



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

VA (Solicitor's non-compliance: counsel's duties) Sri Lanka [2017] UKUT 00012 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

On 20 December 2016

Given orally on 20/12/16,

transcribed & edited

Promulgated on 05 January 2017

Before

THE PRESIDENT, THE HON. MR JUSTICE MCCLOSKEY

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

VA

(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms S Jegarajah, of counsel, instructed by Linga & Co

For the Respondent: Mr T Wilding, Home Office Presenting Officer

(i) Counsel's duty is owed to the client. It does not extend to defending non-compliant instructing solicitors.

(ii) It is for non-compliant instructing solicitors to defend themselves by proactively arranging their attendance before the tribunal in appropriate circumstances.

DECISION AND DIRECTIONS

1.

The Upper Tribunal strives to provide a professional service to the public. From time to time it is prevented from doing so by the conduct of legal representatives. This Tribunal in this elderly case has been repeatedly frustrated in its attempts to bring the proceedings to a conclusion. In a spate of cases in my lists during the past month I have drawn attention to the default of legal representatives. I have done so in strong but measured terms. In one of my orders which will now be published as a reported

decision of the Upper Tribunal I referred to the disgraceful circumstances prevailing: see Ahmed and Others (sanctions for non-compliance) [2016] UKUT 00562 (IAC). That description applies, I regret to say, fully to the present appeal.

2.

The Tribunal was blackmailed in this case by the Appellant's representatives on a previous date, 14 July 2016. The order of that date is attached. This is aptly described as "blackmail", in the figurative sense, because while the Tribunal could have refused to adjourn the hearing and insisted upon proceeding, this was in truth a theoretical possibility only given the virtual inevitability that any constitution of the Tribunal would have given paramount importance to the Appellant's right to a fair hearing - in this discrete context, a professionally prepared and properly presented hearing.

3.

The Tribunal has been blackmailed again today. This requires no elaboration.

4.

In the recently reported decision in Shabir Ahmed and Others (sanctions for non-compliance) [2016] UKUT 00562 (IAC), the Upper Tribunal has broadcast to the legal profession that it will not hesitate to have recourse to the full panoply of powers at its disposal to prevent this kind of shameful event materialising. That order reminds the profession, as I do once again today, that those powers include the initiation of contempt of court proceedings, wasted costs orders and the publication of rulings of this kind on the Tribunal's website. This Tribunal will take steps to ensure that today's ruling once transcribed becomes a reported judgment and has the dissemination which that entails.

5.

I note that the firm of solicitors on record for the Appellants has been representing them during most of the history of these appeals. There is no representative of that firm in attendance at today's hearing. Given the circumstances prevailing, this is inexcusable. Given the events of 14 July 2016, the recurrence of comparable egregious professional default almost defies belief.

6.

The principal solicitor in the firm in question will attend in person before the Upper Tribunal at 9.45 tomorrow to explain the whole history of these proceedings. His attendance will be preceded by sending to the Upper Tribunal a comprehensive witness statement addressing all material issues in the history of these proceedings. That witness statement will be received by 9 o'clock tomorrow morning.**

7.

Meantime the Tribunal succumbs to the blackmail which today's state of affairs entails and adjourns the hearing. All those who have attended this court room, and there are quite a few people involved, have suffered the grave inconvenience of being here today for no good reason, coupled with still further delay in finalisation of this litigation.

8.

This case will be relisted for hearing on the first available date in January 2017. That date I hasten to add could be as early as 3 or 4 January, subject to the availability and convenience of the Tribunal. Needless to say there will be no question of conveniencing the Appellant's representatives in any way. I will take steps to ensure that if necessary adjustments are made to other lists to bring this case back before the Tribunal not later than week commencing 09 January 2017.

9.

The main message which this ruling rebroadcasts will, if necessary, be repeated in future cases. The Upper Tribunal will not hesitate to have recourse to all powers at its disposal with a view to ensuring that its process is not misused and in the interests of furthering the overriding objective. There are no winners in the circumstances which have materialised, twice, in this appeal. The biggest losers are the litigants.

10.

While there are, I trust, many lessons to be learned, I would highlight one in particular. Where solicitors default in their conduct of proceedings, whether by non-compliance with procedural rules or practice directions or specific case management directions or otherwise, it forms no part of instructed counsel's duty to defend the instructing solicitor. The misconception to the contrary was evident in the present case and has manifested itself in others. Counsel represent their client: they do not represent their instructing solicitor.

11.

Counsel must also be alert to the inevitability of a penetrating judicial enquiry in cases where professional default of the kind manifesting itself in this appeal occurs. It would be prudent of counsel to proactively ensure that the instructing solicitor is in attendance at the hearing in such cases. Taking into account what I have said about the true nature of counsel's duty, the Tribunal will not expect to hear from Counsel – unless personally implicated – in circumstances of this kind. Rather, the solicitor having carriage of the case, must, proactively and fully equipped, attend.

12.

In this context, it is appropriate to draw attention to the Code of Conduct in the Bar Standards Handbook (2nd ed), Part 2B ("The Core Duties" and Part 2C ("The Conduct Rules") especially. All of counsel's duties in this key publication, as formulated are owed to the court/tribunal and client. Tellingly, there is no mention of instructing solicitors.

****Addendum**

13.

The solicitor concerned, as directed, attended the following day. An explanation was provided. While this qualified for a degree of sympathy, it did nothing to allay the Tribunal's concerns about the conduct of this appeal throughout.

THE HON. MR JUSTICE MCCLOSKEY

PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 20 December 2016