



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

Appeal Number: PA/01878/2017

THE IMMIGRATION ACTS

**Heard at Birmingham
On 21 August 2017**

**Decision & Reasons Promulgated
On 6 October 2017**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

**MZ
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Gilbert, Counsel instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a citizen of Sri Lanka born in 1977. He came to the UK in 2012 as a student and in the same year made a claim for asylum. That claim was refused and initially certified as clearly unfounded. After further submissions a fresh decision was made on 3 February 2017, again refusing the asylum and human rights claim.

2. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge A J Parker (“the Ftj”) at a hearing on 23 March 2017. He dismissed the appeal on all grounds.
3. The appellant has five children, born on [] 2000, [] 2002, [] 2007, [] 2010, and [] 2014.
4. The appellant’s asylum and human rights claim contains a number of features. First, it is asserted that his two younger daughters would be forced to undergo FGM if returned to Sri Lanka, his elder daughters having been subjected to FGM because of family pressures. Next, it is asserted that he would be at risk of persecution on account of the fact that he is a Muslim. It is also asserted that he is at risk of harm from an individual (whom I shall identify as BA) as a result of a debt that he owes. Lastly, he claims that he is at risk on return on account of his political opinions, that risk arising in part as a result of his activity on social media.

The decision of the Ftj

5. I summarise the Ftj’s decision, although further aspects of it will become apparent in my summary of the grounds of appeal and submissions before me, as well as from my conclusions.
6. The Ftj came to a number of conclusions under the subheading “Findings and Conclusions”, although he expressed other views on the claim and on the evidence earlier in his decision.
7. The Ftj accepted that the appellant’s two elder daughters had undergone FGM, stating that the appellant’s wife’s statement confirmed that she had consented to that. He also referred to a Child and Family Assessment and NHS documents in that respect.
8. The Ftj said that it had not been proved that the appellant’s mother had such influence that she would be able to force the appellant and his wife to have their two younger daughters undergo FGM, stating that “Claims to the contrary are in fact quite absurd”.
9. In any event, he concluded that there would be the option for the appellant (and presumably his family) to relocate, as asserted by the respondent. He rejected the contention that the appellant would have to live near his mother.
10. He likewise rejected the contention that the appellant would be at risk on account of his being a Muslim. The appellant had confirmed that he had not suffered persecution for that reason in the past, although had been questioned at the airport and at a checkpoint. The Ftj concluded that whilst Muslims may face levels of discrimination, the evidence does not indicate that this amounts to persecution or serious harm. He referred to the country guidance decision of *Gj and Others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC), stating that the current categories

of persons at real risk of persecution or serious harm on return to Sri Lanka do not include Muslims.

11. He rejected the claim that the appellant would be at risk as a result of his fear of BA to whom he owes a debt. Although there was evidence that his father-in-law had had his leg amputated, there was no evidence, other than from the appellant, that these injuries were caused by BA or his men. Although there were two loan agreements which are in English, no satisfactory explanation had been given for the fact that they were in English. On one of the agreements the appellant's name is given as the lender, and the lender in the other agreement is not BA.
12. He referred to letters from a lawyer dated from September 2013 "but no later evidence has been produced which cast doubt on their authenticity" (sic). Presumably here, the FtJ was saying that the lack of later evidence casts doubt on their authenticity, although the way the matter is expressed in the decision is not clear. He concluded that the police report does not "corroborate" the story. He also remarked on the fact that the appellant's father had not complained to the police, which the FtJ said was very surprising. There was no objective evidence to show that BA is a notorious criminal or person of influence.
13. At [38], he reminded himself that the appellant's case must be considered in the round. He stated that the appellant had told "a very implausible story" regarding FGM and religion, and he has been inconsistent and implausible, stating that both those factors are against him believing the story regarding BA.
14. Furthermore, the appellant had not tested whether the authorities could protect him and his family because he left before they had a chance to do so.
15. He rejected the contention that the appellant was at risk due to his political opinions. He referred to the appellant's website under which he uses an alias. With further reference to the documentary evidence, he said that it was not clear how the Sri Lankan authorities would identify the appellant, because he has not given his correct name and he is prepared to pay for his identity to be protected. The appellant had said that he would have to pay to remove his name so that he could not be identified.
16. He concluded that the appellant's Facebook page does not indicate a significant political profile which would by itself bring him to the attention of the authorities. Furthermore, although his Facebook page may be public, it could be adjusted to give him control over who views the contents of the page.
17. Although the appellant had resubmitted a letter from an attorney to show that he is wanted by the authorities, and had failed to present himself for inquiry and thus there is an arrest warrant, the FtJ said that "The police statement does not state the charges be brought against him..." (sic) and

he has not shown that his post-UK activity is a cause of the government's concern. The evidence provided was four years old and there was no new evidence showing that he was wanted.

