



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: AA/11450/2014

THE IMMIGRATION ACTS

Heard at Field House, London

Decision & Reasons Promulgated

On the 1<sup>st</sup> April 2016

On 20 April 2016

Before:

DEPUTY JUDGE OF THE UPPER TRIBUNAL MCGINTY

Between:

MRS N.N.

(Anonymity Direction made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bandegani (Counsel)

For the Respondent: Ms Everett (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Spicer promulgated on the 13<sup>th</sup> November 2015, in which he dismissed the Appellant's appeal on asylum grounds, humanitarian protection grounds and on human rights grounds.
2. Permission to appeal against that decision has been granted by First-tier Tribunal Judge Brunnen on the 31<sup>st</sup> January 2016, on the basis that it was arguable that the First-tier Tribunal Judge had erred in applying the wrong standard of proof, in applying the balance of probabilities when making findings of fact relating to the asylum appeal. He also granted permission

to appeal in respect of the remainder of the Grounds of Appeal, which are set out within that document. As they are a matter of record, they are not repeated in full here, given the concessions which were made by Ms Everett on behalf of the Respondent, which means that I do not need to consider the other Grounds of Appeal in this case.

3. Although within the Rule 24 reply it was argued that the Judge had directed himself appropriately and had applied the correct standard of proof when making his findings and that any reference to the “balance of probabilities” was an erroneous slip of the pen, and the findings were adequate and sustainable, in her oral submissions on behalf of the Respondent, Ms Everett conceded that upon closer examination of the decision, it was apparent that the Judge had applied the wrong standard of proof when making findings of fact. She conceded that the Judge had applied the balance of probabilities when making findings of fact and that this was a material error of law such that the decision of First-tier Tribunal Judge Spicer should be set aside and the case remitted back to the First-tier Tribunal for rehearing before any Judge other than First-tier Tribunal Judge Spicer.
4. Given that it was agreed between the parties that as the findings went to the issue of credibility as a whole, and that therefore the entirety of the decision of Judge Spicer should be set aside not only in respect of asylum, but also in respect of his findings on human rights as well, consequent upon those initial findings.
5. Mr Bandegani agreed the Judge did not then need to consider the other Grounds of Appeal, the Respondent having considered there to be a material error of law.

#### My Findings on Error of Law and Materiality

6. In the case of PS (Sri Lanka) v Secretary of State for the Home Department [2008] EWCA Civ 1213, the Court of Appeal said that the single test of

whether a fear of persecution or ill treatment was well founded was whether on the evidence there was a real risk of its occurrence or reoccurrence. In the previous case of R v Secretary of State for the Home Department ex parte Sivakumaran [1998] AC 958 the Court of Appeal said that a well-founded fear of persecution required the establishment of what was described by Lord Keith of Kinkel as a “reasonable degree of likelihood” and by Lord Goff as “a real and substantial risk”.

7. As was therefore agreed between the parties, the correct standard of proof to be applied in asylum claims is not the balance of probabilities, but is the lower standard of proof. As was quite properly conceded by Ms Everett on behalf of the Respondent, it is clear when reading the decision of First-tier Tribunal Judge Spicer that although she reminded herself at [95] of the low standard of proof that applied in asylum cases, namely a reasonable degree of likelihood, when she actually made her findings of fact at [98] she specifically stated that she “made the following findings of fact on the balance of probabilities”. She went on to make findings at paragraph 98(ix) that “Accordingly, I find it more likely than not that there are other family members in Bangladesh who will be able to support the Appellant”, and she made findings at paragraph 100(viii) regarding the Appellant’s age on again “the balance of probabilities” and regarding her identity as being Aftaban, Siftan or Aftafon Bibi, again on the “balance of probabilities”.
8. As Ms Everett therefore properly conceded, it is clear that the Judge has approached the findings of fact in this case on the balance of probabilities, and considered the asylum claim on that basis. As was properly conceded by Ms Everett on behalf of the Respondent, the Judge has therefore made a material error of law in applying the wrong standard of proof when considering the asylum claim put forward by the Appellant, such that the entirety of the decision of Judge Spicer should be set aside, as was conceded by both parties, given that the findings go to the issue of credibility as a whole and the circumstances of the Appellant, and the matter should be remitted back to the First-tier Tribunal for rehearing before any Judge other than First-tier Tribunal Judge Spicer.

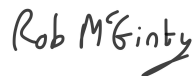
#### Notice of Decision

The decision of First-tier Tribunal Judge Spicer does contain a material error of law and is set aside.

The appeal is remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Spicer, as a rehearing *de novo*.

Unless and until a Tribunal or Court directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This order applies both to the Appellant and to the Respondent. Failure to comply with this order could lead to Contempt of Court proceedings.

Signed

A handwritten signature in black ink that reads "Rob McGinty". The signature is written in a cursive style with a prominent underline at the end.

Deputy Judge of the Upper Tribunal McGinty

Dated 3<sup>rd</sup> April 2016