



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/01032/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 3 August 2015**

**Decision & Reasons
Promulgated
On 13 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS

Between

**SS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner, Counsel instructed by Kanaga Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

The History of the Appeal

1. The Appellant, a citizen of Sri Lanka sought political asylum and protection under Articles 2 and 3 of the European Convention on Human Rights. Her application was refused. Her ensuing appeal was heard by Judge Ghani sitting at Birmingham on 22 April 2015. The Appellant was represented by Mr Moquit of Counsel and the Respondent by Miss Rands (possibly of Counsel but more probably a Home Office Presenting Officer). In a

determination of 20 May 2015, promulgated on 27 May, the judge dismissed the appeal on political asylum and Articles 2 and 3 human rights grounds, whilst allowing it on Article 8 human rights grounds.

2. The Appellant has not appealed the dismissal of her appeal on political asylum and Articles 2 and 3 grounds. The Respondent sought permission to appeal the decision on Article 8 grounds. As subsequently augmented by procedural directions, this was granted by Judge Murray on 16 June 2015 in the following terms:

“1. The appellant is a citizen of Sri Lanka. Judge of the First-tier Tribunal Ghana dismissed her asylum appeal but allowed her appeal on human rights grounds in a determination promulgated on 27 May 2015.

2. The grounds of application state that at the outset of the hearing the appellant’s representative told the court he would not be pursuing Article 8 as there was another outstanding application where this would be considered. The judge agreed to proceed with the hearing without considering Article 8. To allow the case under Article 8 was therefore materially unfair as the presenting officer did not cross examine on this point and did not make any submissions on this issue. The grounds go on to state that the judge has confined his Article 8 findings to paragraph 41 and his findings on family life are unreasoned. Neither does he make his Article 8 findings with any regard to the Immigration Rules or public interest.

3. It is clear that the judge informed the court that he would not be pursuing Article 8. For him to then allow the claim under Article 8 is unfair.

4. There is a material error of law in the judge’s determination.”

3. The Appellant attended the error of law hearing, which took the form of submissions. I have taken these into account, together with the skeleton argument of the Respondent. I reserved my decision.

Decision

4. The first ground of the application for permission to appeal states that:

“At the outset of the hearing the appellant’s representative informed the court that he would not be pursuing Art 8 as there was another outstanding application where this would be considered. The judge agreed to proceed with the hearing without considering Art 8. To therefore allow the case on the basis of Art 8 was therefore clearly materially unfair.”

5. Neither party has submitted evidence of what was said on this matter in court. Mr Turner said that he had no instructions upon it. I note that it was open to the representatives of both parties to submit evidence about this.

6. The only evidence is that in the record of proceedings of the judge, which I read to both representatives at the hearing. At the foot of page 1 of the record, immediately before the commencement of oral evidence, the judge wrote:

“(?) Asylum (?) Art 2/3 stand and fall with the Asylum case.”

7. At page 16, at the conclusion of the submissions of Miss Rands for the Respondent and immediately before the commencement of those of Mr Moquit for the Appellant, the judge wrote:

“Mr Muquit indicated Art 8 – not relied upon – there is an outstanding application.”

8. I find as a fact that Mr Moquit did submit that the Appellant was not relying upon Article 8, since there was an outstanding application.

9. Mr Turner submitted that the Tribunal had been under a statutory duty – doubtless under Section 6 of the Human Rights Act 1998 – to consider Article 8, and should therefore have done so. However, if, as I find, the Appellant’s representative disclaimed reliance upon it, the Tribunal was not required to do so. For it to have done so, in circumstances in which Miss Rands had been entitled to rely upon Article 8 not having required consideration and had thus not addressed it in cross-examination or submissions, was procedurally unfair.

10. The second ground of application is that the consideration of Article 8 in paragraph 41 of the decision of the judge was inadequate. Mr Turner submitted that it was not. Alternatively, in relation to both grounds of appeal, he submitted that the outcome of the application and the appeal must inevitably have been in the Appellant’s favour, so that any error of law was not material. I conclude that this submission, whilst tenable, relies upon a number of assumptions which cannot be made with sufficient assurance.

11. I accordingly conclude that the consideration of the appeal by the Tribunal on Article 8 grounds was procedurally unfair. Whether it was also inadequate is therefore of no moment. Insofar as the decision allows the appeal on Article 8 grounds, which it does in paragraphs 41 and 43, I set those paragraphs aside. The remainder of the determination, dismissing the appeal on political asylum and on Articles 2 and 3 human rights grounds, remains unaffected and stands.

Decision

12. Paragraphs 41 and 43 of the original decision contain a material error of law. I set them aside. Thus there is no decision on Article 8 human rights grounds.
13. The remainder of the original decision, dismissing the appeal on political asylum and Articles 2 and 3 human rights grounds, is to stand.
14. Since the Tribunal should not have considered the appeal on Article 8 grounds, it does not require to be re-heard.

Signed
August 2015

Dated: 4

Deputy Upper Tribunal Judge J M Lewis