Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06506/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 August 2015	**On 3 September 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

PS
[Anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Ms C Meredith, instructed by Islington Law Centre
For the respondent: Mr L Tarlow, Senior Home Office Presenting Officer

ERROR OF LAW DECISION AND REASONS

1. The appellant, PS, date of birth 2.9.88, is a citizen of Sri Lanka.

2. This is her appeal against the decision of First-tier Tribunal Judge Oliver promulgated 13.2.15, allowing on human rights ground only, her appeal against the decision of the Secretary of State to refuse her asylum, humanitarian protection and human rights claims. The Judge heard the appeal on 21.11.14.

3. First-tier Tribunal Judge Cruthers granted permission to appeal on 10.3.15.

4. Thus the matter came before me on 4.8.15 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Oliver should be set aside.

6. Judge Oliver dismissed the asylum and humanitarian protection claims, but allowed the appeal on human rights grounds on the basis of a risk of suicide if returned.

7. In granting permission to appeal, Judge Cruthers noted that the First-tier Tribunal Judge "seems to have accepted, amongst other things, that the appellant had been a victim of detention and rape on return to her home country in 2011 (paragraph 67 of the decision under consideration). Taking into account, amongst other things, the operation of paragraph 339K of the immigration rules, it seems to me arguable that the judge should have allowed this appeal on an asylum basis. But the appellant should not take the grant of permission as any indication that the appeal will ultimately be successful."

8. Paragraph 339K provides "The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."

9. At §67 of the decision, Judge Oliver found that the appellant "has shown to the lower standard that she was the victim of detention and rape, broadly as she described, on her return in 2011." The judge described this an appalling event and accepted that she was able to leave the country within a few days of the incident. The judge also found the failure to mention the rape in the screening interview was explicable and other discrepancies were minor and comfortably explained with the medical evidence, which was found entirely consistent with the appellant's account. In relation to the demonstration the judge was unable to reach any clear conclusion, but considered that she may have confessed falsely.

10. At §70 of the decision the judge set out extracts from the headnote of GJ & Others (post civil war: returnees) Sri Lanka CG [2013] UKUT 00319, which includes this phrase from the headnote: "If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection."

11. However, the significant difference in this case is that the judge did not accept that the appellant had been detained and abused by the Sri Lankan authorities.

12. I do not accept Ms Meredith's interpretation of §72 to §74 of the decision of the First-tier Tribunal, suggesting that the judge accepted that the appellant had been the victim of rape and abuse by Sri Lankan authorities. Whilst the judge accepted that she had been detained and treated as claimed, the judge raised and gave consideration to two possible reasons for the appellant's detention a few days after arrival through the airport in 2011. The first, is that the earlier perception of the

authorities (that she was of no adverse interest) might have changed because of her confession to have attended the demonstration, and she was now perceived to be someone who had been politicised abroad. The judge concluded, however, that this would not place her within the risk categories.

13. The second reason why she may have been detained, and which the judge found "much the more likely," was that she was picked up by rogue elements, acting without state authority, and thus an event which would be unlikely to be repeated on return. The judge reasoned that this was the more likely explanation because she was able to leave Sri Lanka in the normal way using her own identity, without any difficulties from the authorities. At §74 the judge concluded that either way, the appellant does not come within the risk categories and would not face a real risk of persecution or article 3 treatment on return.

14. It appears from the above that the judge reached the conclusion that the appellant was not detained or ill-treated by the Sri Lankan authorities, but rather by rogue elements unconnected with the state. Considered as a whole, the decision is carefully written and takes fully into account the appellant's factual claim and finds it entirely consistent with the medical evidence. However, I am not satisfied that the findings and conclusions at §72 to §74 are cogently reasoned. It is not clear whether the judge was rejecting the first possibility of a change of attitude by the Sri Lankan authorities, even though the judge preferred the second explanation of 'rogue elements.' If the first was still a reasonably likely possibility, then the judge failed to give any weight to the risk of further ill-treatment on the basis of past detention and ill-treatment, both under GJ and paragraph 339K of the Immigration Rules.

15. Further, the appellant's case was that she was questioned about her sister and brother (see §36 of her witness statement), which would be something known to the authorities and not necessarily by 'rogue elements.' It is not clear that the judge considered the family links between the appellant and other family members. §45 of Forah v Home Secretary [2007] 1AC, points out that arbitrary persecution can take place simply because a person is a member of the same family as someone else. A family member merely by connection to a refugee is vulnerable to acts of persecution. The evidence of the appellant's sister at A20 is that she was granted refugee status and was suffering PTSD from her treatment in Sri Lanka. Her claim was that the authorities raped her. This appellant claims that this was mentioned to her when she was raped in 2011. The appellant's brother has also been granted refugee status. Connections with a family member who was a senior member of the LTTE was recognised in GJ at §359 onwards.

16. This issue although present in the case and evidence before the First-tier Tribunal was not addressed by the judge. Taken into account with the possibility of a false confession and change of perception by the Sri Lankan authorities, I find that the reasoning and conclusion at §72-§74 is inadequate to dismiss the question as to whether the appellant may come within the risk categories of GJ. The judge has to make an overall assessment of the evidence and consider all aspects together. I am not satisfied that a comprehensive assessment has been conducted in this case.

17. In the circumstances, I find that the decision on asylum and humanitarian protection grounds is flawed for error of law and should be set aside to be remade.

18. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts and conclusions are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors identified vitiate the findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

19. In all the circumstances, I remit this appeal to the First-tier Tribunal on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh on the asylum and humanitarian protection grounds only.

20. There has been no cross-appeal in relation to the decision on human rights grounds and thus that part of the decision must stand as made.

Conclusion & Decision:

21. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision in respect of asylum and humanitarian protection only should be set aside and remade.

I set aside the decision dismissing the appeal on asylum and humanitarian protection grounds;

I preserve the decision allowing the appeal on human rights;

I remit the appeal to be reheard in the First-tier Tribunal.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

22. The appeal is to be relisted in the First-tier Tribunal for a fresh hearing in relation to asylum and humanitarian protection grounds only;

23. The estimated length of hearing is 3 hours;

24. A Tamil interpreter will be required.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal made an order pursuant to the Asylum and Immigration Tribunal (Procedure) Rules.

Given the circumstances, I continue the anonymity order.

Fee Award **Note: this is not part of the determination.**

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated