Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10476/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13th March 2014	**On 2nd April 2014**

Before

UPPER TRIBUNAL JUDGE COKER
UPPER TRIBUNAL JUDGE DAWSON

Between

V M
Anonymity direction made

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Bayati, counsel, Parker Rhodes Hickmotts
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals a decision of the First-tier Tribunal which dismissed an appeal by her on asylum and human rights grounds against a decision to remove her from the UK in accordance with s. 47 Immigration Asylum and Nationality Act 2006.

Background

2. The appellant first came to the UK on 21st October 2007 with entry clearance as a student. She was granted leave to enter, such leave being extended until 15th October 2012. On 7th July 2011 she returned to Sri Lanka and then came back to the UK on 23rd July 2011. She claimed asylum and international protection on 12th March 2012. Her claim was rejected by the respondent for reasons set out in a letter dated 25th May 2012 and a decision taken by the respondent to refuse to vary her leave to remain and to remove her by way of directions under s. 47 of the Immigration Asylum and Nationality Act 2006 was taken the same date. Her appeal against that decision was determined by Designated Judge Shaerf after a hearing on 16th July 2012; he dismissed her appeal on all grounds (AA/05768/2012). Permission to appeal that decision was granted solely on the grounds that the decision to remove her under s. 47 was arguably unlawful. Deputy Upper Tribunal Judge Monson, in a determination dated 13th December 2012 found that the s. 47 decision was unlawful and allowed the appeal on that ground only.

3. The appellant was then served with a decision to remove her pursuant to s. 10 Immigration and Asylum Act 1999 dated 6th February 2013; the notice of decision stated that she did not have an 'in country right of appeal'. On 21st February 2013 she submitted, through her then legal representatives, grounds of appeal and an application to extend time. On 22nd February 2013 the duty judge extended time and confirmed that the appellant had a valid in country right of appeal.

4. The appellant's appeal against the decision dated 6th February 2013 is the subject of these proceedings. It was heard and determined by First-tier Tribunal Judge Napthine on 3rd September 2013. By a determination promulgated on 17th September 2013 he dismissed her appeal on all grounds.

5. Permission to appeal that decision was granted by UTJ Allen on 16th January 2014.

Error of law

6. The grounds seeking permission submitted, in essence, that the judge had failed to approach the evidence correctly. Although he had referred to Deevaseelan [2002] UKIAT 00282 it was asserted that he had failed to correctly apply the guidance. In particular

- he had taken the approach that he could not depart from Judge Shaerf's determination "without cogent reliable evidence" [20];
- that nothing said by Dr Goldwyn had given him "reason to doubt the findings of Judge Shaerf" [30],

- that "The Appellant has been found not to be credible. Nothing in Dr Smith's report alters that finding" [50]; that "[T….K….] …did not give evidence…..and therefore his claims are untested";
- that "having seen UK government ministers and UK lawyers going to prison for attempting to pervert the course of justice…the assertion that a person in Sri Lanka is an attorney or MP" is not reliable proof of their veracity.

7. Mr Deller accepted that that the judge approached the earlier decision incorrectly. He said it did appear that the judge had not paid attention to a large body of new material and had failed to take account of material evidence. It was also apparent that T..K.. had given oral evidence before the First-tier Tribunal and that evidence had gone unchallenged by the respondent.

8. In all the circumstances and reviewing the material that was before the First-tier Tribunal, the failure to approach the decision of Judge Shaerf correctly and the failure to acknowledge oral evidence, we are satisfied that the judge erred in law such that the decision is set aside to be remade.

Future conduct of appeal

9. Having regard to the nature of the error, no findings can be preserved from the First-tier Tribunal decision. The scheme of the Tribunals, Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal.

10. When we have set aside a decision of the First-tier Tribunal, s.12(2) of the TCEA 2007 permits us to remit the case to the First tier with directions or remake it for ourselves. Having regard to the Practice Statements by the Senior President and the nature and extent of fact finding required, we conclude that the decision should be remitted to the First tier judge to determine the appeal.

11. There is no doubt but that the appellant has an in country right of appeal such appeal having been brought on asylum and human rights grounds, her claim for international protection having been made prior to service of the decision to remove her.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision and remit the appeal to be heard afresh by the First-tier Tribunal – not Judge Napthine, Judge Monson or Designated Judge Shaerf

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 2nd April 2014

Judge of the Upper Tribunal Coker