it is clear from [17] that he was aware of the appropriate test when considering an adjournment. Thereafter it was a matter for him to decide whether to adjourn.

18. The Appellant had apparently undergone a psychological assessment in January 2017 and if a subsequent report was necessary the Judge's view was that there had been considerable time since then for it to be obtained. Although the Respondent had refused the claim on 5 April 2018 and the hearing came before the Judge seven weeks later on 23 May 2018 the Appellant had in reality had considerably more than seven weeks to prepare his case. Not only had the Appellant had 16 months since the psychological assessment to obtain a subsequent report but as the Judge pointed out the Appellant had been in the United Kingdom since October 2008 and could have had a referral for psychological treatment at any time since then.

19. It was not being suggested that the Appellant could not give oral testimony and the Judge at the conclusion of [17] indicated that given the information received about the Appellant's psychiatric difficulties the hearing should proceed in line with the Presidential Guidance on vulnerable witnesses. In the circumstances it is difficult to see what was to be gained from a lengthy adjournment of at least five months until October 2018 for the Appellant to obtain a report which he could and should have obtained much earlier. I do not consider there was any material error of law in the Judge's refusal to adjourn and continue with the hearing.

20. The remainder of the grounds are really a lengthy disagreement with the Judge's conclusions. The point about **TK Burundi** is that if evidence could reasonably be obtained but it has not been obtained, it is open to a Judge to draw an adverse inference from the absence of such evidence. If the Appellant was the journalist he claimed to be, it was reasonable to expect him to have had some evidence in the form of past articles he had written to produce either to the Respondent or to the Tribunal, yet the Appellant had produced nothing. What the Appellant had produced was evidence in letter form from a co-worker claiming that the Appellant was a journalist. What the Judge evidently wanted to see was something more direct than that, evidencing what the Appellant claimed to have done in Sri Lanka. The absence of that evidence meant it was open to the Judge to conclude that the Appellant had not provided supporting evidence because he did not have any and that was because his claim was bogus.

21. The Appellant's argument that he had supplied a previous firm solicitors, Joy and Co, with the documents but they had lost them did not impress the Judge who expected that there would at least have been a letter of complaint to the previous solicitors. If the practice had been intervened, it might have been possible to write to the firm appointed by the Law Society to intervene but nothing of that sort had been done. The Appellant had not even obtained medical evidence to support his claim of injuries in the 2008 incident. There was nothing from the father detailing what enquiries had been made to obtain medical evidence and why those enquiries had been unsuccessful. In those circumstances it would have been open to the Judge to draw the conclusion that there was no medical evidence to obtain.

22. There were serious inconsistencies in the Appellant's account which were itemised in some detail by the Judge in rejecting the Appellant's credibility. There is no satisfactory answer from the Appellant to those inconsistencies. The grounds sought to criticise the Judge for failing to deal adequately with the evidence that was supplied confirming the Appellant's claim to work as a journalist. This ground overlooked [87] of the determination in which the Judge carefully considered evidence that had been before him supporting the claimed employment as a journalist. He noted that there was no evidence that the Appellant had written an article on 21 February 2008 prior to the alleged assault in March 2008. The Appellant had no answer to the particularly serious finding that the Appellant had made no mention of any incident in July 2008 in his asylum interview. Nor did the Appellant have an answer to the conclusion that the alleged complaints to the police of 7 July 2008 and the father's 2016 statement had been produced "after the event and to order".

23. The grounds complained that the Judge had used the wrong standard of proof. The Judge was careful at [8] and [9] to correctly set out the burden and standard of proof in relation to asylum claims. At [11] the Judge referred to the standard of proof in human rights claims as being the balance of probabilities. Given that the Judge had correctly rejected the

asylum claim to the appropriate standard it is difficult to see how the slip in relation to Article 3 was material. The risk of suicide was discounted by the Judge because he did not believe that the Appellant had suffered the injuries or persecution claimed. That had been disbelieved to the lower standard. Whilst it is correct to say that even a subjective fear of persecution can mean that a risk of suicide could arise, the Judge was careful to point out at [89] that return to Sri Lanka would mean a reunion with the Appellant's wife and son, mother and wider family. They could provide the Appellant with support.

24. The Respondent had outlined in some detail in the refusal letter the treatment that was available in Colombo should the Appellant's depression continue. This appears to be a reference to paragraph 79 of the refusal letter which had referred to the fact that Sri Lanka had one of the most effective health systems among developing nations and the country had an extensive network of healthcare institutions. The disease burden had started shifting rapidly towards non-communicable diseases including mental diseases. The Judge acknowledged this evidence and it was open to him to conclude that any mental health issues could be satisfactorily dealt with.

25. The Judge had not rejected the Appellant's claim to be depressed, what he had rejected to the lower standard was that any mental health problems could have been caused by alleged persecution. The Judge held for cogent reasons that adequate medical treatment and family support would be available to the Appellant upon return. In those circumstances I agree with Judge Povey that any error in relation to the standard of proof for Article 3 was immaterial. I find that there were no material errors of law in the determination dismissing the Appellant's claim for international protection and I dismiss the appeal against the decision of the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 4th February 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal, no fee was payable and therefore there can be no fee award.

Signed this 4th February 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge