



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

Appeal Number: PA/00314/2015

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

Heard on 19th October 2018

**Heard on 12th November
2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**[L B]
(Anonymity order not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani of Counsel

For the Respondent: Ms A Everett, Home Office Presenting Officer

REASONS FOR FINDING A MATERIAL ERROR OF LAW

The Appellant

1. The Appellant is a citizen of Guyana born on 8 October 1966. She appeals against a decision of Judge of the First-tier Tribunal Buckwell sitting at Hendon Magistrates Court on 25 April 2016. That decision was to dismiss the Appellant's appeal against a decision of the Respondent dated 5 June 2015 to refuse her international protection and human rights claims. The

Appellant is subject to a deportation order signed on 9 January 2014 following a sentence of 18 years imprisonment imposed on 27 February 2006 at Snaresbrook Crown Court for conspiracy to produce a controlled drug of class A and money-laundering in what was described by the sentencing Judge as “a global conspiracy”. An appeal against the deportation order was dismissed and permission to appeal was refused in July 2014. On 21 August 2014 the Appellant applied for asylum and was interviewed by the Respondent arguing that she was at risk upon return because she was suspected by her co-defendants in the 2006 trial of giving information about them to the authorities. They had threatened her with violence if she were to return to Guyana.

2. The Appellant entered the United Kingdom on 18 December 2001 on a visitor’s visa and was granted indefinite leave to remain in 2004. The Appellant’s claim was summarised by the Judge at [9] to [36] of the determination. In or about 1994 she was abducted and ill-treated by gangsters searching for her brother. She managed to escape to French Guyana where she had no problems but decided to leave for a holiday in the United Kingdom. Here, the Appellant began a relationship in 2003 with a drug dealer called [BC], a leading figure in the conspiracy. The Appellant gave the name of [BC]’s supplier to the police. The Appellant was prosecuted for her involvement with the drug dealing activities of [BC]’s gang. The other defendants came to know what had happened and threats in writing were made to the Appellant during the trial. The threats were handed via a woman who worked for Serco. [BC] and the others were all from the capital Georgetown as she was and would know if she were deported to Guyana.
3. The Respondent did not accept the Appellant had been threatened by [BC] because she had not mentioned any such threats until she made her asylum claim on 21 August 2014. They were not raised during the deportation appeal in 2014. The Appellant’s credibility was undermined by reason of section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. Importantly, the Respondent did not accept that an employee of Serco would have passed threatening messages to the Appellant from [BC]. Although there were deficiencies in the police service there was sufficient protection available to the Appellant in Guyana.

The Decision at First Instance

4. The Appellant submitted to Judge Buckwell that the key question was whether the Appellant was telling the truth (see [87]). Due to the abuse the Appellant had suffered in the past documented in a medical report by Dr Lohawala the Appellant might not be able to deal with the risk she might face on return. The presence of the Appellant in Guyana would be discovered as the gangs there were powerful.
5. The Judge noted at [107] that the Respondent was not relying on a certificate under section 72 of the Nationality Immigration and Asylum Act 2002, this was thus an asylum appeal. The Appellant did not rely on her

claimed experience of kidnap in or around 1993 in relation to her present fear of return to Guyana. The Judge accepted that that incident had occurred but “some 20 years later, any individuals who then took the Appellant and her sister in order to attempt to exert pressure on them in relation to their late brother would have [no] relevance or connection with or interest in the Appellant on her return”, see [109]. The Appellant feared the threat from other Guyanese nationals who had been deported or otherwise removed to Guyana following the conclusion of their sentences for the drugs conspiracy.

6. At [112] the Judge gave his principal finding on the issue of credibility. That paragraph was the subject of the main attack by the Appellant in this appeal and I will therefore set it out in full:

“I find it critical to the account of the Appellant that she claims that during the process of the court appearances threats were received in written terms by way of notes which were given to her by “a black employee of Serco”. It appears that this may have happened on more than one claimed occasion. I do not find this to be credible. Whilst in any organisation there may be individuals who do not perform to the level which is expected of them, Serco are a trusted organisation whose employees, in transporting individuals to and from proceedings within the judicial system of our country, are required to act to a high level of responsibility. The claim by the Appellant that an employee of that company effectively acted as messenger for one or more of her co-defendants is not an account which I believe. Additionally I find it surprising that if the Appellant had received written notes, she would not either have disclose that fact to others, including officials at the premises where she was being detained, or to other friends or family. In addition, [PB], from WISH [a Voice for Women’s Mental Health for whom the Appellant had been working since February 2013], was not able to confirm that there was any substantiated account which she had heard from the Appellant in relation to the past receipt of threats. That I find to be significant because clearly the Appellant has enjoyed a close and fruitful relationship with [PB].”

