Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13213/2017

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 29th October 2018	**On 31st January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

SVL
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. S Ell, Counsel instructed by Maya Solicitors
For the Respondent: Mr. C Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Fiji. On 28th November 2017, the respondent made a decision to refuse a protection and human rights claims made by the appellant. Those claims were made by the appellant in response to notification served upon him in June 2017, that the respondent had decided to make a deportation order against him under s5(1) of the Immigration Act 1971 ("the 1971 Act") because his

presence in the United Kingdom is not conducive to the public good. The decision attracted a right of appeal and the appellant duly appealed to the First-tier Tribunal ("F*t*T"). His appeal was heard and dismissed for the reasons set out in a decision promulgated by F*t*T Judge Pacey on 25th July 2018. The F*t*T Judge dismissed the appellant's appeal on asylum grounds.

2. The F*t*T Judge did not make an anonymity direction. Although no application is made before me, the appeal concerns a claim for asylum and international protection and in my judgement, it is appropriate for an anonymity order to be made under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. SVL is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

3. The appellant has a lengthy immigration history that I do not repeat in this decision. It is sufficient for present purposes to note that the appellant entered the United Kingdom in November 2005 with a Multi visit visa valid until 14 December 2005. He joined the British Army, and was subsequently granted exemption under the 1971 Act for the duration of his service with the British Army. He was discharged from the British Army on the 30 September 2009. There then followed a failed application for indefinite leave to remain outside of the rules on compassionate grounds, and applications for Assisted Voluntary Return. The appellant made a claim for asylum in April 2014, but failed to attend an asylum interview in March 2015. Between August 2015 and June 2017, the appellant was convicted of various offences, leading to the decision to deport in June 2017.

4. A brief summary of the account that is relied upon by the appellant in support of his claim that he cannot return to Fiji, is set out at paragraph [8] of the decision of the F*t*T Judge. At paragraphs [9] to [42] of her decision, the F*t*T Judge sets out the evidence that she received. At paragraphs [58] to [83], the F*t*T Judge sets out her findings and conclusions. The Judge records at paragraph [56] of her decision, that counsel for the

appellant had confirmed that the appellant does not rely upon Article 8, because he does not have contact with his child. At paragraph [57], the Judge stated:

> "The issue therefore is whether I accept the appellant as credible in his claim to have a well-founded fear of persecution on return to Fiji because of his imputed political opinion."

5. At paragraph [83], the F*t*T Judge concludes as follows:

> "For the above reasons I do not accept the Appellant's account as credible and I do not accept that he has a well founded fear of persecution for a Convention reason (noting of course that imputed political opinion is a Convention reason)."

6. The appellant advances three grounds of appeal. First, the Judge's approach to credibility is incoherent and unsustainable because the Judge accepted at paragraph [75] of her decision, that the appellant has a genuine subjective fear of persecution, but then went on to draw adverse inferences as to the appellant's credibility before concluding that she did not accept the appellant's account as credible. As the credibility of the account was the issue at the heart of the appeal, it was incumbent upon the Judge to make coherent findings as to the core of the account relied upon by the appellant. Second, in reaching her decision as to whether the appellant's subjective fear is objectively well-founded, the F*t*T Judge failed to give any adequate weight to the material evidence. The appellant claims that that is particularly relevant here, because it was common ground that the appellant had previously been tortured in Fiji, and the Judge should have regarded that as a serious indication of the appellant's well-founded fear of persecution, and the risk of serious harm, upon return. Finally, the Judge erred in her assessment of the expert evidence of Dr Presterudstuen. There was no criticism of the expert's qualifications or expertise, and the purpose of the expert's report was to assist the Judge by providing objective information regarding conditions in Fiji. The appellant claims that it is not clear why the expert's decision not to interview the appellant is relevant to the weight that the Judge attaches to the report, and the Judge erred in her consideration of the cautious language used by the expert, by taking the extracts relied upon out of context, and without properly considering the report as a whole.

7. Permission to appeal was granted by F*t*T Judge Scott Baker on 22nd August 2018 and the matter comes before me to consider whether the decision of the F*t*T Judge involved the making of a material error of law, and if so, to remake the decision.

8. Mr Ell submits that the respondent accepted that the appellant is a national of Fiji and that the claim advanced by the appellant engages the Refugee Convention. The respondent accepted that the appellant was tortured as he had described by the Fiji military. He submits that at paragraph [58] of her decision, the F*t*T Judge acknowledged that the respondent accepts that the appellant was tortured, but irrationally made an adverse credibility finding without identifying the particular aspects of the claim that are accepted or rejected, before determining whether the appellant would be at risk upon return. He submits that the Judge accepted that the appellant has a subjective fear of return, and that in her analysis of the risk upon return, the Judge refers to selected extracts from the expert's report without considering the report as a whole, and without taking into account in that assessment, the undisputed fact that the appellant has previously been tortured by the military. Mr Ell submits that the Judge failed to make findings as to the core of the appellant's account, and that failure has impacted upon the Judge's assessment of the risk upon return.

