



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: PA/08036/2017  
PA/08861/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 3<sup>rd</sup> August 2018

Decision & Reasons Promulgated  
On 17<sup>th</sup> August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

I N (FIRST APPELLANT)  
U N (SECOND APPELLANT)  
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss A Benfield of Counsel instructed by Theva Solicitors  
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

**Introduction and Background**

1. The Appellants appeal against a decision of Judge Boardman (the judge) of the First-tier Tribunal (the FtT) promulgated following a hearing on 26<sup>th</sup> March 2018.
2. The Appellants born 8<sup>th</sup> September 1958 and 25<sup>th</sup> February 1987 respectively are mother and daughter. They are citizens of Sri Lanka.

3. They arrived in the UK as visitors on 25<sup>th</sup> August 2007. They claimed asylum in February 2008. Their claims were refused and they appealed. Their appeals were heard on 21<sup>st</sup> July 2008 and dismissed.
4. On 9<sup>th</sup> November 2011 the Appellants submitted further submissions requesting that these be treated as a fresh claim for asylum. They also made an application for judicial review. Eventually the Respondent accepted the further submissions as a fresh claim, and refused that claim on 7<sup>th</sup> August 2017.
5. The Appellants lodged appeals with the FtT.
6. An initial hearing of the appeals on 10<sup>th</sup> October 2017 was adjourned at the Appellants' request. The appeals were heard by the FtT on 26<sup>th</sup> March 2018 in their absence. The Appellants had applied for an adjournment, but the judge decided that it was appropriate to proceed in their absence.
7. The appeals were dismissed. The Appellants applied for permission to appeal to the Upper Tribunal. The grounds are summarised below.
8. It was explained that the initial application for an adjournment had been made by letter dated 19<sup>th</sup> March 2018. That application had been refused on 21<sup>st</sup> March 2018. A further application for an adjournment was made on 22<sup>nd</sup> March 2018 without a response from the Tribunal.
9. The Appellants did not attend the hearing because the first Appellant was unwell and had to attend her GP's surgery and the second Appellant was unable to attend the hearing without her. Counsel attended the hearing and applied for an adjournment. A skeleton argument was produced setting out the reasons why an adjournment was appropriate.
10. The Respondent did not oppose the adjournment application. It was submitted that the adjournment application should have been granted as both the Appellants are suffering from a depressive disorder and post-traumatic stress disorder and psychiatric reports prepared some years previously had assessed them as not fit to give evidence. There was therefore an absence of up-to-date medical evidence. It was submitted that the FtT should have treated the Appellants as vulnerable adults. Due to their vulnerability there were no witness statements before the FtT.
11. The Appellants wished to rely upon two witnesses to confirm their sur place activities in the UK, those being Mr Y MP of the TGTE, and Ms S of the ICPPG. Both witnesses had indicated they were willing to give evidence but were unavailable on 26<sup>th</sup> March 2018.
12. In addition the Appellants were waiting from evidence from a lawyer in Sri Lanka who had provided evidence in support of their fresh claim. In addition the Appellants had been unable to obtain their file from their previous legal representatives.
13. It was submitted that the judge had erred in law in refusing the adjournment request and had acted unfairly.

14. Permission to appeal was granted by Judge Robertson of the FtT in the following terms;
  - “2. There is some merit in the grounds that an adjournment may have been appropriate in the circumstances outlined by the Appellants’ representative at the hearing on the basis that two of the Appellants’ key witnesses were not able to attend the hearing, and that A2 herself was unable to attend due to ill-health. As this ground is merely arguable, the Appellants may wish to put before the Upper Tribunal evidence that A1 was in fact attending a medical appointment on the day of the hearing and that her condition on that day meant that she was unfit to attend the hearing.”
15. Following the grant of permission the Respondent did not provide a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
16. Directions were subsequently issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision must be set aside.

