**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/04755/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 20 December 2018** | **On 23 January 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**RAMZIN [F]**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr D Selwood of Counsel instructed by Duncan Lewis & Co, solicitors
For the Respondent: Mr S Kotas of The Specialist Appeals Team

**DECISION AND REASONS**

**The Appellant**

1. The Appellant, Ramzin [F], is a national of Sri Lanka born on 5 August 1980. He has stated he arrived in the United Kingdom on 11 October 2009 with leave as a Tier 4 (General) Student Migrant expiring on 4 November 2013. The sponsorship licence of the college he was attending was revoked and on 28 May 2012, his leave was curtailed but notice was not served until 2 July 2013. In the meantime, on 28 June 2013 he claimed

asylum on account of perceived political opinion as a supporter of the LTTE and his ethnicity, he is a Muslim Tamil. He has no family in the United Kingdom.

## The Respondent's Original Decision

2. On 23 March 2018 the Respondent refused his application for international surrogate protection on all grounds and also any claim he might have based on his private life in the United Kingdom.

3. On 9 April 2018 the Appellant through his solicitors who have acted for him throughout lodged notice of appeal under s.82 Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are brief and entirely formulaic or generic.

## Proceedings in the First-tier Tribunal

4. By a decision promulgated on 21 September 2018 Judge of the First-tier Tribunal R R Hopkins dismissed the appeal on refugee grounds and on humanitarian protection grounds and allowed it on human rights grounds by reference to Article 3 of the European Convention.

5. The Appellant sought to appeal against dismissal of his asylum claim. On 18 October 2018 Judge of the First-tier Tribunal Bird granted permission because it was arguable the Judge had erred in failing to consider the past persecution of the Appellant as an indicator of future risk and properly to assess the expert country evidence and the consequences of finding that the Appellant was on the "watch list" kept by the Sri Lankan authorities at Colombo Airport.

6. The Respondent did not seek to appeal the decision of Judge Hopkins and on 5 October 2018 granted the Appellant discretionary leave.

## Proceedings in the Upper Tribunal

7. By letters of 19 December 2018, the Appellant's solicitors informed the Respondent and the Upper Tribunal of the grant of discretionary leave to the Appellant. They acknowledged that the notification was for the purposes of Rule 17A of the Tribunal Procedure (Upper Tribunal) Rules 2008 and that it was made substantially outside the limit of 30 days of the date on which notice of the grant of leave had been sent to the Appellant. The grant of leave is dated 10 October 2018 (notwithstanding the letter enclosing it being dated 5 October 2018) and was received by the Appellant's solicitors on 15 October 2018.

8. Mr Selwood accepted that the relevant part of Procedure Rule 17A was PR17A(3) which provides:

> "Where an appeal would otherwise fall to be treated as abandoned pursuant to s.104 (4A) of the Nationality, Immigration and Asylum Act 2002, but the Appellant wishes to pursue their appeal, the Appellant

> must send or deliver a notice ... to the Upper Tribunal and the Respondent so that it is received within 30 days of the date on which the notice of the grant of leave ... was sent to the Appellant."

PR17A(5) also provides that the Upper Tribunal must not extend the time limits in paragraph (3).

9. Mr Kotas had not seen the Appellant's solicitor's letter of 19 December 2018 until the start of the hearing.

10. Mr Selwood sought an extension of time for the giving of notice under PR17A. He referred to the circumstances of the delay. The Appellant had psychological difficulties which had been one of the main planks on which the Judge had allowed the appeal under Article 3. He had accepted that the Appellant had been tortured and that more recently the Sri Lankan authorities had made visits to his family home and the mosque which he and his family attended. The Appellant had very limited English and his psychological condition was such that the First-tier Tribunal had not been able to attach weight to any record of an interview of the Appellant by the Respondent.

11. The United Kingdom was a Contracting State to the Refugee Convention and the foreword to the 1992 edition of the UNHCR Handbook on the Refugee Convention provided that "The assessment as to who is a refugee ... is incumbent upon the Contracting State in whose territory the refugee applies for recognition of refugee status" although I noted this wording does not appear in the foreword to the current 2011 edition. It was the obligation of the Tribunal to oversee the Contracting State complied with its obligations. The grant of asylum to the Appellant would confer upon him additional rights to which he was entitled including especially the right not to be refouled.