9. In reply, Mr Bates submits that the Judge properly noted for herself that the appellant had previously been tortured, and she properly noted that the issue for the Tribunal, was the risk upon return. He submits that the focus was rightly upon what would happen upon return now. He submits that the Judge was right to recognise that there has been a significant passage of time since the events that are relied upon by the appellant, and in making an assessment of the risk upon return and the credibility of the appellant, the Judge was entitled to take into account matters such as the applications for assisted voluntary return made by the appellant, and the appellant's evidence concerning his father and uncle. Mr Bates submits that at paragraph [66], the Judge correctly considered what would happen now, in light of all circumstances. In her analysis of the risk upon return, he submits, the F*t*T Judge considered the expert evidence relied upon by the appellant and it was open to the

judge to note that the expert had been cautious. He submits that the weight to be attached to the evidence was ultimately a matter for the Judge, and the conclusion reached by the Judge, was one that was properly open to her given the passage of time, the profile of the family, the appellant's applications for voluntary return, and the overall conclusions of the expert.

Discussion

10. I remind myself of the observations made by Mr. Justice Hadon-Cave in **Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC);**

> *"It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost."*

11. I have also had regard to the decision of the Upper Tribunal in **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 IAC** where it was stated in the head note that:

> "*Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which the appeal is determined, those reasons need not be extensive if the decision makes sense, having regard to the material accepted by the judge.*"

12. It is in that context that I have considered the grounds of appeal and the submissions that have been advanced on behalf of the appellant. The Judge noted at paragraph [56] of her decision that the issue in the appeal was whether the Judge accepts the appellant as credible in his claim to have a well-founded fear of persecution on return to Fiji. In the decision dated 28th November 2017, the respondent stated that in the absence of any evidence to the contrary, the respondent was prepared to accept that the appellant was tortured as he had described, by the Fiji military. That had occurred whilst the appellant was in Fiji between December 2008 and February 2009. The appellant claimed that he was tortured and interrogated for two nights when he was held at a military camp. The Judge noted at paragraph [47] of her

decision, the submission made on behalf of the respondent that although the respondent accepts that the appellant was tortured as he claimed, the respondent did not accept that the appellant's life would be in danger now. The respondent did not accept the appellant's claim that he would be at risk upon return now, and did not accept that the appellant's name is on a blacklist held by the authorities so that he would receive special attention from the security forces upon return.

13. There is no doubt that the Judge proceeds upon the premise that the respondent had accepted that the applicant had been tortured in Fiji. That concession is noted by the Judge at paragraph [57] of her decision.

14. The core of the appellant's account is that he is at risk upon return, because he was put on a blacklist, a claim that was supported, as the Judge notes at paragraph [60], by the appellant's uncle.

15. There is unfortunately no clear decision as to whether the Judge accepted that the appellant's name was put on a blacklist. At paragraph [60], the Judge states that it is "*.. unclear how his uncle was made aware of this..*", but that is not to say that the account is rejected. At paragraph [60], the Judge notes that the letter from the appellant's uncle was in any event written 4½ years ago, and cannot stand as evidence of probative value of the situation in mid-2018. Whilst I accept that the issue for the Tribunal was the risk upon return now, in my judgement it was incumbent upon the Judge to identify the particular aspects of the claim that are accepted or rejected, before determining whether the appellant would be at risk upon return now. Although the Judge appears, at paragraph [60], to say that the appellant's claim that he is on a blacklist gains no real support from his uncle because it is unclear how is uncle was made aware of that, in my judgement the appellant was entitled to a clear finding as to whether that aspect of his claim was accepted or rejected by the Judge. Whether or not the appellant is on a blacklist, is capable of being relevant to the interest that the authorities would have in the appellant upon return, and by extension, the risk upon return.

16. The Judge carefully considered the evidence before her from various individuals supporting the appellant's claim that he is at risk upon return. In my judgement, it was open to the Judge to attach little weight to that evidence for the reasons identified. On its own, I would not have found there to be an error of law in the decision of the F*t*T Judge because of the Judge's assessment of the evidence, including the expert evidence, but I cannot be satisfied that the Judge would have reached the same conclusion if she had found that the appellant was on a blacklist. A finding upon what was a central part of the appellant's claim, was clearly necessary.

17. The assessment of risk upon return and credibility is always a highly fact sensitive task. It does not follow from the fact that the Judge accepted that the appellant has a subjective fear, that the fear is objectively well-founded. In fact, it is clear from a careful reading of paragraph [75] of the decision, that the Judge was referring to the assessment by Dr Wootton that the appellant's subjective fear appeared to be genuine. That is not to say that the appellant's account of events was accepted by the Judge. It was for the Judge to consider the ingredients of the story, and the story as a whole, by reference to all the evidence available to the Tribunal. It was for the Tribunal to make its own findings on whether, and to what extent, the appellant's account is credible. In my judgement the F*t*T Judge failed to make adequate findings of fact as to those aspects of the claim that lay at the heart of the claim.

18. If follows that in my judgement, the decision of the F*t*T Judge is infected by a material error of law and the appeal is allowed.

19. I must then consider whether to remit the case to the F*t*T, or to re-make the decision myself. In my judgment, the appropriate course is to remit the matter to the F*t*T for hearing afresh with no findings preserved. In reaching my decision, I have taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In my view, in determining the appeal, the nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

20. The appeal is allowed, and the decision of F*t*T Judge Pacey is set aside.

21. The appeal is remitted to the F*t*T for a fresh hearing of the appeal with no findings preserved.

Signed Date 7th December 2018

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

There can be no fee award.

Signed Date 7th December 2018

Deputy Upper Tribunal Judge Mandalia