Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10222/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 October 2019	**On 31 October 2019**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

NP
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: *Ms Z McCallum*, instructed by Sutovic & Hartigan
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

Background

1. These are the approved record of the decision and written reasons which were given orally at the end of the hearing on 22 October 2019.

2. It is worth setting out some of the history to the current appeal before the Upper Tribunal.

3. The appellant had arrived in the United Kingdom ('UK') on 3 September 2007; had previously been a dependant on an asylum claim brought by

her estranged husband, which was unsuccessful and refused. The couple are now estranged, following the husband's conviction in the UK for child sex offences, for which he was sentenced to eight years in prison.

4. The appellant in her own right initially claimed asylum on 21 April 2014 which was both refused and certified but the decision on certification was reconsidered and the appellant was offered right of appeal on 23 April 2015. She appealed, but her appeal was refused. The appellant's appeal against that refusal was dismissed by First-tier Tribunal Judge Watson on 14 March 2016. However, the Upper Tribunal in that appeal found an error of law and remitted the appeal to be considered again by the First-tier Tribunal. The appeal was considered and dismissed by First-tier Tribunal Judge Parkes, in a decision promulgated on 11 May 2017. Notably, whilst dismissing the appeal, Judge Parkes found, at paragraph [21] of his decision that the appellant was not only an evangelical Christian but also somebody who proselytised. However, Judge Parkes concluded that the risk to the appellant was reduced because the prime focus of the previous adverse interest was on the appellant's husband; and was not directed by state actors, such as police or prosecutors, but rather by third parties. The appellant could seek state protection and Judge Parkes concluded at [24] that the appellant could internally relocate within Sri Lanka. Judge Parkes noted that the appellant was a professional, namely a doctor, and could find employment in Sri Lanka. While Judge Parkes considered articles 3 and 8 of the ECHR, these were not considered by reference to the appellant's health.

5. The appellant appealed Judge Parkes' decision, and permission to appeal was refused by First-tier Tribunal Judge Pullig on 7 June 2017; and by Upper Tribunal Judge Kekić on 2 August 2017. The appellant subsequently applied for permission to bring a 'Cart' JR, which was refused by the High Court and while further submissions were made to the Court of Appeal, the JR application does not appear to have progressed any further.

6. Following Judge Parkes' decision, the appellant made further submissions on 13 February 2018, which the appellant treated as a fresh claim. Much is made by the respondent of the fact that a large part of the further submissions comprised a criticism of Judge Parkes' decision, but nevertheless importantly there were also two expert reports from experts whose expertise was unchallenged, Dr De Votta and Dr Briffa. Dr De Votta provided expert evidence in relation to objective county evidence on risks to Christians in Sri Lanka, whilst Dr Briffa was a psychiatrist who gave evidence in relation to the appellant's mental health. Broadly speaking, it was said that Dr De Votta's report dealt with the risks not only to Christians, but sub-sets of those within the Christian community, specifically proselytising Christians, and female Christian converts. The appellant was said to fall within both sub-sets and so was at particular risk.

7. The gist of Dr Briffa's report was that the appellant suffered from a number of complex mental health issues, including PTSD, for which it was claimed that the risk of a relapse could not be prevented if the appellant

were returned to Sri Lanka; and that there was a risk of suicide. The appellant's PTSD was in the context of her having previously been the subject of gang rape, prior to fleeing Sri Lanka, while also witnessing her husband being tortured, by Buddhist extremists. Neither fact had been disputed.

8. In response to the fresh submissions the respondent issued a further refusal letter on 6 September 2018, concluding that as previous adverse interest had focussed on the appellant's husband and that the couple had reported matters to the police, that the risk to the appellant was lower; there was sufficiency of protection; and the option of internal relocation was available. The appellant could also work in Sri Lanka. It was that refusal letter which was the subject of an appeal and decision by Judge Lever, promulgated on 5 February 2019. At [10], Judge Lever referred to the well-known authority of Devaseelan 2002 UKIAT 00702 and noted at [10] that the appellant was an 'evangelical' (as opposed to actively proselytising) Christian. While she may suffer discrimination and harassment as a result, this would not be adverse treatment at the level of persecution. Judge Lever referred himself to extracts of source objective evidence from the appellant's bundle and concluded that Dr De Votta's report had been dealt with in the refusal letter. He referred at [16] to the March 2018 Country Policy and Information Note (CPIN) for Sri Lanka, which was not consistent with a level of risk amounting to persecution. While Dr De Votta referred to 96 attacks against evangelical Christians, this had to be considered in the context of the Christian population as a whole. Judge Lever concluded that the appellant had not shown that there were any significant exacerbating features that placed her at higher risk, or that she would be unable to relocate, should she wish to do so.

9. A claim by the appellant in respect of her mental health by reference to article 3 of the ECHR did not reach the high threshold needed. There were medical facilities available in Sri Lanka and there had been an analysis of a potential suicide risk within the refusal letter. Judge Lever said regarded the appellant's appeal as reflecting the appellant's determination to remain in the UK rather than a real fear or risk on return to Sri Lanka.

10. Both representatives acknowledged the brevity of Judge Lever's analysis under article 8 of the ECHR at [29] to [30]; initially by reference to paragraph 276ADE of the Immigration; then noting the fact that the appellant's children did not have leave to remain in the UK, with a possible implication that the appellant might be able to return with her adult children as a family unit, although I accept Ms McCallum's submission that there was not a finding to this effect. Judge Lever included a single sentence referring to section 117B of the Nationality, Immigration and Asylum Act 2002 Act as not assisting the appellant.

11. Permission to appeal against Judge Lever's decision was granted by Upper Tribunal Judge S Smith on 16 May 2019, who noted that there was an arguable error of law when considering the risk to evangelical Christians, specifically in failing to engage in previous findings about the appellant's

likely activities, by implication of the fact of proselytization. At paragraph [5], Judge Smith regarded Judge Lever's reasoning concerning paragraph 276ADE as light, with a single paragraph devoted to article 8 without an articulation of the applicable test, and was by reference to the length of the appellant's residence in the UK, rather than integration on return.

The grounds of challenge

12. In terms of the grounds before me, these fell into three areas.

13. Ground (1) was that that Judge Lever had erred in his assessment of the risk to the appellant, not only as an evangelical Christian, but somebody whom Judge Parkes had expressly accepted was a proselytiser and a convert. In other words, there was a distinction between those of Christian evangelical faith who might feel compelled to tell others of their faith but in more guarded terms, as opposed to those who were active in their proselytising. The emphasis on the risk to those who actively proselytised was accepted in other contexts, specifically SZ and JM (Christians – FS confirmed) Iran CG [2008] UKAIT 82; as was the additional risk to those who had converted, AS (Iran) v SSHD [2017] EWCA Civ 1539. Judge Lever had failed to consider that the appellant, in seeking to proselytise, would not only explain her faith but would also feel compelled to describe her conversion, something it is said by Dr De Votta would place her at particular risk.

14. Ground (2) was that Judge Lever had inadequately reasoned how the appellant would be able to integrate in Sri Lanka, both by reference to paragraph 276ADE(1)(vi) of the Immigration Rules and also by reference to a wider analysis under article 8 of the ECHR. There were unchallenged findings that the appellant was suffering from PTSD by virtue of the context of being a victim of the previous gang rape; that there was a risk of suicide on return; and also expert medical evidence that by virtue of her mental ill-health, the appellant would be unable to work on her return to Sri Lanka. Judge Lever had simply failed to consider these factors in concluding whether the appellant would be able to integrate in any meaningful sense, as understood in the well-known authority of Kamara v SSHD [2016] EWCA Civ 813. Judge Lever had also failed to consider the support which the appellant received in the UK, including from her daughter, who was of support with night-time anxiety; and separately had failed to consider whether the appellant would be further shunned by relatives in Sri Lanka because of the stigma associated with her husband's conviction for child sex offences. All this was said to have been inadequately reasoned and assessed by Judge Lever when considering the Article 8/paragraph 276ADE analysis.

15. Ground (3) was that Judge Lever had failed to consider, for the purposes of section 117B of the 2002 Act, whether there were exceptional circumstances meriting a greater weight to be attached to the appellant's private and family life in the UK, as permitted by the Court of Appeal in the case of Rhuppiah v SSHD [2016] 1 WLR 4203.

The respondent's response

16. The gist of the respondent's response was that the grounds were merely a disagreement with Judge Lever's conclusions, which were open to him to reach on the evidence before him. Whilst the article 8 analysis was brief, it had considered the respondent's decision; and adopted the findings in Judge Parkes's earlier decision, whose reasoning had been upheld at higher appellate level. Judge Lever had considered the expert reports of Dr De Votta and Dr Briffa. He was entitled to conclude that while the appellant had suffered adverse interest in the past, she would not face the same level of risk on return given the low-level number of attacks against evangelical Christians and that she would be able to receive the support of her family as part of a family unit, as well as police protection. There was also no evidence that there would be any state actors persecuting her.

The hearing – further oral submissions

The appellant

17. Ms McCallum re-emphasised that Judge Lever had failed to appreciate and assess the risk to proselytising Christians. While objective evidence such as the CPIN referred to discrimination against evangelicals, there was other evidence suggesting a higher level of adverse treatment amounting to persecution, in particular the report of Dr De Votta, which had referred to attempts to outlaw proselytization; the impunity with which attacks by Buddhist extremists had taken place; and the fact that any statistical analysis needed to be made on the appropriate comparator pool – in other words, if there were 96 attacks, then Judge Lever should have considered the size of the proselytising community.

18. In relation to article 8, the risk to the appellant's mental health worsening needed to be considered in the context of a high level of discrimination against proselytising Christians. The medical evidence was clear that the appellant was not medically fit to work and mental ill-health was an acknowledged factor in an ability to integrate. Judge Lever's analysis at [29] of his decision did not assess the appellant's ability to work and her risk of suicide and had instead made a superficial assessment of the availability of mental health treatment available in Sri Lanka. In contrast, the written skeleton argument before Judge Lever had referred expressly to this in the context of the appellant's limited ability to relocate.

The respondent

19. Mr Melvin reiterated that Judge Lever had considered and assessed the new evidence and he was entitled to conclude that it did not justify a departure from the previous findings of Judge Parkes. The distinction between evangelical Christianity and proselytising should not be 'overly'

considered, as evangelical Christianity necessarily included the latter. There was also no evidence of persecution by state actors. Evidence of heighted risk to Christian evangelicals from Christian 'pressure groups' such as 'Open Doors' (which was before Judge Lever), was not objective evidence. Judge Lever was entitled to consider the risk to Christians as a whole. The question of why the appellant might conceal her faith was not relevant here, as there was no risk, at a level of ill-treatment amounting to persecution, to her.

20. Much had been made at the hearing of Judge Lever's article 8 analysis. In reality, in various different appeals, the appellant had sought to emphasis different aspects of her case, frankly as the opportunities arose, in order to ensure that the appellant need never leave the UK. The appellant had got family to support her, including in Sri Lanka, or even if it were the case that they would shun her, she also had adult children in the UK who could support her on her return to Sri Lanka.

21. Mr Melvin candidly accepted that the reasoning by Judge Lever was 'scant', but that Judge Lever was entitled to refer back to, and rely on, Judge Parkes's reasoning. There could not be much reliance on private, as opposed to family life, given the appellant's limited integration in the UK.

Discussion and Conclusions

The protection claim

22. I conclude that Judge Lever did err in law in his reasoning in relation to the protection claim. While he correctly referred himself to the case of Devaseelan, when considering Judge Parkes's earlier decision, he failed to assess adequately the crucial additional element, not necessarily encompassing all evangelical Christians, of a sub-set of those who seek to actively proselytise. Judge Parkes had referred at [21] to his finding that that the appellant was an evangelical Christian and would take part in proselytising in the UK and Sri Lanka. Judge Lever accepted that the appellant and her daughter were also converts to Christianity. Dr De Votta had described in his report, at [D154] of the appellant's bundle, to the particular risks to female converts, who were regarded by Buddhist extremist as that religion's 'biggest traitors,' ([D155]) as a Sinhalese Buddhist woman is considered the 'bearer' of Sinhalese Buddhist 'nationhood'. Having had the benefit of both the CPIN and Dr De Votta's report, the specific risks to the appellant as a proselytising female Christian convert were clearly potentially identifiable. While Judge Lever had considered what he regarded as a relatively small number of attacks (identified by Dr De Votta at [D157]) as being only 96, in a single year, considering the wider Christian community in Sri Lanka, I accepted Ms McCallum's submission that the failure to consider the appropriate comparator pool undermined the statistical analysis. To pick one hypothetical example, had the proselytising Christian female convert community in Sri Lanka comprised only 96 people, and every member of that population had been singled out for attack, a comparison with the

