Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02129/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given following hearing On 16 January 2015	**On 12 February 2015**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

RR
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Rothwell of Counsel instructed by Jein Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Sri Lanka having been born on 12 July 1986. He applied for further leave to remain in the UK on the basis of his private life under Article 8 of the ECHR which was refused by the respondent on 10 December 2013. He had been served with a One-Stop Notice under Section 120 of the Nationality, Immigration and Asylum Act 2002 in response to which he had merely stated that he had an asylum claim but

had not it is fair to say given full details with regard to that claim or at any rate the details which he gave were insufficient to give this claim much chance of success. In particular, and this is relevant in light of what is said below, his claim was not supported by a medical report.

2. His appeal was then heard before First-tier Tribunal Judge Conrath sitting at Hatton Cross on 8 July 2014 and in a determination promulgated on 15 September 2014 she dismissed the appellant's appeal on Article 8 grounds but also, more importantly for present purposes on asylum grounds as well.

3. The appellant has appealed against this decision and permission to appeal was granted by First-tier Tribunal Judge Lambert on a date which is unclear within the file who set out his reasons as follows:

> "1. The Appellant seeks permission to appeal... against a decision of the First-tier Tribunal (Judge Conrath) who, in a determination promulgated on 25 September 2014 dismissed the Appellant's appeal against the Secretary of State's decision to refuse leave to remain on human rights grounds. The judge also found not credible the Appellant's claim on asylum grounds raised in the grounds of appeal.
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> 2. The grounds argue unfair failure by the judge to recognise that the Appellant had followed the correct procedure under the S120 notice for raising asylum concerns. It is further argued that the judge failed to take account of the fact that under this procedure and in the absence of any decision by the respondent to interview the Appellant his statement produced for the hearing was the first chance he had had to give evidence about his concerns. There is also alleged failure to consider the explanation offered for the absence of medical evidence – which appears to be that he was poorly advised by his previous representatives. Although the determination as a whole is adequately reasoned, it may be that the adverse credibility conclusions reached on these points amount to errors of law capable of being material to the outcome of the asylum appeal...".

4. I do not need to examine all the arguments advanced in the grounds because for the reasons which follow I consider that this decision cannot stand.

5. Among the reasons argued before me why the decision should be set aside was the judge's reliance on the inadequate preparation of the asylum appeal and in particular the failure of the appellant or more relevantly his then solicitors to support his claim that he had sustained injuries at the hands of the Sri Lankan authorities by a medical report. In particular at paragraph 24 the judge found as follows:

> "24. In addition, there was no medical report in support of the Appellant's claim that he had been tortured or caused harm at the hands of the Sri Lankan authorities. When he was asked about this in cross-examination, he stated that he was going to see his GP for an appointment the following Friday. It is clear that this Appellant has been represented by solicitors since, at least, the filing of the Notice and Grounds of Appeal, which were dated the 30th December 2013, *and I have no doubt that, had he raised the fact that he had sustained injuries in the way that he claims at the hands f the Sri Lankan authorities, his solicitors would have organised a medical report in relation to such alleged injuries prior to the hearing of this matter in July 2014"*[my emphasis].

6. It is asserted on behalf of the appellant that as a matter of fact this finding by the judge was factually incorrect because the appellant had told his solicitors that he had sustained injuries in the way claimed and they had not organised such a medical report as the judge had no doubt would have been prepared. In support of this assertion I was shown a letter which the appellant's current solicitors, that is Jein Solicitors, had obtained from the appellant's previous solicitors, S Satha Solicitors of 376-378 High Street North Manor, Manor Park. The appellant's current solicitors had written requesting an explanation from Satha & Co as to why it was that "you did not advise the client to get medical evidence in support of his claim to have been detained and tortured and why you advised him that he should wait for the Home Office to call him for interview". The solicitors also asked Satha Solicitors to "please explain why you did not explain the procedure where a One-Stop Notice has been issued as in this case".

7. The relevant parts of S Satha's response provides as follows:

> "We refer to your letter dated 24/09/2014 and express our dismay at the tone of the letter...
>
> The client mentioned his wish to claim asylum but at that stage he did not provide us with details for the basis of his claim. He told us that he would produce the statement in Tamil with full details of the basis for his claim. He told us that he would provide a statement in Tamil with full details of the claim and supporting evidence, if any, in due course. Bearing in mind the limited time to file an appeal to the Tribunal and the risk of client's asylum claim being considered under the detained fast track procedure, it was agreed with client to file his appeal to the Tribunal first and then later consider the basis of the asylum claim after obtaining his statement. The appeal was therefore lodged on 30/12/2013 and the grounds raised the asylum issue. We believed that once the appeal was lodged with among other reasons, an asylum ground, the asylum would be considered by an Immigration Judge as a preliminary issue and then remitted to Home Office Asylum team for proper consideration of the asylum claim.

> Secondly in preparation for his appeal hearing, we discussed with client the issue of his detention and torture in 2007 and the injuries suffered. He made us aware that his injuries had healed with time but he had some scars at his back. We discussed the possibility of obtaining medical report on the scars to support the claim as well as the financial cost involved. The client agreed to provide photographs of the scars instead of obtaining a medical report at this stage. The need for a medical report was to be revisited on the understanding that the matter would be remitted to Home Office for consideration of the asylum claim...".

8. When writing this letter, the appellant's previous solicitors did not appear to appreciate just how wrong their advice had been, nor is it at all clear why, when it should have been apparent to any competent solicitor during the hearing before Judge Conrath that their advice was at the very least misguided, they did not at this stage ask for an adjournment in order to enable a medical report to be prepared or at least inform the court as to why a medical report had not been produced. The net effect was, as appears to be clear in this case, that this appellant was deprived of a proper opportunity to put his case before the Tribunal.

9. On behalf of the respondent Mr Wilding accepted that in light of the decision of the Court of Appeal in *FP (Iran) v Secretary of State for the Home Department* [2007] EWCA Civ 13 it was open to this Tribunal to find that the total failure of the appellant's previous solicitors to give the appellant adequate or proper legal advice as it is clear was the case here was such as to amount to a procedural irregularity. In *FP (Iran)* the situation was that an applicant had not been notified of the date of hearing and consequently the case proceeded in his absence; the Court of Appeal in that case considered that albeit that the Tribunal had been unaware that the applicant had not been informed of the hearing of the court this was nonetheless a material irregularity because the situation was so unfair that it needed to be remedied. In this case I would and do set aside the determination of First-tier Tribunal Judge Conrath for procedural irregularity, although in this regard I make it clear that she was of course unaware that the advice which the appellant had been given was so incompetent.

10. I also consider that in any event it is clear from what is put at paragraph 24 that the judge proceeded on the basis of a factual error which was that the appellant had been given competent legal advice, which as is clear from the letter which I have set out above was not the case and the judge should not have assumed without any enquiry that these solicitors would have acted in a competent manner. While one would like to assume that solicitors usually act competently this is by no means always the case and a judge should be wary of making blanket assumptions that this is always so.

11. Accordingly, in my judgment the appropriate course must be to set this determination aside for procedural irregularity and I agree with the

submissions made on behalf of both parties that in light of this decision the appeal should be remitted to the First-tier Tribunal for re-hearing because the effect of the irregularity is that the appellant has not had a fair trial.

Decision

I set aside the determination of the First-tier Tribunal as containing a material error of law and remit the appeal to the First-tier Tribunal, to be heard at Hatton Cross by any Immigration Judge other than First-tier Tribunal Judge Conrath.

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:

Date: 6 February 2015

Upper Tribunal Judge Craig