



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

Appeal Number: AA/03183/2015

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke
On 30th June 2016**

**Decision & Reasons
Promulgated
On 11th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**KT
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muquit of Counsel instructed by Kanaga Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Coates of the First-tier Tribunal (the FTT) promulgated on 7th April 2016.

2. The Appellant is a female Sri Lankan citizen born [] 1985 who claimed asylum on 27th February 2013.
3. The application was refused on 6th February 2015 and the Appellant appealed to the FTT.
4. The appeal was heard on 1st April 2016. The FTT heard evidence from the Appellant and her husband. The FTT found neither to be credible witnesses. The FTT noted that the Appellant had left Sri Lanka without any difficulty, travelling on her own passport, and that she had been granted a visa to study in the United Kingdom. The Appellant did not claim asylum on arrival in the United Kingdom and waited over three years before making a claim, and her asylum claim was only made after her application for a Tier 1 visa was refused.
5. The FTT considered the medical report prepared by Mr Mason, dated 18th June 2015. Mr Mason found scars on the Appellant's left thigh were diagnostic of scars that would result from burns inflicted deliberately as a result of torture. The FTT noted that the scars could not be accurately dated and there was no evidence, except for the Appellant's own testimony, to show when or how the injuries were inflicted. The FTT noted that the report did not mention the possibility of self-infliction by proxy. The FTT found that the medical report was outweighed by all the other evidence in the case, which undermined the Appellant's credibility.
6. The FTT considered the Appellant's *sur place* activities, finding that these were "nothing more than a cynical attempt to provide her with a reason for claiming asylum."
7. The FTT found that the Appellant did not come within any of the risk categories identified in the current country guidance. The appeal was dismissed on all grounds.
8. The Appellant applied for permission to appeal to the Upper Tribunal. The Appellant contended that the FTT decision contained six errors of law, one of which was the consideration by the FTT of the medical report, and another related to the FTT finding that the Appellant's *sur place* activities were a cynical attempt to assist her in claiming asylum.
9. Permission to appeal was granted by Judge Kelly who stated;

"It is arguable, as asserted in the first ground, that it was not reasonably open to the Tribunal (i.e. it was perverse) to find that mature scarring, which in the opinion of an expert was diagnostic of torture and would have resulted in the Appellant experiencing severe pain, might conceivably have been inflicted by proxy whilst the Appellant was either anaesthetised or otherwise unconscious [paragraph 27]. It is further arguable, as asserted in the fifth ground, that the Tribunal erred in treating as relevant the Appellant's motives for engaging in *sur place* activities and in failing to consider whether

those activities might place her at risk on return to Sri Lanka (paragraph 38). Permission to appeal is accordingly granted on those grounds. The other grounds, however, are simply a quarrel with reasoning that it was reasonably open to the Tribunal to adopt. Permission to argue those grounds at an error of law hearing is accordingly refused.”

10. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 stating that the Respondent accepted that the FTT decision contained material errors of law which were referred to in the grant of permission, and which related to scarring and sur place activities. The Respondent’s view was that the decision should be re-made at a fresh oral hearing.
11. Directions were subsequently issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision must be set aside.

Oral Submissions

12. Mr McVeety confirmed the rule 24 response represented the Respondent’s position.
13. Mr Muquit submitted that the appropriate course would be to remit the appeal back to the FTT, as the Appellant’s solicitors wished to submit further evidence in relation to the Appellant’s sur place activities.
14. Mr McVeety agreed that a remittal to the FTT would be appropriate.

My Conclusions and Reasons

15. As conceded by the Respondent, the FTT materially erred in law in consideration of the medical report, for the reasons given in the grant of permission.
16. The FTT also materially erred in consideration of the Appellant’s sur place activities by taking the view that these were a cynical attempt to provide her with a reason for claiming asylum. That is not the correct test. The correct test to be applied was explained in Danian v Secretary of State for the Home Department [1999] EWCA Civ 3000 in which Brook LJ stated;

“For all these reasons I do not accept the Tribunal’s conclusion that a refugee sur place who has acted in bad faith falls outwith the Geneva Convention and can be deported to his home country notwithstanding that he has a genuine and well-founded fear of persecution for a Convention reason and there is a real risk that such persecution may take place. Although his credibility is likely to be low and his claim must be rigorously scrutinised, he is still entitled to the protection of the Convention, and this country is not entitled to disregard the provisions of the Convention by which it is bound, if it should turn out that he does indeed qualify for protection against refoulement at the time his application is considered.”

17. I have decided that it is appropriate to remit this appeal back to the FTT, having considered paragraph 7 of the Senior President's Practice Statements which is set out below;

"7.1 Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).

7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that;

(a) the effect of the error has to be deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact-finding which is necessary in order for the decision and the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Re-making rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact-finding is necessary."

18. Although permission to appeal was granted on only two grounds, the consideration of the medical report may mean that a different view is taken in relation to the Appellant's credibility. In my view it is not appropriate to preserve any findings made by the FTT, and therefore the appeal is remitted to the FTT to be heard afresh, with no findings of fact preserved. It is appropriate to remit, in my view, because of the nature and extent of the judicial fact-finding which will be necessary. Such fact-finding is more appropriately carried out in the FTT, rather than the Upper Tribunal.

19. The appeal will be heard by the FTT at the Bennett House, Stoke hearing centre and the parties will be advised of the time and date in due course. The appeal is to be heard by an FTT Judge other than Judge Coates.

20. If either party seeks to submit further documentary evidence, such evidence must be served upon the FTT and the other party no later than fourteen calendar days before the next hearing date. If skeleton arguments are to be produced, they must be submitted no later than seven calendar days before the FTT hearing.

Notice of Decision

The decision of the FTT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FTT with no findings of fact preserved.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

As this is an asylum claim, I have decided it is appropriate to make an anonymity order pursuant to 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. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

5th July 2016

**TO THE RESPONDENT
FEE AWARD**

The issue of any fee award will need to be considered by the FTT.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

5th July 2016