Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10366/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 12th February 2018	**On 1st March 2018**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

SK
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Bandegani, instructed by Duncan Lewis & Co Solicitors.
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a national of Sri Lanka born in 1979. He entered the UK on 4th December 2000. On 14th May 2001 his asylum claim was refused and his appeal dismissed on 18th January 2002. He was appeal rights exhausted on 5th February 2002. On 1st June 2010 he was granted Indefinite Leave to Remain. On 29th September 2016 he was convicted at Wood Green Crown Court for wounding/inflicting grievous bodily harm and sentenced to 12

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months in prison. A Deportation Order was signed and served on 18th October 2016. On 2nd October 2017 a decision to refuse a protection and human rights claim was made and the appellant appealed on human rights grounds.

2. In a determination dated 23rd November 2017 First-tier Tribunal Judge Howard dismissed the appeal on all grounds.

Application for Permission to Appeal

3. The application for permission was made by the appellant who was unrepresented. He asserted that he had family in the UK (his brother), he had no family in Sri Lanka and that the government in Sri Lanka was still pressuring Tamils wrongly. He had no connection with family in Sri Lanka, had lived in the UK for 17 years.

4. Permission to appeal was granted by DIJ Shaerf who recognised that the appellant was unrepresented at the hearing. He noted that the structure of the decision was 'unusual' and did not follow the structure recommended by the Supreme Court in Hesham Ali v SSHD [2016] UKSC 60. Particularly striking was the consideration at [37] without enumeration of the factual findings against the criteria contained in paragraphs 398-399B and after he had given his decision in the preceding paragraph. There was, further, no reference to Section 117B or Section 117C. The Judge made no distinction in his treatment of the Appellant's claim under Article 8 whether within or without the Rules.

The Hearing

5. At the hearing before me, Mr Bandegani attempted to amend his grounds of appeal to include a challenge to (i) the judge's direction in law relating to the test of 'unduly harsh' when in fact the challenge related to his 'private life', (this was related to EX.1) (ii) there was no reference to the test in **SSHD v Kamara** [2016] EWCA Civ 813 such that the concept of integration is a broad evaluative one and not confined to the mere ability to find a job, (iii) the fact that the question of rehabilitation was not irrelevant and (iv) that there was unfairness in that the appellant was not represented and thus the judge should have adjourned the hearing. The judge did not proceed in a procedurally fair manner. The appellant was unable to furnish the court with further information.

6. Mr Tufan resisted the further grounds of challenge and submitted that any error of law was immaterial to the outcome.

Conclusions

7. The challenge by the appellant was in relation to the assessment of Article 8. I declined to allow Mr Bandegani to raise further grounds of appeal with reference to the overriding objective of The Tribunal Procedure (Upper Tribunal) Rules 2008. This application was made at the last moment and two days prior to the hearing. The solicitors were instructed by the end of January 2018. The appellant's solicitors were instructed late but were on file and the grounds of appeal could have been settled earlier and certainly prior to two days before the hearing.

8. Notwithstanding my point above I find that the further grounds (i) and (ii) are effectively already incorporated by virtue of the effective omission of reference to the Immigration rules. With reference to (iii) I am not persuaded that rehabilitation would make a material difference and thus is not arguable.

9. With reference to (iv) above, the appellant was invited by the court's direction dated 17th October 2017 to submit further evidence to the Tribunal in support of his appeal. There was absolutely no evidence submitted by the appellant for his appeal or indeed any request for an adjournment at any time. That the appellant was detained does not immediately preclude the need to comply with court directions. The appellant was able himself to appeal the refusal of his human rights claim and further request permission to appeal when the decision dismissed his appeal. This was despite the fact that he was in detention. Although not framed in legalistic terms those documents produced by the appellant enabled him to express dissatisfaction with the process. In the circumstances I am not persuaded that it was incumbent upon the judge to adjourn the proceedings of his own motion. There was no indication that any further evidence would be forthcoming.

