Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09358/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 January 2020	**On 9 January 2020**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

D S P
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant or members of his/her family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the Appellant: Ms B Asanovic, Counsel, instructed by MTC and Co Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge NMK Lawrence ("the judge"), promulgated on 29 August 2019, in which he dismissed the Appellant's appeal against the Respondent's decision of 15 September 2017, refusing his protection and human rights claims.

2. The Appellant, a citizen of Sri Lanka, had claimed that he was at risk on return to that country because of an association with an LTTE member in the past which had caused him to be detained and tortured. In addition, it was claimed that a consequence of the past experiences was a significant mental health condition namely depression, and this was relevant not only to the protection claim also the risk of suicide and/or his article 8 case.

The judge's decision

3. When considering the core issue of the Appellant's credibility, the judge focused almost exclusively on two particular issues: first, the question of who had "organised" the Appellant's student visa for the United Kingdom - whether it was the Appellant himself or his mother; second, where the Appellant's mother had been living at a particular point in time - whether this was in the home area of Kalatara, or in Galle (I note that the judge does not in fact state a clear adverse finding respect of the place of residence issue; an unfortunate omission given that it was one of only two adverse points taken against the Appellant).

4. In respect of the first issue, the judge appeared to conclude that certain aspects of the Appellant's answers interview were credible. However, the evidence on the "discreet" point of the visa was "fundamentally" damaged by at least one other interview answer. The judge revisits the issue when subsequently considering a psychiatric report from a Consultant Psychiatrist, Dr Obuaya, who provided a diagnosis of severe depression. The judge was of the view that the report did not support the Appellant's explanation that he had been "confused" in the interview, and that this led to apparent inconsistencies between his answers on the visa issue. The judge found that the Appellant had been relatively precise with his chronology about other aspects of his claim, and that the alleged confusion had only arisen when the interviewing officer put apparent inconsistencies in other answers to him.

5. On the second credibility issue, the judge focused on what the Appellant had said in his witness statement as compared to oral evidence. It appears as though the judge himself asked a number of questions of the Appellant. The underlying thrust of what is recited by the judge indicates that an adverse view was taken of this other aspect of the Appellant's case, one that can again be described in many respects as "discreet".

6. In further consideration of the psychiatric report, the judge notes that the author did not perform the same function as the fact-finding tribunal, and that the report formed part and parcel of the evidence as a whole. He then inaccurately notes that the author had not stated that certain sources of evidence relating to the Appellant's claim had been taken into consideration when preparing the report (in fact, the author had specifically stated that he had taken these materials into account).

7. The judge then addresses the issue of risk of suicide. He notes that the Appellant was not under any specific treatment, as had been recommended by the Consultant Psychiatrist. The judge finds that the Appellant had provided a false narrative when being assessed. He then states that, "there is no evidence that the appellant will be unable to receive treatment in Sri Lanka. He has his mother and siblings there."

8. A country report by Dr C Smith is briefly considered. Having accepted the author's expertise, the judge goes on to state that, "… in applying the findings of Dr Smith to the appellant in the instant appeal, I find the appellant is not at risk of persecution in Sri Lanka."

9. Finally, article 8 is considered, both within and without the context of the Immigration Rules. It is concluded that the Appellant was unable to succeed on either basis.

The grounds of appeal and grant of permission

10. The grounds of appeal are three-fold: first, it is said that the judge failed to adequately consider and/or provide reasons in respect of Dr Smith's country report; second, that the judge failed to consider or apply the Joint Presidential Guidance Note No.2 of 2010 on vulnerable witnesses, as he should have done, given the Appellant's mental health condition; third, that the judge failed to engage adequately with the psychiatric report in respect of the risk of suicide and/or "insurmountable obstacles" to the Appellant been able to reintegrate into Sri Lankan society.

11. Permission to appeal was granted by First-tier Tribunal Judge Saffer 31 October 2019.

The hearing before me

12. Ms Asanovic provided a skeleton argument, upon which she relied. Its contents included what were put forward during the course of argument as amended grounds of appeal. In the absence of any prior application to amend, Ms Asanovic made such an application orally. In response, Mr Tufan noted its timing. In all the circumstances, I refused the application to amend the grounds of appeal. Not only had no application been made between the grant of permission in October 2019 and the hearing, but

nothing had been said at the outset of the hearing and the proposed amendments were not even contained in a document entitled, for example, Amended Grounds. With respect, the changes were somewhat buried within the skeleton argument (at para 11). Although I refused application, I did indicate that I would, if necessary, take the points set out in the skeleton argument when considering whether any pleaded errors were material not.

13. Ms Asanovic relied on the three grounds of appeal. Her main focus was on the second ground and the judge's apparent failure to treat the Appellant as a vulnerable witness and assess his evidence accordingly.

14. Mr Tufan quite fairly acknowledged that the judge had indeed failed to consider the issue of vulnerability in terms. However, he submitted that the judge had dealt with matters sufficiently. Any errors were not material. In respect of the mental health issue and return, he relied on KH (Afghanistan) [2009] EWCA Civ 1354 and noted that the Appellant has family members in Sri Lanka.

15. At the end of the hearing I reserved my decision on the error of law issue.

Decision on error of law

16. For the reasons set out below, I conclude that the judge has materially erred in law, and that his decision must be set aside with reference to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

17. On the face of it, the judge's treatment of Dr Smith's report is inadequate. There is no analysis or reasoning for apparently rejecting what is contained therein. However, the specific passages within the report cited in the grounds of appeal (those being paras 24-29) in fact add nothing to the Appellant's challenge. They relate to the issue of returnees to Sri Lanka. This topic is dealt with in GJ (post-Civil War: returnees) Sri Lanka CG [2013] UKUT 319 (IAC). On the materials before me, there is no indication that the judge was being asked to depart from the country guidance, in particular to the extent that any and all returnees are at risk. In addition, the question of whether an individual appears on a "stop list" or a "watch list" depends of course upon the facts of the case, with particular reference to the credibility of the account put forward. In the present case, the judge had rejected the Appellant's account and there was no live issue as to whether he appeared on any relevant list.

18. The first ground of appeal also asserts that the judge failed to address a second element of Dr Smith report, namely his conclusion that the Appellant's account was "plausible" in view of the country situation. There is merit to this aspect of the challenge. Whilst it is of course the role of the judge to find facts, expert evidence on general plausibility is *a* relevant matter. The judge has failed to engage with this aspect of Dr Smith's

report and has failed to provide any reasons for rejecting it (if this is what he was purporting to do). By itself, this error may not be material, but I consider it in conjunction with other matters, set out below.

19. The second ground challenge is of much greater significance. On the face of the expert medical evidence, which included a diagnosis of severe depression that appears to have been accepted by the judge (or at least without there being any clear findings to the contrary), the Appellant suffered from a significant mental health condition both at the time of the hearing and, in view of what is said in para 34 of the report, at the time of the interview with the Respondent in October 2017. Thus, there was, at the very least, *prima facie* vulnerability within the meaning of the Joint Presidential Guidance Note No.2 of 2010. I note from the skeleton argument before the judge that the issue of vulnerability was specifically relied upon (there being a sub-heading in bold highlighting this as a preliminary issue and making specific reference to the Guidance Note). Neither the guidance nor any specific statement that the Appellant was being treated as a vulnerable witness is contained within the judge's decision. In light of what was stated by the Court of Appeal in AM (Afghanistan) [2018] 4 WLR 78, at paras 18, 21, and in particular 30, this omission constitutes an error of law.

20. Whilst indicative of the error being material, this is not necessarily the case. I note the recent decision of the Presidential panel in SB (vulnerable adult: credibility) Ghana [2019] UKUT 00398 (IAC), the headnote of which states:

> "(1) The fact that a judicial fact-finder decides to treat an appellant or witness as a vulnerable adult does not mean that any adverse credibility finding in respect of that person is thereby to be regarded as inherently problematic and thus open to challenge on appeal.
>
> (2) By applying the Joint Presidential Guidance Note No 2 of 2010, two aims are achieved. First, the judicial fact-finder will ensure the best practicable conditions for the person concerned to give their evidence. Secondly, the vulnerability will also be taken into account when assessing the credibility of that evidence.
>
> (3) The Guidance makes it plain that it is for the judicial fact-finder to determine the relationship between the vulnerability and the evidence that is adduced."