12. Mr Selwood then submitted that time should be extended to enable the Appellant to pursue his asylum claim and not to do so would be contrary to European Union law. He referred to Directive 2005/85/EC. Articles 20.1(a) and 20.2 were applicable. Article 20 deals with the case of implicit withdrawal or abandonment which might be assumed "unless the applicant demonstrates within a reasonable time that his/her failure was due to circumstances beyond his control". Article 20.2 provides that an applicant "who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of this Article is taken, is entitled to request that his/her case be re-opened, unless the request is examined in accordance with Articles 32 and 34." Article 32 deals with subsequent applications and Article 34 deals with Procedural Rules. Mr Selwood referred me generally to Article 34 which imposes an obligation on Member States to "ensure that applicants for asylum whose application is subject to a preliminary examination ... enjoy the guarantees provided for in Article 10(1)". He accepted that in relation to the present appeal this was relevant only by way of analogy.

13. He then referred me to the primary legislation of s.104 of the 2002 Act. And the judgment in *R (MM (Ghana)) v SSHD [2012] EWCA Civ. 827*. Paragraph 24 deals with the application of s.104(4) and the meaning of "left the United Kingdom". In the present case there is no suggestion the Appellant has left the United Kingdom. Paragraphs 31 and 32 also deal with what is meant by leaving the United Kingdom. He concluded that not to permit the Appellant to pursue his appeal against refusal of refugee status would have severe consequences for him. Time should be extended.

**Submissions for the Respondent**

14. Mr Kotas submitted that the consequences of preventing the Appellant pursuing his asylum appeal were not so severe. The Appellant had been given discretionary leave but this would deny him some benefits which a grant of refugee status would bestow but the non-availability of these was not such as to amount to severe consequences.

15. The Appellant had instructed solicitors throughout. The provisions of both s.104 and PR17A did not admit the exercise of any discretion: the application could not succeed.

**Response for the Appellant**

16. Mr Selwood accepted that the grant of discretionary leave meant the Appellant was now on a path to settlement but it was the ten year route which was longer and more arduous than the route to settlement for a refugee. The Appellant's solicitors had accepted that the failure to give notice in accordance with PR17A was exclusively due to their oversight and time should be extended.

**Consideration of the Issue of the Validity of the Appeal Before the Upper Tribunal**

17. I accept all that Mr Selwood said about the circumstances how it came about that the Appellant failed to comply with the requirements of PR17A. Out of caution, I should add that this does not amount to a finding of fact in relation to the recent visits to the Appellant's family home and mosque in Sri Lanka.

18. The obligations imposed by the Refugee Convention on Contracting States and the Directive on minimum standards 2005/85/EC in respect of the consideration and assessment of refugee claims apply as is made clear in the wording of Article 34 of the Directive to a preliminary examination. The Appellant has not only received a preliminary examination of his refugee claim but has had the benefit of judicial oversight of the decision reached following the preliminary examination of his claim. There was no suggestion that the Respondent had in any way failed to comply with obligations in this respect under the Refugee Convention or the Directive.

19. I find little assistance in the present appeal from the judgment in *R (MM)* which dealt with the abandonment of an appeal by an applicant who left the United Kingdom with the intention of returning at some later point in the course of his appeal.

20. The provisions of s.104(4A) are clearly definitive. Sub-section (4B) provides that when leave is granted the appeal will not be treated as abandoned if notice is given in accordance with the Procedure Rules: s.104 uses the word "shall" which has mandatory effect and the provisions of PR17A similarly are mandatory.

21. The impact of the effect of the requirements imposed by s.104(4B) and PR17A are not onerous but I accept that the consequences of non-compliance are draconian and unlike in many civil cases cannot be appropriately offset by financial compensation because the issue relates to status.

22. While I have sympathy for the Appellant who has lost the right which he had acquired to pursue his asylum claim and for his solicitors who have fairly and properly acknowledged their oversight, I do not find that the Upper Tribunal is in a position to extend time beyond the limit set by PR17A which would be in direct contradiction of PR17A.

## Afterword

23. I am grateful to Mr Selwood for his clear and forceful presentation of the case for the Appellant and to Mr Kotas for agreeing to make submissions on the arguable error of law in respect of which permission to appeal had been granted; even if in the event it has turned out to be unnecessary.

## Anonymity

24. There was no request for an anonymity direction and I see no reason for one to be made.

## NOTICE OF DECISION

**Notice has not been given within the time limit specified by Procedure Rule 17A which mandates that the Tribunal shall not extend the time for giving notice. Accordingly, the appeal of the Appellant is deemed to have been abandoned by reason of s.104(4A) Nationality, Immigration and Asylum Act 2002 as amended.**

Signed/Official Crest Date 11. i. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal