



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/12892/2017

THE IMMIGRATION ACTS

Heard at Field House
On 26th April 2018

Decision & Reasons Promulgated
On 4th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

KS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Jaquiss of Counsel instructed by Wimbledon Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Miller of the First-tier Tribunal (the FTT) promulgated on 6th February 2018.
2. The Appellant is a female Sri Lankan citizen born in July 1986. The Appellant claimed asylum on 2nd January 2015. The application was refused on 22nd November 2017 and the Appellant appealed to the FTT.

3. The FTT refused an application for an adjournment at the hearing on 17th January 2018. Counsel for the Appellant had requested an adjournment to obtain a psychologist's report. Following refusal of the adjournment request the FTT heard evidence from the Appellant and a witness. The FTT agreed that the Appellant should be treated as a vulnerable witness. The FTT did not find that the Appellant had given a credible account. Reasons for this finding were given by the FTT at paragraph 37(i)-(ix).
4. The Appellant was found not to be credible, the FTT did not find that she would be at risk if returned to Sri Lanka, and therefore concluded that she was not entitled to asylum or humanitarian protection, and her removal from the UK would not breach Articles 2 or 3 of the 1950 European Convention on Human Rights (the 1950 Convention).
5. The Appellant applied for permission to appeal to the Upper Tribunal relying upon six grounds which are summarised below;

Ground 1

The FTT failed to apply country guidance and failed to make any or any sufficient findings in relation to country guidance and country information. It was submitted that the FTT had made no findings in relation to GJ Sri Lanka CG [2013] UKUT 00319, MM (Sri Lanka) [2014] EWCA Civ 36, and PP (Sri Lanka) [2017] UKUT 117.

The Respondent had accepted that the Appellant had been an active LTT member, and the FTT did not make a finding as to whether or not the Appellant would as a result be perceived by the Sri Lankan authorities as posing a threat to the unity of Sri Lanka. No finding was made as to whether and to what extent that risk would be compounded by her diaspora activities which included giving evidence to the ICPPG and her involvement with the TGTE.

The FTT made no findings as to whether or not the Appellant would be at risk as a single Tamil female returning to a previous conflict area, and the impact of her significant mental vulnerability which elevates risks significantly according to PP (Sri Lanka).

Ground 2

The FTT erred by making no findings in relation to Article 3 and the risk of suicide.

The FTT was referred to J v SSHD [2005] EWCA Civ 629 and invited to find there was a real risk the Appellant would commit suicide as a result of return to Sri Lanka but no findings were made.

Ground 3

The FTT failed to have regard to relevant factors and had regard to irrelevant factors. The FTT did not consider MM Sri Lanka when finding it incredible that the

Appellant had been able to pass through security at Colombo Airport and made no attempt to conceal her identity.

The FTT erred in expecting evidence to be produced from the people with whom the Appellant was living in relation to her suicide attempt, if this was as a result of her treatment in Sri Lanka. The Appellant's evidence was that she did not want to tell those she was living with about being raped.

It was submitted that the FTT had erred by finding there was "very little" in the way of medical evidence in relation to the Appellant. It was contended that there were documents in relation to the Appellant's discharge from hospital following a suicide attempt, a scarring report, a letter confirming a diagnosis of depressive disorder with PTSD symptoms, a letter from the Appellant's psychotherapist, and a letter from the Appellant's GP dated 28th November 2016 which referred to the Appellant expressing definite plans to end her life if sent back to Sri Lanka. The FTT did not refer to the report in which the Appellant's scars were found to be consistent with her claims to have been tortured, and made no reference to the Appellant's suicide risk.

The FTT found at paragraph 37(viii) that the Appellant had first studied and then applied for an EEA residence card "without mentioning asylum to anybody". It was contended that this was incorrect, as the Appellant had given evidence in her asylum interview that she had asked a solicitor about claiming asylum but was told that this would cost £5,000 which she could not afford. It was contended that the FTT erred in considering the letter from the ICPPG at page 1 of the Appellant's bundle, in that the Appellant had not merely consented to give evidence, but had provided written evidence.