10. Mr Bandegani also indicated that there was medical evidence dating from 18th December 2001 on the Home Office file and which should have been considered but there was no indication that this was placed before the judge. Further, this document predated the appellant's hearing in 2001, was specifically compiled for the court in 2001, relied on the appellant's account which was then rejected and further identified 'past medical history' as 'nil significant and is not on regular medication'. For these reasons I am not persuaded that there was any 'error of fact' on the part of the judge in failing to have regard to this medical evidence such that the appellant would have been considered 'vulnerable'.

11. There was no indication that the judge should have, in the absence of any request by the appellant for an adjournment, and in the absence of any further evidence and any medical

evidence, have taken it upon himself to direct an adjournment or conclude that it was unfair to proceed.

12. The challenge in the appellant's grounds of appeal and indeed in the application for permission to appeal rested on Article 8 grounds and the attendant difficulties in his return. I am not persuaded that there was any procedural error and thus the judge's approach to the asylum claim was not challenged and will be preserved.

13. I can, however, appreciate the judge did not approach the law, regarding Article 8, in a structured manner and as recommended by **Hesham Ali v SSHD** [2016] UKSC 60. I was invited to conclude that this was not material. I cannot agree. Had the judge adopted the 'balance sheet approach', although not compulsory, as recommended in **Hesham**, he may have avoided falling into the error of ignoring any assessment of the appellant's integration into the UK. The judge needed to interpret the Immigration Rules in accordance with the law and apply them. Under the broad evaluative test regarding integration, and as set out in **SSHD v Kamara [2016] EWCA Civ 813 [37],** the fact that the appellant had been in the United Kingdom for 18 years and had previously been granted Indefinite Leave to Remain was a relevant and important issue to factor into the assessment. In making an assessment with reference to Section 117C (2) it is also relevant to factor in the concept that the more serious the offence committed by a foreign criminal the greater is the public interest in deportation of the criminal.

14. As set out by Lord Thomas in **Hesham** at [83]

> *'One way of structuring such a judgment would be to follow what has become known as the "balance sheet" approach. After the judge has found the facts, the judge would set out each of the "pros" and "cons" in what has been described as a "balance sheet" and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders'.*

15. Although Mr Tufan made the point that the test would be 'very compelling circumstances' the judge needed to factor in all that was relevant in coming to the assessment and made no findings for example, on the seriousness of the offending, the family in Sri Lanka and the relevance of the previous grant of Indefinite Leave to Remain. The judge failed to set out the Immigration Rules, failed to refer anywhere to the correct test and failed to set out the mandatory statutory factors. As such the judge failed to make the relevant findings and therefore I find that there is an error of law in relation to the assessment of the human rights claim.

16. For clarity

> *53. As explained at para 17 above, the Rules are not law (although they are treated as law for the purposes of section 86(3)(a) of the 2002 Act), and therefore do not govern the determination of appeals, other than appeals brought on the ground that the decision is not in accordance with the Rules: see para 7 above. The policies adopted by the Secretary of State, and given effect by the Rules, are nevertheless a relevant and important consideration for tribunals determining appeals brought on Convention grounds, because they reflect the assessment of the general public interest made by the responsible minister and endorsed by Parliament. In particular, tribunals should accord respect to the Secretary of State's assessment of the strength of the general public interest in the deportation of foreign offenders, and also* ***consider all factors relevant to the specific case before them****, as explained at paras 37-38, 46 and 50 above. It remains for them to judge whether, on the facts as they have found them, and giving due weight to the strength of the public interest in deportation in the case before them, the factors brought into account on the other side lead to the conclusion that deportation would be disproportionate.*

17. In making an assessment with reference to Section 117C (2) it is also relevant to factor in the concept that the more serious the offence committed by a foreign criminal the greater is the public interest in deportation of the criminal. As pointed out, the provisions under Section 117 are mandatory and were material. Albeit there was automatic deportation the nature and extent of the offending and the weight attached to that needed to be addressed.

18. The First-tier Tribunal Judge's decision on asylum is preserved but the decision in relation to Article 8 is set aside. The matter should be returned to the First Tier Tribunal for a hearing de novo, bearing in mind the need for relevant and adequate findings to found the Article 8 human rights' assessment.

Signed Helen Rimington Date 12th February 2018

Upper Tribunal Judge Rimington