Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02782/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25th April 2019	**On 24th May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

M D L K A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms L Tobin, Counsel
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sri Lanka born on 24th March 1982. The Appellant has an extensive immigration history having been issued with a Tier 4 (General) Student visa on 11th January 2011. Thereafter, the Appellant made further applications and on 14th August 2017 was encountered working illegally and arrested as a Section 10 overstayer. On 17th August 2017 he claimed asylum. His claim for asylum was based on a purported well-founded fear of persecution in Sri Lanka on the basis of his imputed political opinion. His application was refused by Notice of Refusal dated 10th February 2018.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Burns sitting at Birmingham on 25th October 2018. In a decision and reasons promulgated on 29th October 2018 the Appellant's appeal was dismissed on asylum grounds and pursuant to Article 3 of the European Convention of Human Rights. The First-tier Tribunal Judge granted the Appellant anonymity. No application is made to vary that order and none is made.

3. Grounds of Appeal were lodged to the Upper Tribunal on 24th February 2019. Those grounds contended:-

   (i) that there had been a failure by the First-tier Tribunal Judge to apply the Joint Presidential Guidance Note No 2 of 2010;

   (ii) that there had been a failure to give adequate reasons for rejecting the medical evidence; and

   (iii) that there had been a failure to give adequate reasons for rejecting supporting evidence.

4. On 19th March 2019 First-tier Tribunal Judge Hodgkinson granted permission to appeal.

5. It is on that basis that this appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by his instructed Counsel, Ms Tobin. The Secretary of State appears by her Home Office Presenting Officer, Mr Tarlow.

Submission/Discussion

6. Ms Tobin takes me to the Grounds of Appeal pointed out that although she is not the author of them they are fairly comprehensive. She starts by reminding me of the factual background and procedural history of this matter which is set out in some detail at paragraphs 4 to 7 of the Grounds of Appeal. Thereafter, she submits that Counsel before the First-tier Tribunal addressed the judge that the Appellant should be treated as a vulnerable witness and that the Joint Presidential Guidance Note No 2 applied in his case. She points out that the judge noted that "given that he has a diagnosis of a mental health problem I proceeded in accordance with the guidance". The judge notes that thereafter there was a discussion about what adjustments were sought which the judge recorded as being "entirely reasonable requests".

7. Ms Tobin submits that the issue herein relates to the judge's assessment of the evidence when he made several adverse credibility findings when considering the Appellant's mental health. She submits that those findings constitute a material error of law. She reminds me that the judge notes that he addressed credibility at paragraph 44 of his determination and noted that the Appellant's depression "may well have hindered his ability to fully participate in the appeal" but that when the judge came to make findings on credibility there was no consideration as to whether

potential issues in the Appellant's evidence may have resulted due to this condition.

8. Ms Tobin goes on to refer me to paragraph 10 of the Grounds of Appeal pointing out issues therein including the Appellant's delay in claiming asylum, the coherence of his account, the lack of consistency in his account, his inability to recall the chronology of when a letter was received or his "stumbling" in oral evidence and submits that all were as a result of his mental health difficulties. She contends that none of these factors were properly considered by the judge and consequently the judge has totally failed to assess the vulnerability of the Appellant in accordance with the guidelines.

9. Secondly, she turns to the failure that is contended by the judge to give adequate reasons for rejecting the medical evidence. She submits that the judge's credibility had already been formed and that it is completely wrong as a matter of law to formulate the assessment of credibility prior to reading and making findings on the report. She submits that even when reading the determination in the round it is clear that the judge rejected the medical report to a significant extent because he had rejected the Appellant's credibility and therefore rejected the corroborative potential of the report. She submits that this is clearly the wrong approach and contravenes the principles set out in *Mibanga* which conclusively establishes that a judge should not make findings on credibility before assessing the medical evidence.

