Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/08189/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 April 2018	**On 11 April 2018**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SA
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Chelvan, Counsel, instructed by Tami Welfare Association
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Chana (the judge), promulgated on 13 October 2017, in which she dismissed the appellant's appeal against the respondent's decision dated 10 August 2017 refusing his asylum claim.

2. I need only set out the background to this appeal in brief terms. The appellant is a Tamil national of Sri Lanka, born in 1986. He maintains that he was coerced into joining the LTTE in 2006 and, after being injured, undertook an administrative role in the organisation until he

left in February 2009 when he surrendered to the authorities. He was detained in an army camp until 2011 where he was subjected to interrogation and torture. The appellant maintains that he joined the Tamil National Alliance party and later the Democratic Fighters party. In 2013 he opened a shop and earned money by fishing. He claims that he was detained for approximately a month at the beginning of December 2013 and asked to provide information about the LTTE. He was released after members of the Fishermen's Union vouched for him. He married in 2014 and had a son in 2015. He was again detained in March 2015 and later released after the Fishermen's Union once again vouched for him. He celebrated Heroes' Day in November 2016 with a friend who, it is claimed, was then killed by the authorities on 1 January 2017. The authorities later came to the appellant's house on several occasions searching for him. Fearing for his life the appellant left Sri Lanka on 11 February 2017 with the assistance of an agent and, after transiting in an unknown country, arrived in the UK on 12 February 2017 and claimed asylum the same day. He claims to attend the Sri Lankan transitional government office in London every Sunday and attends associated functions and rallies.

3. The respondent did not find the appellant to be a credible witness and rejected his account based on various alleged inconsistencies and implausible assertions. The respondent rejected the appellant's claim to have been a member of the LTTE, his claim to have been arrested and to have been a member of the Tamil National Alliance and Democratic Fighters Party, and his claim to be wanted by the Sri Lankan authorities.

4. The appeal lodged an appeal with the First-tier Tribunal following the refusal of his protection claim. A hearing date was listed for 22 September 2017, 6 weeks after the refusal of his protection claim. The appellant's representatives sought an adjournment at the case management stage in order to secure medical evidence from the Medical Foundation. This application was supported by a letter from the Medical Foundation dated 6 September 2017 confirming that it had accepted the appellant's referral and that 3 appointments had been arranged between 3 October 2017 and 17 October 2017. This application was refused on 8 September 2017 on the basis that medical evidence from a GP would be sufficient.

5. On the day of the hearing Counsel was instructed to renew the adjournment application in order to obtain from the Medical Foundation a scarring report that also addressed mental health/psychological issues. The renewed application was additionally advanced on the basis that the appellant's legal representatives had serious concerns as to his litigation capacity and were unclear as to whether he was fit to instruct. The judge refused the application citing the relevant provisions of the Tribunal Procedure (First-tier Tribunal) (Immigration & Asylum Chamber) Rules 2014 and the case of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC). The judge noted that the appellant had recently given evidence in his screening

and asylum interviews and that there was no sign that he was mentally compromised. The judge referred to a letter from the appellant's GP, dated 21 September 2017, which indicated that the appellant suffered from dyspepsia, post-traumatic stress disorder, that he was currently having counselling and was on antidepressants, and that he had pain in his right shoulder. The letter did not state that the appellant was unable to attend the hearing or give evidence and the judge observed that, as the appellant was receiving antidepressants, this should help his nerves. The judge did not consider that she would be particularly helped by a scarring report as she was willing to accept the appellant had scars but that she would determine the manner in which they were caused having considered all the evidence. Even if a Medical Foundation report found that the scars were consistent with the appellant's description, the judge held that consistency was not the same as proof.

6. Having refused the adjournment application the judge was informed that Counsel had only been instructed to make the adjournment request. The judge subsequently treated the appellant as being unrepresented and the hearing proceeded. The judge took the appellant through the Reasons For Refusal Letter and explained the issues to him, and sought confirmation that the appellant understood the issues and gave him more time to prepare for the hearing. An addendum to the judge's decision indicates that, at the resumed hearing, the appellant said he was not feeling well. The judge however continued with the hearing given the appellant's earlier engagement with the proceedings. Towards the end of the appellant's cross examination Counsel came into the hearing room and said that she was advising her clients not to give evidence. The judge subsequently found out that Counsel had been trying to contact Judge Woodcraft, the duty judge, in relation to the adjournment request. The duty judge, through an usher, informed Counsel that he would not intervene and that any complaints about the judge's conduct had to be made in writing and through formal complaint channels. The judge heard submissions from the presenting officer and gave the appellant a short adjournment to prepare his submissions. The appellant did not however return to the hearing room after the adjournment.

7. In her determination the judge did not find the appellant to be a credible witness. She rejected his account, found he was a man lacking in credibility and that he was an economic migrant. The judge consequently dismissed the appeal. For reasons that will become apparent it is not necessary for me to engage with the judge's substantive consideration of the appellant's claim.