Ground 4

It was submitted that the FTT erred by misapplying section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 by failing to assess the impact of the Appellant's vulnerability upon the promptness or otherwise of her asylum claim. The FTT had failed to recognise that claiming asylum was a last resort in that the Appellant's evidence was that she had other routes open to her to remain in the UK which she attempted to use, albeit unsuccessfully.

Ground 5

The FTT erred by accepting that the Appellant was a vulnerable witness but failed to treat her as a vulnerable witness when assessing credibility. It was contended that the FTT had failed to follow the principles in AM (Afghanistan) [2017] EWCA Civ 1123. It was contended that the FTT had erred by failing to give consideration as to how the Appellant's vulnerability might have affected her account.

Ground 6

The FTT erred by failing to grant an adjournment which meant that the Appellant did not have a fair hearing. It was submitted that the evidence indicated that the Appellant had clear mental health issues, but there was no up-to-date expert report and this was required. The FTT commented at paragraph 37(vi) that little had been submitted by way of medical evidence, but had refused an adjournment to acquire this evidence.

6. Permission to appeal was granted by Judge Parkes and I set out below in part the grant of permission;
 2. The judge refused to adjourn the case on an application made at the hearing. It was found that the Appellant was not credible with regards to her claim about events in Sri Lanka for the reasons given in paragraph 37 of the decision.
 3. The grounds argue that the judge did not apply country guidance and did not make relevant findings. The judge did not make findings on Article 3 and the Appellant's suicide risk. With regard to the Appellant's departure from Sri Lanka the judge had not had regard to the evidence of corruption at the airport. There was medical evidence relating to the Appellant's condition and suicide attempts and there was no reference to the scarring report. The Appellant had not been treated as vulnerable and should have adjourned the hearing for a psychiatric report.
 4. The final point has no merit, with the history of the case set out by the judge there had been ample opportunity for the report to be obtained or for an application to be made ahead of the hearing. Fairness is obtained by providing the opportunity to take the required action, if an Appellant does not take the opportunity that does not make the hearing unfair. That said the point is not important in the context of this appeal as there is merit in the failure of the judge to deal adequately or at all with the medical evidence that was available and to assess the future risk to the Appellant.
 5. The grounds are arguable and permission to appeal is granted.
7. Following the grant of permission, the Respondent submitted a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. It is a brief response contending that the judge directed himself appropriately and made findings open to him on the basis of the evidence before him and gave adequate reasons.
8. Directions were issued making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FTT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

9. Ms Jaquiss relied upon the grounds contained within the application for permission to appeal and expanded upon them.

10. Mr Kotas conceded that the grounds disclosed a material error of law, and conceded that the FTT decision should be set aside with no findings preserved.
11. Both representatives submitted that in the circumstances it was appropriate to remit the appeal back to the FTT to be heard afresh.

My Conclusions and Reasons

12. I find the FTT materially erred in law for the reasons given in the grounds contained within the application for permission to appeal, read together with the grant of permission. In my view the concession made by Mr Kotas is rightly made.
13. The decision needs to be re-made. No findings of fact are preserved. I have taken into account paragraph 7.2 of the Senior President's Practice Statements, and find it is appropriate to remit this appeal back to the FTT because there is substantial fact-finding to be undertaken. It is more appropriate for such substantial fact-finding to be undertaken by the FTT rather than the Upper Tribunal.
14. The appeal will therefore need to be decided afresh by the FTT. The parties will be advised of the time and date of the hearing in due course. The appeal is to be heard by an FTT judge other than Judge Miller.

Notice of Decision

The decision of the FTT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FTT with no findings of fact preserved.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 26th April 2018

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

No fee award is made by the Upper Tribunal. The issue of any fee award will need to be considered by the FTT.

Signed

Dated 26th April 2018

Deputy Upper Tribunal Judge M A Hall