18. The Ftj also referred to the appellant having gone back to Sri Lanka from New Zealand in 2011, and having lived in New Zealand with his family for five or six years. He went back to Sri Lanka for 10-12 months. He concluded that the appellant would not have returned to a country in which there was a genuine risk of persecution.
19. At [46] he referred to aspects of matters raised by previous representatives in relation to his claim, which were inconsistent with the present claim. This relates to an issue raised in cross-examination about assertions made by his previous representatives in respect of his claim. The Ftj said that it had been put to the appellant that he was a highly educated man, and yet did not read and check previous statements that were advanced in respect of the claim. He concluded that the appellant was evasive and found that the point made on behalf of the respondent in cross-examination was a valid one.
20. The implication is clearly that the Ftj found the appellant's account inconsistent and that no satisfactory explanation had been given for that inconsistency.

The grounds and submissions

21. The grounds take issue with the Ftj's conclusions in terms of the risk of FGM for the appellant's younger daughters. It is contended that the Ftj made a mistake of fact at [27] in concluding that the appellant's wife had consented to their undergoing FGM. In fact, her witness statement demonstrates that the procedure took place against her wishes, and that it was only agreed to as a result of pressure from the family.
22. Furthermore, given that it was accepted that the appellant's elder two daughters had been subjected to FGM (a conclusion also supported by the report from Social Services), the Ftj's finding that it had not been established that the appellant's mother had such influence so as to be able to force the appellant and his wife to have their two younger daughters undergo FGM, was irrational.
23. Reference is made in the grounds to background evidence in terms of the reports of harassment, threats and physical violence against Muslims, and the evidence of discrimination. In that context, the Ftj's conclusion that the appellant would not be at risk of persecution was in error. Furthermore, the Ftj erred in concluding that the country guidance decision of *Gj and Others* held that the categories of person at risk did not include Muslims, given that the Tribunal was not asked to determine that issue.

24. It is contended that the Ftj's conclusions in respect of the risk from BA is infected by his earlier conclusions in relation to FGM, the Ftj having said that that adverse credibility finding was relevant to his conclusions in relation to the risk asserted from BA.
25. As to the appellant's Facebook, it was submitted that the appellant's identity may already have been discovered by the Sri Lankan authorities. Therefore, changing his settings so that he could not be identified may not assist. Again, the Ftj's earlier flawed credibility assessment must have affected his conclusions in terms of the appellant's political activities.
26. Although the Ftj had said at [45] that the appellant's credibility was damaged by the fact that he returned to Sri Lanka in 2011 for 10-12 months, the fact is that the issues which gave rise to the appellant's claim on political grounds had not arisen at that point, but later.
27. The adverse credibility finding based on previous statements made by his earlier representatives failed to recognise that in the respondent's decision it was accepted that those were errors on the part of his then representatives.
28. Given that the risk of persecution arises from the authorities, internal relocation was not an option for him.
29. Issue is taken with the Ftj's assessment of Article 8, in particular with reference to the best interests of the appellant's children.
30. Relying on the grounds, Mr Gilbert referred me to various aspects of the documentary evidence, for example the Child and Family Assessment starting at page 51 of the appellant's bundle, on the issue of the appellant and his wife's attitude of hostility to FGM.
31. As to what is said in the grounds at [12] in terms of the loan agreements to which the Ftj referred, and their being in English, Mr Gilbert submitted that his instructions were that the appellant had said at the hearing that those documents were in English because English is widely spoken. Indeed, that is consistent with what the Ftj recorded in his manuscript record of proceedings as to the appellant's explanation for those documents being in English. However, it was accepted by Mr Gilbert that that explanation was not supported by any evidence he could point to.
32. I was referred to the extracts from the appellant's Facebook page and his website. It was submitted that the appellant's name is on the website, as can be seen for example at page 181 of the bundle. The Ftj appeared to accept at [40] that the appellant's website and Facebook posts are critical of the government. It was further submitted that it was apparent from existing country guidance that the Sri Lankan authorities maintain sophisticated intelligence. Furthermore, the decision in *YB (Eritrea) v Secretary of State for the Home Department* [2008] EWCA Civ 360 was

relied on in terms of the monitoring of individuals by intelligence or security services.

