



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15378/2016

THE IMMIGRATION ACTS

Heard at Field House
On 19 June 2018

Decision & Reasons Promulgated
On 28 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SINTHUJA [G]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mrs W Brocklesby, Senior Presenting Officer

For the Respondent: Ms A Patyna, Counsel instructed by Gurney Harden Solicitors Ltd

DECISION AND REASONS

1. The appellant is the Secretary of State and the respondent is Miss [G]. However, I shall refer to the parties as they were before the First-tier Tribunal where the appellant was Miss [G].
2. The appellant before the First-tier Tribunal is a Sri Lankan national born on 15 August 1990 who appealed against the decision of the respondent dated 6 June 2016 refusing to grant her leave to remain in the UK. In a decision promulgated on 4 December 2017,

Judge of the First-tier Tribunal Adio allowed the appellant's appeal on human rights grounds, Article 8.

3. The Secretary of State appeals on the following grounds:

Ground 1

The First-tier Tribunal materially erred in law in failing to have regard to the public interest factors set out in Section 117B. It was argued that the First-tier Tribunal had not applied the test either in substance or form (**Dube (ss.117A-117B) [2015] UKUT 00090 (IAC)**). It was further argued that there were no very significant obstacles which prevent the appellant from returning to Sri Lanka and that she has skills and qualifications and although she was living with her parents she could live on her own and was 27 years old. The fact that she was living with her parents was not enough to show dependency. It was further argued that the appellant had already been a burden on the state through pregnancy appointments and will continue to do so as she gave birth.

Error of Law Discussion

4. At the beginning of the hearing Mrs Brocklesby submitted, under Rule 15(2A) of the Upper Tribunal Procedure Rules, the determination against the appellant's previous asylum decision promulgated on 24 October 2012. This appeal dismissed the appellant's asylum claim including for credibility reasons [at 72]. The First-tier Tribunal in 2012 did not accept that the appellant was detained as she claimed.
5. Although the fact that the appellant had lost an asylum appeal was in the appellant's witness statement before the First-tier Tribunal, Mrs Brocklesby submitted that the findings of the First-tier Tribunal are relevant in that the appellant had been found not to be credible including in relation to her claim for detention. The First-tier Tribunal Judge in the decision currently under appeal specifically noted that he did not make any findings upon any fresh asylum claim but then at paragraph [18] found as follows:

“ However, one bit of evidence which is relevant to whether there are significant obstacles to integration into Sri Lanka is the fact that the appellant stated that when she returned to Sri Lanka in 2010 she was detained and ill-treated”
6. Further, at paragraph [23] when considering very significant obstacles, the judge went on to find:

“That the appellant has been detained and ill-treated in the past is a significant obstacle because she has only lived there for six years. She will therefore be left in a situation whereby she has to live her life hiding because of her past experience.”
7. Those findings are based in error. I accept the appellant in her witness statement indicated that she claimed asylum and was refused and her appeal dismissed, at

paragraph 11, of her witness statement. It has not been suggested that the appellant sought to mislead the Tribunal and it is unclear why the appellant's previous unsuccessful asylum appeal decision was not before the First-tier Tribunal.

8. However, the judge's findings, that there were very significant obstacles, were underpinned by his findings, which are patently incorrect given the comprehensive 2012 decision (and the lack of any adequate fresh evidence before the First-tier Tribunal that might suggest the judge should have departed from that decision) that the appellant had been detained and ill-treated in Sri Lanka. Such an error cannot be anything other than material. Although Ms Patyna submitted that any error was not material given that the judge also allowed the appeal under family life, the judge's reasoning in this regard is also in error.
9. In addition to the judge erroneously accepting that the appellant had been previously detained and would be in hiding on return, the judge failed to have proper regard to the public interest factors at Section 117B of the Nationality, Immigration and Asylum Act. Whilst I accept that **Dube** is authority for the proposition that there is no error in not referring to Section 117A to D providing the relevant tests are applied in substance, that was not the case in this appeal. Whilst the judge set out the parties' submissions, which included [117B] at paragraphs 12 to 14, the judge failed to address the test in substance.
10. The appellant gave evidence through a Tamil interpreter. Whilst I accept Ms Patyna's submissions that the respondent took no point on English language in submissions and that the appellant stated at paragraph 5 of her witness statement that "once I completed this course, I learned English and passed level 3 in international English language testing system", there were no findings made by the judge and it was unclear whether this factor counted against the appellant or whether it was a neutral factor.
11. The respondent did submit that weight should be given to the effective maintenance of immigration control and the fact that the appellant is not financially independent and as someone expecting a child will be a burden on the state. There is no evidence that the judge considered these factors or applied the 'balance sheet' approach.
12. Although the permission judge argued that it was unclear why the judge found Article 8 to be engaged in the first place and there is potentially merit in that argument this was not addressed in the grounds of appeal. Mrs Brocklesby conceded that the grounds of appeal did not adequately address this. Such is immaterial given that there are sufficient errors in the judge's decision such that it must be set aside.
13. The decision of the First-tier Tribunal contains errors of law and must be set aside with no findings preserved. Having regard to the Upper Tribunal Practice Statement 2012, the nature or extent of judicial fact finding necessary, is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal. Ms Patyna indicated that, in light of the production of the 2012 appeal decision, further instructions would be taken in relation to any ongoing fresh asylum

claim. The appeal is remitted to the First-tier Tribunal to be heard by a judge other than Judge Adio.

Notice of Decision

14. The decision of the First-tier Tribunal contains material errors of law and is set aside. The appeal is remitted to the First-tier Tribunal for hearing de novo.

No anonymity direction was sought or is appropriate in this case.

Signed

Date: 26 June 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT

FEE AWARD

No fee was paid or payable so no fee award is made.

Signed

Date: 26 June 2018

Deputy Upper Tribunal Judge Hutchinson