



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

Appeal Number: DA/01308/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons**

**On 1 December 2015**

**Promulgated**

**On 4 January 2016**

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**MR S A**

(ANONYMITY DIRECTION MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

As a protection claim, it is appropriate to make a direction.

**Representation:**

For the Appellant: Ms S Pinder, Counsel instructed by Polpitiya & Co Solicitors

For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a national of Sri Lanka who entered the United Kingdom on 29 May 1998 and claimed asylum. He had an earlier appeal in relation to his asylum claim in 1999 which was ultimately refused and he became appeal rights exhausted. In 2005 he submitted a human rights claim which was similarly refused and a further appeal was dismissed.
2. Following the commission of a number of offences on 6 September 2010 the appellant was notified of his liability to deportation under the UK

Borders Act 2007. He claims that his case is an exception to the automatic deportation regime on the basis that removal would breach his human rights and that he is entitled to protection under the Refugee Convention.

3. The Appellant was subsequently notified formally of his liability to deportation with his asylum claim being certified under Section 72 of the Nationality, Immigration and Asylum Act 2002. That certification has led to the main error of law which is alleged in relation to the First-Tier Tribunal Judge's approach to the appeal. The appeal was heard by First-Tier Tribunal Judge Thanki on 19 December 2014 and dismissed in a decision promulgated on 13 January 2015 ("the Decision"). At [76] to [88] of the Decision, the Judge upheld the certification. There is no challenge to that finding. However, having considered that by reason of section 72 of the 2002 Act, the Appellant was rightly excluded from the protection of the Refugee Convention, the Judge failed to go on to consider whether there would be a risk on return such as to engage Article 3 of the ECHR.
4. Mr Deller very properly did not submit strongly that this was not an error of law. It appears from [28] of the Decision that the Judge was aware that the grounds of appeal included a challenge to the Respondent's decision on the basis of humanitarian protection and it was incumbent on him to go further and to consider whether there would be a risk on return.
5. Ms Pinder properly accepts that following **Devaseelan** the starting point for the First-tier Tribunal Judge is the decision of the Tribunal in relation to the earlier asylum appeal but as she rightly points out that was some considerable time ago and events in Sri Lanka have moved on apace since then.
6. When granting permission to appeal, First-Tier Tribunal Judge Cruthers noted that there did appear to be an error of law in relation to the Article 3 risk and observed that the other grounds probably lacked merit. I certainly agree with that assessment in terms of the ground relating to Article 8 ECHR. However, Mr Deller accepts that Article 8 would need to be looked at as at the date of any further hearing in any event and there would be no point in preserving findings for that reason.
7. In relation to the statelessness ground, Ms Pinder may have a better argument that there is an error of law in the Decision at [89] to [96] because it does appear that the First-tier Tribunal Judge failed to consider the Appellant's own evidence on this point. The Judge may also have erred (and I would put it no higher than that), in relation to the burden of proof. However, Mr Deller accepted that there was little point in seeking to preserve the statelessness findings given the overlap with the risk on return issue. As he rightly points out, however, since this is a criminal deportation case, even if the Appellant could establish that he was stateless as a matter of fact, that may not lead to a grant of leave.

8. Both parties were agreed that, having found an error of law, I should remit the appeal to the First-tier Tribunal for it to be considered afresh. As indicated, no findings are preserved.

**Notice of Decision**

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

**I set aside the Decision**

**I remit the appeal to the First-Tier Tribunal for re-hearing. No findings are preserved**

Signed



Date 18 December 2015

Upper Tribunal Judge Smith