### **The Upper Tribunal Hearing**

17. Miss Benfield in making oral submissions relied upon the grounds contained within the application for permission to appeal, the skeleton argument dated 25<sup>th</sup> March 2018, and a supplementary bundle of documents provided by the Appellants’ solicitors which is neither indexed nor paginated. That bundle contains a letter from the GP who saw IN on 26<sup>th</sup> March 2018. The letter is brief referring to IN as having multiple medical problems, and describing that she “felt faintish with symptom of UTI which is being treated”. Confirmation was given that she attended the surgery on 26<sup>th</sup> March 2018 and “she is unable to attend the scheduled appointment today”. The scheduled appointment presumably refers to the Tribunal hearing.
18. Miss Benfield pointed out that it had taken the Respondent approximately six years to make a decision on the fresh representations made by the Appellants. The difficulties experienced by the Appellants’ solicitors related to the mental health of the Appellants which meant that taking instructions was difficult. There were also problems with funding as the Appellants were funding their appeals privately. It was accepted that the solicitors should have advised the Tribunal before they did, of the difficulties they were encountering in preparing the case.
19. It was submitted that the evidence to be given by the two witnesses was highly relevant as it related to sur place activities.
20. It was also submitted that there were no up-to-date psychiatric reports, and that the Appellants’ file from previous solicitors had not been obtained, and no further evidence had been provided by the lawyer in Sri Lanka. It was therefore submitted that the refusal to grant an adjournment meant that the Appellants did not have a fair hearing, and I was asked to set aside the decision of the FtT and remit the appeals back to the FtT to be heard afresh.

21. Mr Kotas disagreed, submitting that the judge had not materially erred in law.
22. I was asked to find that at paragraphs 8-13 of the FtT decision, the judge had dealt thoroughly with the adjournment request. Fairness dictates that the Appellants have an opportunity to prepare their case, and they had been given such an opportunity, as the initial hearing in October 2017 had been adjourned at their request.
23. Mr Kotas submitted that the length of time taken by the Respondent in deciding the fresh submissions was not relevant. I was asked to note that no details had been provided of the efforts made to obtain the missing evidence and information. It was submitted that the actions of the Appellants' solicitors in waiting until seven days before the hearing on 28<sup>th</sup> March 2018 to request an adjournment was manifestly inadequate. I was also asked to note that no evidence had been prepared for that hearing.
24. With reference to the non-attendance by the Appellants, it was submitted that the medical evidence fell short of providing any adequate explanation and Mr Kotas submitted that the non-attendance was a cynical attempt by the Appellants to coerce the judge into adjourning the case, when the Appellants were aware that previous applications to adjourn had been refused. I was asked to uphold the decision.
25. In response Miss Benfield referred to AM (Afghanistan) [2017] EWCA Civ 1123 on the basis that the out of date psychiatric reports indicated that the Appellants were vulnerable, and the decision in AM indicated that the Tribunal was required to enable vulnerable Appellants to fully participate in proceedings. I was asked to find that the medical evidence provided by the GP was sufficient to explain the non-attendance of the Appellants.

### **My Conclusions and Reasons**

26. I note that the initial hearing of these appeals was a pre-hearing review on 26<sup>th</sup> September 2017. At that time the Appellants' solicitors requested an adjournment by letter. The application for an adjournment of the substantive hearing on 10<sup>th</sup> October 2017 was granted.
27. The reason for the adjournment was that the solicitors needed to obtain the Appellants' file from previous representatives, and to obtain instructions from the Appellants which was not made easy by them suffering from mental illness. In addition psychiatric reports were needed. A psychiatrist had been consulted and the earliest appointment he could give was 16<sup>th</sup> October 2017. In addition the solicitors needed to contact a lawyer in Sri Lanka who had provided evidence which led to the fresh submissions.
28. By notice dated 20<sup>th</sup> November 2017 the Appellants were advised that their appeals would be heard on 26<sup>th</sup> March 2018.
29. The next that the Tribunal heard from the Appellants' solicitors was the letter dated 19<sup>th</sup> March 2018 requesting an adjournment. That letter does not mention a need for psychiatric reports, but makes the point that the file from the previous solicitors had

still not been received, and evidence had not been received from the Sri Lankan lawyer and in addition, mentions that two witnesses have agreed to give evidence on the Appellants' behalf, from the TGTE and ICPPG, but those witnesses would not be available on 26<sup>th</sup> March 2018. The Tribunal refused that adjournment request, and also refused a request in similar terms at the hearing.