21. The judge was right to say that the psychiatric report did not specifically state that the Appellant suffered from "confusion". However, the report did make clear reference to "pervasive low mood", "persistent anxiety", and "poor concentration", amongst other factors. It stated that the Appellant's depressive symptoms had only manifested themselves to a significant degree from early 2017 onwards. The author's opinion was that the symptoms were not being feigned. Whilst the Appellant was deemed fit to give evidence, it was said that particular care should be given to questioning at a hearing. That was the context of the expert evidence

which the judge was obliged to take account of in respect of the Appellant's vulnerability; i.e. his state of mind both at the time of the interview and at the hearing.

22. In respect of the visa issue, the judge does analyse the interview answers in some detail at paras 24 and 25. However, there is nothing to indicate that he took the Appellant's mental state at the time into account, other than to discount the possibility of "confusion". In my view, the judge has, as a matter of substance, failed to adequately address the issue of the relevant evidence within the full context of the expert report.

23. The Appellant's evidence in relation to his mother's residence provides a stronger example of the materiality of the judge's error. Unlike the visa issue, this evidence primarily related to what the Appellant said at the hearing itself. Again, there is no indication that any specific consideration was given to the Appellant's vulnerability when giving that evidence. I note that there are references to the Appellant stating that he could not remember specific dates in respect of his mother's whereabouts (see para 20). Such responses were, on the face of it, consistent with certain symptoms highlighted within the psychiatric report.

24. Overall, the failure to consider and apply the Guidance Note had a material bearing the assessment of credibility.

25. I will deal with the third ground briefly. By a relatively narrow margin, I conclude that there is an error in relation to the judge's assessment of the potential risks and/or difficulties faced by the Appellant on return as regards his mental health. The judge correctly notes that the Appellant was not under any specialist medical treatment at the time of the hearing, and that there were family members in Sri Lanka. Having said that, he has not considered the passages within the psychiatric report relating to the Appellant's ability to engage with relevant treatment (see paras 48-51), nor has he addressed the submission set out in the skeleton argument relating to the inadequacy of mental health treatment in Sri Lanka (with reference to what is said in GJ. On this point, I have of course take into account the fact that GJ is not country guidance on the provision of medical treatment in that country. However, it does provide at least a fairly detailed assessment of facilities at that time, and required specific consideration). Taken in conjunction with the other errors I have identified, I regard this aspect of the judge's decision to be materially flawed as well.

26. In consequence, the judge's decision must be set aside in its entirety.

Disposal

27. This appeal has already been considered and remitted by the Upper Tribunal in 2018, following a successful challenge by the Appellant to the

original decision of the First-tier Tribunal. It would be with the greatest reluctance that I would be prepared to remit this case once more.

28. Having considered para 7.2 of the Practice Statement and all other circumstances, I have concluded that I should nonetheless follow that course of action. The primary basis upon which I have set the judge's decision aside is his failure to treat the Appellant as a vulnerable witness and to have assessed the evidence accordingly. In a sense, this goes to the issue of fairness. Further, as I trust is clear from my decision, the judge only dealt with two aspects of the Appellant's own evidence when considering the entire account. There are no clear findings on a number of other elements of the claim. This is, to say the least, unfortunate, particularly in light of the procedural history of this appeal. Whilst it is entirely possible for fact-finding to be undertaken in the Upper Tribunal, the combination of the basis upon which I found the judge to have erred and the nature and extent of the fact-finding now required, is such that remittal is, on an exceptional basis, appropriate.

29. The rehearing of this appeal shall be on a *de novo* basis: all aspects of the Appellant's claim are to be considered. Absent a change of circumstances, the Appellant should be treated as a vulnerable witness on the next occasion.

Anonymity

30. For reasons unknown, the judge did not make an anonymity direction. The fact that this appeal involves a protection claim and that it is ongoing, I make such a direction pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

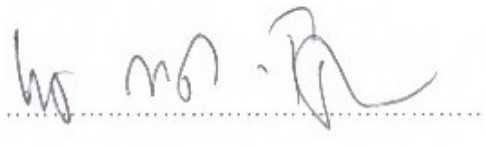
I remit the case to the First-tier Tribunal.

Directions to the First-tier Tribunal

1. The appeal is remitted to the First-tier Tribunal (Hatton Cross hearing Centre) for a complete rehearing, with no preserved findings of fact;

2. The remitted hearing shall not be conducted by First-tier Tribunal Judge NMK Lawrence;

3. Absent a change of circumstances, the Appellant shall be treated as a vulnerable witness at the remitted hearing.

Signed  Date: 3 January 2020

Upper Tribunal Judge Norton-Taylor