10. Finally, she turns to the contention that the judge has failed to give adequate reasons for rejecting supportive evidence, particularly in this instance the evidence from the Appellant's former attorney-at-law and the provision by the attorney of a letter along with his Bar Association of Sri Lanka identity card. She points out that this issue was given very short consideration by the judge and was dismissed at paragraph 64. She consequently contends that overall there are substantial material errors of law which taint the decision and she asks me to set the decision aside and to remit the matter back to the First-tier Tribunal for rehearing.

11. In response Mr Tarlow states that at paragraph 72 of his decision the judge made a finding that even if the Appellant's case was true he has not shown to the lower standard that the abductors were in any way connected to the authorities in Sri Lanka and consequently that he would not be at risk. He therefore contends that even if there were to be errors of law they are not material. He submits that whatever the *Mibanga* error is (and he concedes there may be one), the risk on return is covered by the guidance given in *GJ and Others (post-civil war returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)* that the Appellant would not be of interest to the authorities in accordance with that authority. He asks me to dismiss this appeal.

12. In brief response Ms Tobin points out that the Appellant would fall within the risk categories of *GJ* if he was credible. For example, he has been

noted to have passed evidence onto Channel 4 News and she submits he would be at risk and fall into the risk categories therein. She reiterates that there are material errors of law and asks me to remit the matter back to the First-tier Tribunal for rehearing.

The Law

13. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

14. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

15. The starting point in this case relates to the judge's assessment of credibility. A proper approach to credibility would require an assessment of the evidence and of the general claim. In asylum claims relevant factors would be the internal consistency of the claim, the inherent plausibility of the claim, and thirdly the consistency of the claim with external factors of the sort typically found in country guidance. I acknowledge that theoretically all a claimant need do is no more than state his claim but that claim still needs to be examined for consistency and inherent plausibility and in nearly every case external information against which the claim could be checked would be available. That would appear to be a valid general contention in this matter.

16. Consequently, I accept the submission made by Ms Tobin that if there is an error of law it is material insofar as the evidence does not immediately show that the Appellant if found to be credible would not fall within the risk categories of *GJ* and consequently much will depend upon the assessment of the Appellant's credibility. In reaching such assessments

there are two specific factors where the judge has erred in law that need to be considered. Firstly, it is clear from the manner in which the decision is set out that the judge has fallen into error in the order in which he has assessed the medical evidence, i.e. he has considered the credibility of the Appellant prior to considering the medical evidence.

17. Secondly, the judge goes to great lengths to make reference to the fact that he acknowledges the Appellant is a vulnerable witness and then seemingly fails to take those factors into account when making his credibility assessment. For all these reasons I am satisfied that there are material errors of law in the decision of the First-tier Tribunal Judge which taint the decision and make it unsafe.

18. The correct approach is consequently to set aside the decision and to send the matter back to the First-tier Tribunal for rehearing with none of the findings of fact to stand. However, I do emphasise to the Appellant that this is not to say that on a proper and fully reasoned assessment of this appeal that another judge would come to a different conclusion ultimately to that of the original judge.

Decision and Reasons

19. The decision of the First-tier Tribunal contains material errors of law and is set aside. Directions are given hereinafter for the rehearing of this matter.

    (1) That on finding that there are material errors of law in the decision of the First-tier Tribunal Judge the decision of the First-tier Tribunal is set aside and the matter is remitted to the First-tier Tribunal sitting at Birmingham on the first available date 28 days hence with an ELH of three hours.

    (2) None of the findings of fact are to stand.

    (3) That the rehearing of the appeal is to be before any Judge of the First-tier Tribunal other than Immigration Judge Burns.

    (4) That there be leave to either party to file and serve a bundle of such further subjective and/or objective evidence upon which they seek to rely at least seven days prior to the restored hearing.

    (5) That a Sinhalese interpreter do attend the restored hearing.

20. The First-tier Tribunal Judge granted the Appellant anonymity. No application is made to vary that order and none is made.

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 him or any member of his 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 23 May 2019

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date 23 May 2019

Deputy Upper Tribunal Judge D N Harris