wider Christian community would have resulted in the conclusion that only 96 people out of a wider community had been attacked and therefore the risk to that small sub-set was slim. That analysis would have ignored the fact that those sharing the appellant's risk profile had a 100% chance of adverse interest; and the analysis would then have failed to consider why those with the common risk profile suffered adverse interest, or whether the characteristics and adverse interest were not causally connected.

23. Even though Judge Lever referred to Dr De Votta's report, his failure to adequately assess the statistic evidence, as well as the suggested cultural causes of adverse interest identified by Dr De Votta, infected the overall analysis of the appellant's protection claim, so that it cannot be said that Judge Lever applied the level of anxious scrutiny to the appellant's particular circumstances. It cannot be said that the flaws in the analysis were immaterial. The consequence is that Judge Lever's conclusions on the protection claim are unsafe and cannot stand.

Article 8

24. I also concluded that Judge Lever's article 8 analysis was not adequately reasoned. As pointed out by UT Judge Smith in his grant of permission to appeal, Judge Lever had considered paragraph 276ADE solely on the very narrow limited basis of the possibility that the appellant's children would be returning with her and on the basis of the continuing availability to of her medical treatment in Sri Lanka. While Judge Lever made a brief reference to Dr Briffa's report, he did not consider adequately the potential obstacles to integration in a meaningful sense, noting the authority of Kamara, including her inability to find work; or her risk of suicide, particularly as somebody who, even on the respondent's case, would be discriminated against in Sri Lanka. Once again, Judge Lever's conclusions on article 8 are unsafe and must be set aside.

Preserved findings

25. In setting aside Judge Lever's conclusions, I preserve his findings that:

(a) the appellant and her daughter are evangelical Christian converts who will seek actively to proselytise in both the UK and Sri Lanka;

(b) the appellant was, at the date of Dr Briffa's report, suffering from PTSD, having previously been the victim of gang rape.

Disposal of proceedings

26. In terms of how these proceedings should be resolved, on the one hand, I am very conscious that the appellant's previous appeals have been the subject of First-tier and Upper Tribunal proceedings, so that this would ordinarily be a prime case to be retained by the Upper Tribunal.

27. On the other hand, Ms McCallum points out that the appellant's children in the UK currently have protection claims, with substantive hearings listed in

Newport on 23 December 2019, although she informs me that directions have been stayed pending the appellant's appeals. While she was not able to inform me of the precise detail of those protection claims, it is reasonable to suppose that there is a substantial degree of overlap between the appellant's protection claim and those of her children. Ms McCallum's instructing solicitors have also written to this Tribunal indicating that if her Upper Tribunal appeal is successful, the intention is also to seek legal aid funding for further expert evidence on the risk to heightened risk to Christians in Sri Lanka, following their additional targeting by Islamist extremists in Easter 2019. In other words, further submissions are anticipated.

28. In that context, I regarded it as appropriate for the appellant's appeal to be remitted to the First-tier Tribunal in Newport. While I do not presume to cut-across the First-tier Tribunal's listing of the protection appeals of the appellant's children, I direct that this appeal is referred to the First-tier Tribunal for consideration of whether it should be linked with those of her children. Their case numbers are: PA/06188/2019 and PA/06159/2019.

29. The First-tier Tribunal will have a better understanding of the precise nature of those appeals, with which to make an informed decision on whether they should be linked to this appeal.

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: J Keith

Upper Tribunal Judge Keith

Dated: 30 October 2019