8. The grounds of appeal essentially contend that the judge erred in law in refusing the adjournment for medical evidence, in refusing the adjournment following the assertions relating to the appellant's capacity, and in light of the appellant's assertions that he was feeling unwell at the hearing. The grounds additionally content that the judge failed to contextualise the limited answers given by the appellant at

the hearing in light of his claim to feel unwell and that he was answering questions in cross examination over a short period of time. It was additionally submitted that the judge was not entitled to rely on purported discrepancies in evidence given by the appellant at his screening interview as the purpose of the screening interview was to glean generalities as to claim.

9. Permission was granted by the first-tier Tribunal on the basis that it was arguable that the judge's exercise of discretion in refusing the adjournment was unlawful in circumstances where the Medical Foundation had accepted his referral, where the legal representatives had concerns relating to his capacity to give evidence, and where the appellant notified his counsel that he was unwell.

10. At the outset of the 'error of law' hearing I was informed by both representatives that the respondent accepted that the decision contained material legal errors and that it would have to be remade. The respondent accepted that the judge erred in law in refusing to grant the adjournment and that this resulted in a procedurally unfair hearing. I have independently reached the same conclusion. I therefore need only give brief reasons for my finding that the judge materially erred in law.

11. I find that the judge failed to take into account a number of relevant considerations when she refused to adjourn the hearing. There was no appreciation by the judge of the Home Office Guidance 'Medical Evidence (Non Medical Foundation cases), November 2008, which indicated that the respondent recognised the particular expertise of the Medical Foundation in identifying and treating survivors of torture. The judge, and the First-tier Tribunal in its earlier refusal to grant an adjournment, failed to appreciate that a GP would not necessarily have the experience and training to provide a reliable assessment of the scarring on the appellant's body. At [33] the judge indicated that she was willing to accept the appellant had scars on his body but that she would determine whether they were caused in the manner claimed by the appellant on consideration of all the evidence. The judge however did not profess to have any medical expertise and would be unable to assess the scarring applying the Istanbul Protocol. Although the judge would not be obliged to accept a professional medical assessment of the causes of the scarring such a report would undoubtedly have been of some assistance to the Tribunal in assessing the overall protection claim. Nor does the judge appear to have taken into account the potential relevance of a Medical Foundation assessment of the appellant's mental state. If the appellant was suffering from a mental illness a medicolegal report would have assisted the Tribunal in determining the cause and nature of any mental illness and whether the same could explain inconsistencies other perceived defects in the appellant's evidence. Following AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 the findings of a medical expert have to be treated as part of the holistic assessment and medical

evidence could be critical in explaining why an account might be incoherent or inconsistent. Nor is it clear that the judge actually took into account the fact that appointments had been fixed and were to be conducted within 4 weeks of the proposed hearing, and that a final report was anticipated by February 2018, so that the adjournment request was not open ended.

12. The judge observed that the Medical Foundation provided a standard letter that inaccurately referred to the appellant as 'she' and that the letter provided to the Tribunal was a copy and that it had been sent by email. It appears from [34] that the judge holds these factors against the appellant as she concludes that he was using delay tactics. The judge has not given any reasons as to why the filing of a copy rather than the original of the letter was relevant, or explained why the manner in which the letter was transmitted was of any relevance. Although there was a mistake in the letter it was apparent that it was written specifically for the appellant given that his name and date of birth were included. Given that the referral to the Medical Foundation was made within a month of the respondent's decision it is difficult to see how the judge was entitled to conclude that the appellant was deploying 'delay tactics'.

13. I additionally observe that, at [29], the judge considered that the Tribunal must not adjourn the hearing of an appeal on the application of a party in the satisfied that the appeal cannot otherwise be justly determined. The judge appears to be quoting from the provisions of the 2014 Procedure Rules contained in the schedule containing the Fast Track Rules. No such presumption against the granting of an adjournment appears in the 2014 Rules relating to non-Fast Track cases. The judge appears to have therefore misdirected herself in her general approach to the issue of the adjournment.

14. Following detailed submissions as to the best way to proceed with the appeal I am satisfied that it is appropriate to remit the case back to the First-tier Tribunal for an entirely fresh hearing.

Notice of Decision

The First-tier Tribunal decision is vitiated by material errors of law. The case is remitted to the First-tier Tribunal for a fresh (de novo) hearing to be heard by a judge other than Judges of the First-tier Tribunal Chana or Woodcraft.

Directions

1. **There is to be a Case Management Hearing in the First-tier Tribunal before the matter is listed for substantive hearing.**
2. **The First-tier Tribunal will endeavour to list the matter for Counsel's convenience (Mr Chelvan).**

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

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal 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.

5 April 2018

Signed
Upper Tribunal Judge Blum

Date