33. In relation to the Ftj's adverse credibility finding about the appellant having gone back to Sri Lanka in 2011, in the main the facts which indicated a risk to him, for example as shown in the attorney's letter at page 137, arose after 2011. The attorney's letter is dated September 2013, and the arrest warrant (so called) is dated August 2013 (page 109-111).
34. The appellant's witness statement dated 9 December 2016 at [4]-[6] explained the errors made by the appellant's previous representatives, and which the respondent accepted were errors.
35. Mrs Aboni relied on the 'rule 24' response to the effect that the Ftj's decision was free from error of law. Although it was accepted that the Ftj's decision may be slightly confusing, he had considered all relevant factors and aspects of the claim.
36. In relation to FGM, the Ftj was entitled to conclude that the appellant would have the option of internal relocation.
37. Similarly, he was entitled to conclude that the appellant's social media profile was not such as would put him at risk.
38. Likewise, in relation to what was earlier accepted by the respondent as an error in the representations made on behalf of the appellant in terms of the detail of his account, the Ftj was entitled to have regard to the fact that the appellant appeared evasive when he gave evidence. Any error of law in this respect was not material.

Assessment

39. I announced at the hearing that I was satisfied that the Ftj had erred in law in his assessment of the appellant's credibility. It is not necessary for me to express a view on every aspect of the grounds and submissions. Suffice to say, the following reasons are a sufficient basis from which to conclude that the Ftj's decision should be set aside.
40. The Ftj's conclusion that the appellant's wife said in her witness statement that she had consented to FGM for their elder two daughters, fails to have regard to the fact that in her witness statement she said that it was family pressures that led to her consenting to it. She said in her witness statement that the appellant's mother and sisters and brother started to speak to her about FGM and said that all the girls in the family must have that procedure. They referred to it as being part of their religion and culture and that the children would not be accepted without it. They also tried to convince her to have FGM. The witness statement continues that she did not want to risk the relationship her children had with their family or the relationship with her husband and she therefore agreed to FGM for

her younger daughter. Her other daughter was subjected to the procedure when she was approximately 4 years old.

41. The FtJ having accepted that those children had undergone FGM, the conclusion that it was “quite absurd” to find that the appellant’s mother had such influence that she would be able to force FGM on the other two children, failed to take into account the detail of the witness statement and indeed the FtJ’s own acceptance of the procedure having previously carried out on two of the children. Likewise, his conclusion at [38] that the appellant had told “a very implausible story” regarding FGM.
42. The FtJ concluded that the appellant’s credibility was damaged by reason of his having returned to Sri Lanka in 2011 for 10-12 months, on the basis that he would not have returned to a country which placed him and his family at risk. However, this conclusion fails to have regard to the detail of the appellant’s claim and the supporting documentary evidence to the effect that his political activities were not a matter that, for the most part at least, gave rise to a risk of persecution by the authorities at that point. I have indicated the documents to which I was referred in this respect.
43. The FtJ made a further adverse credibility finding because of what he plainly regarded as an inconsistency in the appellant’s claim with reference to statements made on his behalf by his previous representatives. However, albeit not in the most recent decision letter of 3 February 2017, in the respondent’s decision dated 3 June 2016 on page 7 it refers to a statement made on the appellant’s behalf by his previous solicitors. The respondent there states that it is believed that the statement does not relate to his claim and is an error on the part of his legal representative. Similarly in relation to another aspect of his previous solicitor’s letter it states that it is not believed that this statement relates to his claim because he had never had his case heard before an Immigration Judge (as suggested), and there was no evidence that he had ever been arrested or tortured by the Sri Lankan Army (again as suggested), which was never part of his claim.
44. The FtJ’s reliance on those erroneous assertions on his behalf by his previous representatives further undermines the adverse credibility assessment.
45. The FtJ did undertake an assessment of the background evidence in relation to the risk to the appellant of persecution on the basis that he is a Muslim. However, the FtJ’s finding at [33] in relation to *GJ and Others* that “The Tribunal held that” (written in bold type) the current categories of persons at risk did not include Muslims, suggests that this was a matter that was subject to inquiry by the Tribunal in that case, which it was not.
46. The FtJ’s decision under the subheading “Evidence” gives a narrative of the oral evidence, in particular cross-examination. He made the observation at [13] that the appellant was evasive (in relation to the previous inconsistent statements to which I have referred). The same