30. The decision that I have to make is whether the judge acted unfairly in refusing the adjournment request. I set out below, for ease of reference, the head note to Nwagwe (adjournment: fairness) [2014] UKUT 00418 (IAC):

If a Tribunal refuses to accede to an adjournment request, such decision could, in principle be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. 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 FtT 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? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284.

31. The issue that I have to decide is whether the Appellants were deprived of a fair hearing. I do not find that their non-attendance justified an adjournment. I do not accept that the medical evidence indicates that it was essential for IN to consult her doctor on the date of the hearing. No justification has been given for the non-attendance of UN. I find myself in agreement with Mr Kotas, in that the non-attendance was a ploy to attempt to force an adjournment.
32. The judge in refusing the application took the view that the Appellants had had ample time to prepare their case, and it is difficult to argue against that. Very little progress appears to have been made since the hearing in October 2017 was adjourned. The Appellants' solicitors have not provided comprehensive or satisfactory explanations in relation to their failure to obtain the Appellants' file from previous solicitors, and their failure to obtain evidence from a lawyer in Sri Lanka.
33. The judge was also entitled to question why, given the application to adjourn was for an eight week period, it would be possible to obtain psychiatric reports within that period, when it had not been possible in the previous six months apparently due to funding difficulties. It was put to the judge in the Appellants' skeleton argument at 18(d) that the Appellants "will employ their best endeavours to secure funding to obtain such reports".
34. I find no satisfactory explanation was provided by the Appellants' solicitors as to why a bundle of documents was not prepared for the hearing. No satisfactory explanation has been provided as to why witness statements were not taken from the two witnesses who were prepared to give evidence in support of the Appellants.
35. It might be said that in the absence of the Appellants, the absence of their witnesses, the absence of any up-to-date medical evidence, and the absence of any documentary

evidence, the Appellants could not have a fair hearing. It is hard to argue against that, but there must come a point when a judge has to proceed with a hearing, otherwise it would be open to a party simply to fail to prepare, and at each hearing claim that there should be an adjournment so that the case can be properly prepared. Fairness involves giving a party an opportunity to properly prepare the case.

36. In my view the judge was faced with a difficult decision. I find that my decision in relation to error of law is finely balanced. What persuades me, on balance, that the judge erred in law in failing to grant the adjournment request, is the nature of the appeal. The Appellants are claiming international protection. There is evidence that they have mental health difficulties and I find perhaps most significantly, two witnesses, representing the TGTE and the ICPPG had confirmed that they were willing to give evidence in support of the Appellants, in relation to sur place activity. That evidence could be highly relevant. The witnesses were not available on 26<sup>th</sup> March 2018, and although the Appellants' solicitors may be criticised for not taking witness statements from them, it may have been extremely relevant to the Appellants' appeal for oral evidence from those witnesses to be given.
37. I therefore conclude that in refusing to grant an adjournment, the FtT did deprive the Appellants of a fair hearing, particularly in relation to the evidence of the witnesses from the TGTE and ICPPG.
38. I therefore set aside the decision of the FtT. I have considered paragraph 7 of the Senior President's Practice Statements and find that it is appropriate to remit the appeals back to the FtT because of the nature and extent of judicial fact-finding that will be necessary in order for this decision to be re-made.
39. The parties will be advised of the time and date of the hearing in due course. The appeals are to be heard by an FtT Judge other than Judge Boardman.

### **Notice of Decision**

The decision of the FtT involved the making of an error of law such that it is set aside. The appeals are allowed to the extent that they are remitted to the FtT with no findings of fact preserved.

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

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 3<sup>rd</sup> August 2018

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT  
FEE AWARD**

The issue of any fee award will need to be considered by the FtT.

Signed

Date: 3<sup>rd</sup> August 2018

Deputy Upper Tribunal Judge M A Hall