



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/14429/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 7 February 2018**

**Decision & Reasons Promulgated  
On 27 February 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON**

**Between**

**MR SURESHKANTHI GANESHALINGAM  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Ms Jegarajah, Counsel, Direct Access

For the Respondent: Ms Z Ahmad, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. The appellant in this case is a citizen of Sri Lanka who was born on 11 June 1980. There is a considerable history to this case. The appellant originally applied for entry clearance as the spouse of a person present and settled in the UK. That application was refused by the respondent on 10 January 2013. In a decision promulgated by Judge of the First-tier Tribunal Sullivan, sitting in Hatton Cross on 31 October 2013, the appellant's appeal was allowed. However, the Upper Tribunal in the decision of Deputy Upper Tribunal Judge Woodcraft set aside that decision and

dismissed the appellant's appeal against the respondent's refusal of entry clearance.

2. The appellant again applied for entry clearance, that application being refused by the respondent on 23 November 2015. In a decision promulgated on 26 April 2017, Judge of the First-tier Tribunal Mark Eldridge dismissed the appellant's appeal.
3. The appellant appealed with permission on the following grounds:

#### Ground 1

The Judge of the First-tier Tribunal erred by refusing to grant an adjournment despite the fact that the sponsor was admitted to A&E with chest pain the day before the hearing;

#### Ground 2

The judge erred in failing to give any consideration to the sponsor's witness statement and the other evidence in the bundle which was produced to the Tribunal prior to the hearing, the judge finding at [16] of the Decision and Reasons that:

"There is no evidence in any form from the appellant. It is appreciated that being in Sri Lanka he cannot give oral evidence but he could have provided a witness statement or similar and has not. Similarly, there is nothing from his wife or anyone else about their relationship. There is nothing before me to show whether they are married and when they married or concerning her circumstances in this country."

#### Ground 3

It was argued that the judge erred when conducting the Article 8 proportionality balance, particularly in light of the fact that the appellant's wife and child are now British citizens and it was argued that there was inadequate consideration of the child's best interests.

#### **Error of Law Discussion**

4. This is a case where the Judge of the First-tier Tribunal took into consideration that the appellant's then legal representatives had written to the Tribunal the day before the hearing on 20 April to indicate that the sponsor had been taken to hospital. Upon further enquiries made by the Tribunal the legal representatives indicated that the family members and the sponsor had indicated that they did not need legal representation as the sponsor was unable to attend. The judge directed himself in relation to Rules 2 and 28 of the Tribunal Procedure Rules 2014. The judge took into consideration that there was no medical evidence confirming admission to hospital of the sponsor or when this had occurred and took into consideration that it was sixteen months since the lodging of the notice of appeal and five and a half months since notification of the hearing date and there was no explanation why there was no statement from the appellant or the sponsor or any other evidence provided. It was

the judge's opinion that the "appellant had not engaged with the appeal process at all beyond lodging a notice of appeal".

5. The judge indicated that after he had disposed of the case a further fax was received from the solicitors including a statement of fitness for work in respect of the sponsor which indicated that she had a pain in her breast and chest pain. It was noted that this certificate was issued on the day of the hearing. The Tribunal drew the conclusion that the sponsor was well enough to attend her GP and that there was a 'clear possible distinction between fitness for work and fitness for court attendance'.
6. In relation to the fitness for work certificate however, the Tribunal failed to note that this certificate indicates that the appellant had attended A&E the previous day and that "still continues to have left breast pain".
7. Whilst the Tribunal's decision not to adjourn the case was arguably reasonable on the basis of the evidence before the Tribunal, that is not the test to be applied. When the Tribunal refuses to grant an adjournment request, it must be considered whether this decision deprives the affected party of their right to a fair hearing. The question for the Upper Tribunal is not whether the First-tier Tribunal acted reasonably, but rather the test is one 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**; and **Nwagwe (adjournment: fairness) [2014] UKUT 00418 (IAC)**).
8. Although the Tribunal directed itself to the Tribunal Procedure Rules 2014 including the overriding objective at Rule 2 and hearing in a party's absence at Rule 28, it is unclear whether the Tribunal turned its mind to considering whether it was in the interests of justice to proceed with the hearing, particularly in light of the fact that there was evidence provided to the Tribunal on the day of the hearing that the sponsor had attended hospital on the day before the hearing and was still unwell.
9. In addition I take into consideration that the First-tier Tribunal's consideration of the adjournment request was influenced by the fact that the Tribunal considered that there was no other evidence produced despite sixteen months elapsing since the notice of appeal. However, that was incorrect. The Tribunal file includes a bundle, albeit a very scant one, which includes passport copies, family photographs and a witness statement for the sponsor. Although this does not address the Tribunal's concern that there was no witness statement evidence from the appellant, nevertheless it was incumbent on the Tribunal to engage with the evidence before it and give reasons for rejecting that evidence if that was the case. The documents in question were stamped as being received by Harmondsworth hearing centre on 20 April 2017, the day before the hearing. It may well be that these documents had not reached the relevant file, given that the Tribunal specifically referred on a number of occasions to no other evidence being provided.

10. I am of the view therefore, and Ms Ahmad did not forcefully argue to the contrary, that the appellant has been deprived of a fair hearing. Although given the paucity of evidence thus far the appellant has an uphill struggle in his appeal, nevertheless I cannot say, as a matter of certainty, that such an appeal is bound to fail. Therefore the error was material.

### **Conclusion**

11. The decision of the First-tier Tribunal contains an error of law. The determination of the First-tier Tribunal is set aside. No findings are to stand, Under section 12(2)(b)(i) of the 2007 Act and Practice Statement 7.2, the nature and extent of judicial fact finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal. The member(s) of the First-tier Tribunal chosen to reconsider the case are not to include Judge Eldridge.

### **Direction**

The following direction is made with the consent of the parties: The respondent is directed to confirm, no later than two weeks prior to the First-tier Tribunal hearing, whether or not it is accepted that Sri Lankan citizens require a visa to reside in India.

No anonymity direction was sought or is made.

Signed

Date: 23 February 2018

Deputy Upper Tribunal Judge Hutchinson

### **TO THE RESPONDENT** **FEE AWARD**

No fee award application was sought so no fee award is made.

Signed

Date: 23 February 2018

Deputy Upper Tribunal Judge Hutchinson