UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: PA/08281/2018**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 23 November 2018	**On: 7 December 2018**

Before

Deputy Upper Tribunal Judge Mailer

Between

AKSSHAYAN [A]

ANONYMITY DIRECTION NOT MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: **Ms B Jones, of counsel**
For the Respondent: **Ms Z Kiss, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The appellant is a national of Sri Lanka, born on [~] 1995. He appeals with permission against the decision of the First-tier Tribunal Judge, promulgated on 20 August 2018, dismissing his appeal on asylum, humanitarian protection and human rights grounds.

2. Neither the appellant, nor any representative on his behalf, attended the hearing of his appeal at Taylor House on 30 July 2018.

3. The Judge noted at [8] that a letter 26 July 2018 was received from the appellant at the Tribunal on 27 July 2018. In his letter the appellant asked that his hearing be adjourned for two months. His reasons for the request were that he has been very sick and depressed and is unable to concentrate in his case. As he was sick he could not instruct a representative to represent him at the hearing on 30 July 2018. He is due to see the doctor and will forward the medical certificate once he has received it.

4. The application to adjourn was considered by First-tier Tribunal Judge Peart on 27 July. He refused the application on the basis that the reason given was insufficient to warrant an adjournment.

5. At the hearing on 30 July, the First-tier Tribunal Judge noted that given that the application to adjourn had been made, she was satisfied that the appellant was aware of the hearing date.

6. She considered whether to use her power under Rule 28 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. She was satisfied that it was in the interests of justice to proceed, taking into account matters referred to at [12] of her decision.

7. The Home Office Presenting Officer made no submission in relation to the issue regarding adjournment. Nor did she make any submissions thereafter in relation to the substantive issues in the case [13].

8. The Judge considered the appellant's claimed fear of persecution. She had regard to the basis of his claim as set out in his witness statement dated 31 May 2018, produced in the respondent's bundle at C1, as his "Statement of Persecution." She also had regard to a letter purporting to come from a Member of the Provincial Council, which the appellant handed to the respondent at the time of his interview [30].

9. She had regard to the country guidance decision in GJ and Others [2013] UKUT 00319. She found that there was a "remarkable lack of detail" in both the asylum interview and his witness statement, even on his own account, that his family had been in touch with his brother up until six months before the asylum interview, and that the incidents he complained about had been going on since 2012. There was no explanation why the alleged harassment only began in 2012 when he and his parents were all in the UK by 2008. The only reason given for the suspicion of the authorities was the absence of his parents. No explanation was given as to why this would be sufficient for the authorities to be suspicious that his brother was involved in LTTE activity. She did not find it "inherently credible" that such a suspicion would arise for such a reason.

10. Nor did the appellant give any explanation as to why his brother went into hiding, given that he was released from detention. No explanation was given as to why the

authorities tried to extort money from his brother. Nor has any explanation been given as to why his brother cannot speak to his parents on the telephone [39].

11. She also noted that there were important inconsistencies between his account given at the asylum interview and the account in his witness statement as set out at [39(7)]. She gave no weight to the letter purporting to be from the member of the Provincial Council dated 30 March 2013 for reasons set out at [39(8)].

12. She found that the appellant would not be at risk of persecution or serious harm on return to Sri Lanka. His removal would not breach Article 3 of the Human Rights Convention. Nor did he fit into any of the risk categories defined in GJ.

13. He did not meet the requirements under paragraph 276ADE of the Rules.

14. In his grounds of appeal, the appellant contended that he sought an adjournment as he was not well enough to attend the hearing. He attached the letter sent to the Tribunal. He again set out his claim. He stated that he is depressed and is arranging to attend counselling.

15. In granting permission to appeal, First-tier Tribunal Judge Hollingworth stated that it is arguable that the appellant was not in a position to properly present his case in the light of the contemporaneous assessment in relation to depression and anxiety reflected in the NHS documentation provided by the appellant.

16. In his grounds of appeal the appellant contended that it was evident from his letter that he sent to the Tribunal that he has been sick and depressed and is unable to concentrate in his case. He accordingly could not instruct a representative to represent him at the hearing on 30 July 2018.

17. Ms Jones on behalf of the appellant referred to the Upper Tribunal decision in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC). Although the Tribunal considered the appeal under the "old Rules," she submitted that the same principles continue to apply.

18. In Nwaigwe, neither party was present or represented at the hearing. His solicitors wrote to the Tribunal a few days before the scheduled hearing that they had been informed that he was ill, but they were unable to give any further information. An adjournment was therefore requested. They stated that they had been unable to obtain instructions from their client to enable them to prepare properly for the hearing. They had been informed that their client has been ill and all attempts to contact his doctor and hospital to provide them with the information about his situation have proved abortive. This was because of the restraints under the Data Protection Act. Accordingly, they had no other option than to apply to adjourn the hearing for a short period.

19. The Upper Tribunal considered that the Judge erred in law in deciding that the appellant's adjournment application should be refused. At [7] of the decision, the

President of the Upper Tribunal, Mr Justice McCloskey, stated that if a Tribunal refuses to accede to an adjournment request, such a decision could in principle be erroneous in law in several respects. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing.

20. He stated that where an adjournment refusal is challenged on fairness grounds it is important to recognise that the question for the Upper Tribunal is not whether the First-tier Tribunal acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? Any temptation to review the conduct and decision of the First-tier Tribunal through the lens of reasonableness, must be firmly resisted in order to avoid a misdirection in law. In a nutshell, fairness is the supreme criterion.

21. Mr Justice McCloskey noted that the First-tier Tribunal procedural Rules applicable in that appeal were to be replaced by a new code in 2014. The substantially less prescriptive formula in the 2014 Rules reinforces the necessity of giving full effect, in every case, to the common law right and principles referred to. The overriding objective remains unchanged: see Rule 2.

22. First-tier Tribunal Judges dealing with adjournment issues should continue to apply the principles rehearsed in Nwaigwe and the decision of the Court of Appeal in SH (Afghanistan) v SSHD [2011] EWCA Civ 1284 at [13]. There the Court of Appeal held that when considering whether the Immigration Judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse. The test and sole test was whether it was unfair.

23. In addition, the Court must also consider whether the error was material. In Nwaigwe, the Tribunal ultimately held that there had not been a material error and that the secretary of state's decision was sustainable.

24. Ms Jones submitted that prior to the date that the Judge promulgated her decision, the appellant had received a summary of an assessment undertaken by Hounslow IAPT (Improving Access to Psychological Therapies), dated 17 August 2018.

25. The appellant had a telephone appointment with the psychological wellbeing practitioner, Ms Rachel Watson. He told her that at the moment the main thing bothering him is low mood and anxiety as a result of his current legal status. He scored 19 on the PHQ9, indicating severe symptoms of depression and 17 on GAD 7, indicating severe symptoms of anxiety. His reply to one of the questions indicated some thoughts that he might be better off dead or harming himself in some way. However, he stated that his family is a strong protective factor preventing him from taking those thoughts further.

26. As a result, the outcome was that they had agreed to a plan. Having regard to the specific nature of his difficulties, it was felt that specialist services would be better

able to support him at the moment. Their service only offered short term CBT. He was therefore provided with information relating to services. A team of mental health social workers are linked with primary care services. A number of organisations providing counselling and therapy are set out on the second page of Ms Watson's assessment.

27. On behalf of the respondent Ms Kiss submitted that credibility issues were raised against the appellant. The application for an adjournment had been refused. The Judge had regard to the refusal of the adjournment by Judge Peart on 27 July 2018. The letter requesting that adjournment was not before the First-tier Tribunal Judge.

28. She referred to [12] of the decision. The Judge took into account that there was no good reason for the appellant's absence. He claimed that his sickness and depression meant he was unable to concentrate, but not that he could not attend the hearing. Further, adjourning the hearing was unlikely to result in evidence being submitted by the appellant. Despite being aware at the date of the appeal hearing and being well enough to correspond with the Tribunal, he had not sent in a bundle of evidence. He stated that he had no documents to obtain from Sri Lanka at his screening interview.

29. She also noted the inconsistencies identified as affecting his credibility. There was no evidence produced apart from the appellant's asylum statement.

30. In reply, Ms Jones submitted that the reasons for adjournment might well have resulted in further evidence. The appellant should have been given the benefit of the doubt. He had indicated that he was taking steps to prepare. Further, the appellant had lived in the UK for ten years. His Article 8 claim was considered without the benefit of any evidence.

Assessment

31. First-tier Tribunal Judge Peart refused the appellant's application for an adjournment on the basis that "this is no reason to adjourn an asylum hearing." That decision is recorded on the file and dated 27 July 2018.

32. The appellant had however asserted that he has been very sick and depressed and was unable to concentrate in his case. Further, he was due to see a doctor and would forward the medical certificate once he received it.

33. Following the hearing on 30 July 2018, and before promulgation, the appellant did produce to the Tribunal his assessment from Hounslow to which I have referred. He had a telephone appointment with them on 8 August 2018. It is evident from the report produced on 17 August 2018, some three days prior to the date of promulgation of the First-tier Tribunal Judge's decision, that the appellant had

indicated severe symptoms of depression and anxiety. There was also evidence of intrusive thoughts including harming himself in some way or worse.

34. It was recorded that specialist services would be better able to support him. Short term CBT would not be of assistance to him. Accordingly, he was referred to various counselling and support groups.

35. The First-tier Tribunal Judge did not refer to, nor direct herself, in accordance with Nwaigwe, supra. She did not exercise her discretion in accordance with the approach to be adopted in such a case.

36. The appellant has challenged the decision to refuse his adjournment on fairness grounds. As noted, the question for the Upper Tribunal is not whether the First-tier Tribunal Judge acted reasonably. The sole test relates to that of fairness. Was there any deprivation of the affected party's right to a fair hearing?

37. I am satisfied that in the circumstances of the case, the appellant has been deprived of his right to a fair hearing.

38. I accordingly find that the decision of the First-tier Tribunal involved the making of an error on a point of law. There has been no contention that the error of law was not material in the circumstances.

39. I accordingly set it aside. In the circumstances, the appeal will be remitted to the First-tier Tribunal for a fresh decision to be made before another Judge.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and it is set aside.

The appeal is remitted to the First-tier Tribunal (Taylor House) for a fresh decision to be made by another Judge.

Anonymity direction not made.

Signed Date 2 December 2018

Deputy Upper Tribunal Judge Mailer