observation is repeated at [46] in relation to the same topic. Of course, the Ftj saw and heard the appellant give evidence and he was in a position to make an assessment of the way that the appellant gave his evidence. However, the assessment that the appellant was vague and evasive relates to a matter about which it was wrong to make an adverse credibility finding, for the reasons I have already stated. The respondent accepted that the statements about which he was cross-examined appeared as part of his case through error by his previous representatives.

47. During the course of the narrative of the appellant's evidence in cross-examination, on two occasions the Ftj said that the Presenting Officer "extracted from him" certain evidence. It is not entirely clear whether this expression was used deliberately by the Ftj to indicate that the evidence given by the appellant was not readily forthcoming. In my judgement, this is a source for confusion in terms of the Ftj's assessment of the appellant's evidence.
48. I have considered whether what appears as the Ftj's own assessment of the appellant's evidence, for example at [38] to the effect that he had been inconsistent and implausible in relation to FGM and the risk from BA, is in fact a reflection of the submissions made on behalf of the respondent. In that paragraph and others, reading the Ftj's decision in a different way, it could be that the Ftj was only reflecting the submissions that were made to him. However, given that those assessments appear under the subheading "Findings and Conclusions" it seems to me that they do in fact represent the Ftj's own assessment of the appellant's case, even though rather confusingly interspersed with the observations of the Presenting Officer.
49. The cumulative effect of what I regard to be errors in the Ftj's assessment of the appellant's credibility is such as to lead me to conclude that his credibility assessment cannot stand. The errors are such as to require the decision to be set aside.
50. Mr Gilbert submitted that it would be appropriate for the appeal to be retained in the Upper Tribunal for a re-assessment of credibility because of what he described as the difficult issue of FGM in Sri Lanka.
51. However, I do not consider that that is an appropriate course. It has been found that the appellant's two elder daughters have been subjected to FGM, and that is a finding that can be preserved. There needs to be a re-assessment of the extent to which the appellant's other two daughters are at risk in the same way on return to Sri Lanka. There is no reason for that matter to be retained in the Upper Tribunal in circumstances where the appellant has not had a proper appraisal of his claim in all its respects.
52. Whilst I do not consider that there is any harm in stating that the claimed risk to the appellant on the basis that he is a Muslim seems to me not to be the strongest aspect of his claim, I do not consider that the Ftj's

findings in that respect can be preserved given the wholesale rejection of the appellant's claim in all its respects.

53. In those circumstances, it is appropriate for the appeal to be remitted to the First-tier Tribunal for a hearing *de novo*. The only finding of fact that can be preserved is that the appellant's two elder daughters have been subject to FGM in Sri Lanka.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge A J Parker, with the only preserved finding being that referred to in the preceding paragraph.

Direction Regarding Anonymity - 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 him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Post script

By letter dated 26 September 2017, the appellant's solicitors wrote to the Tribunal to state that "the previous representatives appear to have mistakenly failed to lodge appeals for each of the Appellant's dependants, i.e. his wife and five children. As such they are not a party to this appeal although they should have been at the outset had it not been for the error of their representatives".

The dependent children are then named. It is stated that they were included as dependants on the appellant's asylum claim and are considered as such for NASS purposes. It then states that "We therefore make these out of time appeals for each of the above and request that the appeals be linked as would normally be the case."

Although not part of my judgment in this appeal, this is as convenient a way as any of responding to the letter from the appellant's representatives. Simply put, the appellant's children are not parties to this appeal. There is no mechanism by which simply writing a letter (to the Upper Tribunal in particular) can make them so. One would have thought that experienced representatives such as these would appreciate that fact.

Upper Tribunal Judge Kopieczek

5/10/17