



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/14176/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 29 January 2020**

**Decision & Reasons Promulgated
On 11 February 2020**

Before

**THE HON. MR JUSTICE LANE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT**

Between

**M S
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. N. Paramjorthy, Counsel, instructed by ABN Solicitors
For the Respondent: Mr. T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka who entered the United Kingdom with entry clearance as a student, probably in 2009. After receiving further leave to remain in a student capacity, he was granted leave to remain as an entrepreneur until June 2016. Shortly before the expiry of that leave, the appellant claimed to be in need of international protection. He appealed to the First-tier Tribunal against the respondent's refusal of that claim.

2. On 3 July 2017, the appellant's appeal was due to be heard at Hatton Cross. The First-tier Tribunal Judge caused her clerk to telephone the appellant's then solicitors, in order to discover why there had been no appearance by or on behalf of the appellant. That was at or around 12.30 p.m. on the day of the hearing. The clerk was informed that the appellant was unwell and had been taken to hospital. The judge requested the clerk to telephone the solicitors to "inform them that medical evidence/evidence from the hospital was required".
3. Those solicitors had, in fact, earlier faxed a letter to the First-tier Tribunal, dated 3 July 2017, which said:-

"The appellant is unwell. Specifically, the appellant has had chest pains. The appellant has been taken to hospital by his friends.

We are awaiting evidence as confirmation of this.

In light of the above we request the appellant's hearing be adjourned. It would be unfair to proceed such hearing (sic) without the appellant being present".
4. The First-tier Tribunal Judge had, it seems, received that letter by the time she turned again to the appeal, around 4.30 p.m. In her decision, she said that she "acceded to the Presenting Officer's request to hear this appeal in the absence of the appellant after considering the provisions of Rule 2 and further delay which was not in the public interest". In that regard, the judge took into account the fact that an earlier hearing on 31 January 2017 had been adjourned for the appellant to obtain medical reports and documents from abroad. She also noted that in June 2017 the appellant had made a self-referral to the Central and North West London NHS, owing to problems he was having with his sleep and nightmares. He had been offered a course of cognitive behavioural therapy.
5. The First-tier Tribunal Judge analysed the documentary evidence before her. She found that the appellant had not provided a credible explanation for aspects of his claim to be in need of international protection. She concluded that the appellant had not established, even to the lower standard required of him, that he was arrested and detained by the CID and accused of assisting a Tamil activist. She concluded that, despite his claim, the appellant had not been the subject of an outstanding arrest warrant. In this regard, the First-tier Tribunal Judge noted that the appellant "did not attend the oral hearing to be cross-examined on this and other points".
6. The First-tier Tribunal Judge dismissed the appellant's appeal on asylum, humanitarian protection and human rights grounds.
7. Permission to appeal to the Upper Tribunal was sought from the First-tier Tribunal. Paragraph 5 of the grounds engaged with what the First-tier Tribunal Judge had said about evidence from the hospital being required, to confirm that the appellant had been admitted on 3 July. Paragraph 5 stated that "it was unfortunate that the evidence was not available at the

date of the hearing but that specific evidence has now been provided ... and the reason the evidence was not provided by 4.30 p.m. on the day of the hearing was due to the fact that [the appellant] was not discharged until 1656 hours”.

8. Paragraph 6 of the grounds said the evidence revealed that the appellant had fallen, the night before the appeal hearing, and was admitted to hospital with chest pains and therefore could not have attended the hearing. Since the appellant’s oral evidence was “crucial to a determination of credibility”, the grounds contended that the First-tier Tribunal Judge’s decision not to adjourn the matter deprived the appellant of discharging the burden of proof.
9. Before us, Mr. Paramjorthy adduced the fax transmission report of the solicitors, in respect of the faxing of the application for permission and grounds in February 2017. The fax transmission report recorded that a number of additional pages attached to the application and grounds were successfully transmitted. Crucially, however, these pages were either not received by the First-tier Tribunal or, if they were, they were not put before the judge who decided the application for permission. The pages comprised an official record of the appellant’s attendance at hospital on the day of the hearing.
10. As a result, the judge deciding permission noted that, whilst paragraph 6 of the grounds referred to medical evidence “that has not been provided to the Tribunal. Without any medical evidence, these grounds are not arguable”. The judge accordingly refused permission to appeal.
11. Following the First-tier Tribunal’s refusal of permission, the appellant sought permission to appeal from the Upper Tribunal. On 1 December 2017, the Upper Tribunal refused permission to appeal. The Upper Tribunal considered that there was “no evidence to support the explanation given on behalf of the appellant for his non-attendance at the hearing”. In those circumstances, it was considered that the First-tier Tribunal Judge was entitled to proceed in the appellant’s absence.
12. The appellant applied to the High Court for permission to judicially review the Upper Tribunal’s refusal of permission to appeal. The High Court granted permission, following which the Upper Tribunal’s refusal of permission was quashed.
13. We have already referred to the fact that evidence relating to the appellant’s admission to hospital had been sent to the First-tier Tribunal, along with the grounds. The evidence is a printout from the hospital’s records. It notes that the appellant was initially seen at 12:31 on 3 July 2017 and that he was discharged to his own GP at 15:56 p.m.
14. This evidence plainly meets the requirements described by Carnwath LJ (as he then was) in E & R v Secretary of State for the Home Department [2004] EWCA Civ 49 for establishing that there has been an error of fact,

amounting to unfairness, which constitutes an error of law. The First-tier Tribunal Judge, who dismissed the appeal, cannot be criticised for failing to know about the printout from the hospital. It could, however, be said that she imposed an unrealistic burden on the appellant and his advisors, in requiring such evidence from the hospital to be produced on the date of the hearing.

15. Be that as it may, the undisputed fact is that the appellant did, indeed, attend the hospital on 3 July 2017, complaining of the symptoms described in the solicitor's letter sent to the judge. This was manifestly a good reason for his absence from the hearing of his appeal. Had the judge been aware of it, she plainly would not have proceeded to determine the appeal in his absence, drawing adverse credibility inferences from that absence.
16. Mr. Melvin helpfully agreed, in the circumstances, that the oral permission hearing on 29 January 2020 could immediately proceed, following our indication that permission to appeal would be granted, to a hearing of whether the decision of the First-tier Tribunal Judge should be set aside. This decision therefore stands both as a record of the grant of permission and as a record of the decision on the appeal to the Upper Tribunal.
17. It is quite plain that the effect of the "E & R" error has been to deprive the appellant of a fair hearing. The decision of the First-tier Tribunal Judge must, accordingly, be set aside.
18. Given that the appellant has not had any lawful hearing in the First-tier Tribunal, the only appropriate course is to remit the matter to be decided afresh, with no findings preserved from the decision of the First-tier Tribunal Judge.

Decision

The decision of the First-tier Tribunal contains an error on a point of law. We set that decision aside and remit the matter to be decided afresh by the First-tier Tribunal.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed
2020

Date 7 February

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber