IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05452/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 January 2016	**On 15 February 2016**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

U R
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Harris, instructed by Nag Law solicitors
For the Respondent: Ms E Savage, Senior Presenting Officer

DECISION AND REASONS
(Delivered orally on 19 January 2016)

1. The appellant is a national of Sri Lanka born on 6 December 1982. He was granted a student visa on 17 August 2007, such visa being conferred until 31 October 2009. The appellant first entered the United Kingdom on 22 September 2007, returned to Sri Lanka in December 2008, and thereafter lawfully re-entered the United Kingdom. The appellant's student leave was subsequently extended until 18 November 2012.

2. The appellant claimed asylum on 25 September 2012. This application was refused and on 13 March 2015 a decision was made to remove him to Sri Lanka. That decision was the subject of an appeal to the First-tier Tribunal. The appeal was heard by First-tier Tribunal Judge Plumptre on 3 September 2015 and dismissed in a decision of 17 September 2015. On 9 October 2015 FtT Judge Baker granted permission to appeal to the Upper Tribunal and thus the matter came before me.

3. The primary ground of appeal in this matter has at its core the issue of procedural fairness and, in particular, the refusal by Judge Plumptre of an application to admit new documentation; such application having been made at the outset of the hearing before her.

4. It is prudent at this juncture to set out paragraphs 14 to 17 of Judge Plumptre's decision:

> "14. I ruled the letter from the attorney inadmissible after referring myself to Rules 4, 6, 12 and 14 of the Procedure Rules 2014 - none of which dealt specifically with any power to admit evidence late but only a general power to waive a direction. I took into account the fact the appellant had been represented throughout by Nag Law Solicitors and that they had both been sent a notice of direction and notice of hearing as long against as 31 March 2015. I also took into account the reply notice completed by Nag Law Solicitors which made no mention of further evidence other than "objective and subjective evidence" and that the reply notice specifically stated 'Any further documentary evidence (papers about your appeal) you send us must be received by the Tribunal by 29 August 2015 and must be copied to the respondent'. Hence I found that more than one set of directions had not been complied with either by the appellant or his solicitor.
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> 15. I ruled the arrest warrant admissible since this has been photocopied in the appellant's bundle (pages 25-26) which I found to have been faxed to the Presenting Officer's Unit on 27 August 2015 although the Tribunal's copy of the appellant's bundle had not been received until 1 September 2015 and hence found that the copy arrest warrant had been served in compliance with directions.
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> 16. I also took into account that the attorney's letter had been sent in a DHL envelope to the appellant personally although her instructions are from Nag Law Solicitors (pages 31-33) and also took into account the fact that no request to adjourn had been made by Nag Law Solicitors even though they must have expected, given that correspondence was first entered into on 14 August 2015, there was a risk that the attorney would not be able to respond in a timely manner such as to ensure compliance with directions. I also took into account that Nag Law Solicitors had only instructed this attorney on 14 August 2015, i.e. some three months after receipt of the refusal letter.
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> 17. Miss Anzani [who represented the appellant at the hearing before the First-tier Tribunal] had understandably submitted that the appellant would not receive a fair hearing if the attorney's letter was not submitted since it contained an explanation as to how the attorney had obtained the arrest warrant which was crucial to the appellant's claim. I took this into account when making my ruling but found that given the arrest warrant was admissible that I should consider this document in the round with all the other evidence and that any explanation

from the attorney would add little if anything to my consideration of the arrest warrant and that there was no unfairness to the appellant in not having evidence as to how it was obtained before the Tribunal, given the late production of the arrest warrant."

5. The appellant's legal representatives are far from blameless for the situation that the appellant now finds himself in. They should have put the First-tier Tribunal, and the Secretary of State, on notice before the hearing as to the possibility of an application to admit new evidence being made; indeed, it is difficult to understand why such application was not made in writing prior to the date of hearing.

6. Nevertheless, the starting point for my consideration and, indeed, what should have been the starting point for the First-tier Tribunal's consideration, is paragraph 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which reads:

> "(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.
>
> (2) ...
>
> (3) The Upper Tribunal must seek to give effect to the overriding objective when it (a) exercising any power under these Rules or, (b) interprets any Rule or practice direction. Rule 4 of the Procedure Rules gives power to the First-tier Tribunal to adjourn or postpone a hearing. "

7. The issue of fairness has recently been considered in a number of recent decisions of the Upper Tribunal, including that of the President in Nwaigwe (Adjournment: fairness) [2014] UKUT 00418. Although this case considered the previous version of the First-tier Tribunal Procedure Rules it is, nevertheless, instructive on the approach that should be taken in cases such as the instant one.

8. Miss Harris submitted, with some force, that First-tier Tribunal Judge Plumptre "misconstrued" or "underestimated" the extent to which the attorney's letter was relevant to the assessment of credibility, finding incorrectly in paragraph 17 of the determination that it was relevant only to the question of the origins of the arrest warrant. This, it was asserted, led to the irrational conclusion that exclusion of this evidence would not result in unfairness.

9. The letter from the attorney dated 18 August 2015 relevantly states as follows:

> "I was instructed on 16 August 2012 by your client's father-in-law, and Reverend [P]. This was after your client's father was detained as a result of the authorities having gone in search of your client as he was suspected of having assisted in collating evidence of war crimes committed by the Sri Lankan authorities. Due to the fact that your client was in the UK at the time, his father was into custody [sic].
>
> O was instructed on 16th August 2012... . This was after your client's father was detained as a result of the authorities having gone in search of your client as he

was suspected of having assisted in collating evidence of war crimes… . Due to the fact that your client was in the UK at the time, his father was into custody.

The authorities are still in pursuit of your client ... and I am forwarding true [sic] an open arrest warrant which I was able to procure on his behalf from the courts for our records. ...

I confirm that I am a practising Attorney-at-law, and have no objections in your using this letter of evidence. I am issuing this letter on the request of his father-in-law."

10. This evidence must be viewed in the context of the First-tier Tribunal's conclusions in relation to the arrest warrant, found in paragraph 50 of its decision:

> "I find that after giving weight to its certification some ten months after it was issued, its late production and the fact that the attorney apparently sent this original document to the appellant although she had been instructed by Nag Law Solicitors on 27 August 2015, four months after his asylum interview, and nearly three years after his asylum claim made on 20 September 2012 which facts, coupled with the altered date and the failure of the appellant to mention his arrest warrant at several points in his asylum interview that when considering this arrest warrant in the round as required by the reasoning in **Tanveer Ahmed**, I find that it is an untruthful document whose contents I can give no weight and that it was produced at a very late stage to bolster a false asylum claim."

11. Previously, at paragraph 41 of its decision, the FtT stated:

> "I give weight to the fact that there is no evidence at all other than oral evidence that his father was arrested and detained on 15 August 2012 as claimed." [emphasis added]

12. In my conclusion the First-tier Tribunal erred in its consideration of the potential relevance of the attorney's letter. Had it properly understood the potential significance of this evidence over, and above simply identifying how the arrest warrant was obtained, I have no doubt that it would have been apparent that to proceed in its absence would lead to procedural unfairness.

13. As a consequence I conclude that the First-tier Tribunal's decision is vitiated by legal error. The failure to admit the attorney's letter, even in circumstances where the appellant's solicitors appear to have been dilatory in both their attempts to obtain it and to secure an adjournment of the hearing before the FtT, was procedurally unfair. This undermines the entirety of the FtT's decision and for this reason it must be set aside.

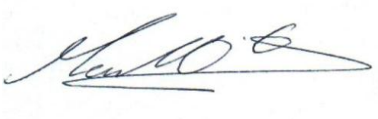
14. I gave my decision at the end of the hearing and it was agreed by the parties that the appropriate course is for the matter to be remitted back to the First-tier Tribunal to be heard *de novo*. I pass no comment on the other of the grounds and my absence of consideration of those grounds should not be taken as an acceptance that they are, or are not, made out. There is simply no need to extend this decision any further to deal with the additional points raised.

Notice of Decision

The decision of the First-tier Tribunal is set aside.

The matter is remitted to the First-tier Tribunal to determine *de novo*.

Signed:



Upper Tribunal Judge O'Connor
Date: 2 February 2016