7. The Judge summarised the evidence of [LB], at [66] to [70] of the determination. At [113] the Judge concluded that he did not believe the account of the Appellant in terms of threats she claimed to have received. Even if section 8 of the 2004 Act had not applied the Judge’s findings on credibility would have been the same. As there had been no specific threats from [BC] or any other of the co-defendants there was no particular or specific risk to the safety of the Appellant if she were removed to Guyana. At [117] the Judge did not find that the Appellant had discharge the burden of demonstrating that her medical conditions met the threshold in the case of **N** and dismissed the appeal.

The Onward Appeal

8. The Appellant’s appeal argued that the Judge had failed to determine the risk to the Appellant upon return to Guyana as a mentally ill lone woman having accepted that the Appellant had been a victim of violence in the

past. Whether Serco was a trusted organisation was not a matter of evidence before the Judge. Prison guards did pass messages to detainees and Serco's impropriety regularly featured in the public domain. The grounds also complained that the Judge misdirected himself in relation to article 8 by failing to consider properly or at all the award-winning community work undertaken by the Appellant through WISH.

9. Permission to appeal was initially refused by Judge of the First-tier Tribunal Parkes on 15 June 2016. He wrote "the finding in [112] was based in large part on the Appellant's failure to raise the issue with others or to mention it to friends or family. The reasoning was appropriate and open to the Judge and the grounds do not address the paragraph read as a whole (*my emphasis*). The grounds in relation to article 8 overlook the fact that the Appellant is the subject of a deportation order and different considerations apply. There is no error. The Appellant's mental health was considered from [117] and the case of N considered, the Judge was entitled to find a high threshold had not been met."
10. The Appellant renewed her application for permission to appeal over four months late the delay having been caused by an error by the Appellant's solicitor. Upper Tribunal Judge O'Connor granted permission on 1 August 2018 stating "in particular, I find it to be arguable that the First-tier Tribunal erred in: (i) failing to engage with, or provide adequate reasons for rejecting if it did engage with, the submission that the Appellant would be at risk upon return as a "mentally ill lone woman" and (ii) failing to provide lawfully adequate reasons for its conclusion that the Appellant's evidence regarding the passing of messages by a Serco employee was implausible. All grounds may be argued".
11. The Respondent replied to the grant of permission by letter dated 20 September 2018 noting that the argument that the Appellant would be at risk as a lone woman with mental health difficulties did not appear to have been canvassed as a Convention reason before the Tribunal. The Judge had made "clear findings that the Appellant was not at risk from gang members on return. The finding in relation to whether or not the Appellant had received threats from her co-accused many years ago was not just based on Serco being a trusted organisation (with which the grounds take issue). The Judge also had regard to the late disclosure by the Appellant of the existence of the threats and that her supporting witness from WISH had made no mention of this. The Judge was entitled to make little mention of the Appellant's charity or other community work in the context of her deportation as this was unlikely to bring her within having a protected private life".

The Hearing Before Me

12. At the outset of the hearing counsel indicated that there was agreement between the Appellant and the Respondent that grounds 1 and 2, failure to determine risk on return as a mentally ill lone woman and the finding that it was not credible that a Serco employee would pass messages

between the Appellant and her co-defendant were made out. The Presenting Officer agreed because the finding regarding the Serco employee was based on an assumption that it was not plausible that an employee of Serco would pass threatening messages to the Appellant. Counsel argued that that it was not enough for the Judge to assume that no Serco employee would pass notes. If the Judge was proposing to make such a finding the Appellant should have been given an opportunity to adduce evidence that a number of Serco employees had been involved in serious criminality in other cases.

13. I commented that at [112] the Judge had given two separate reasons why he did not accept the passing of the threatening messages, his view about Serco employees and the late disclosure. Counsel replied that that 2nd part of the reasoning was only 50% of the reasoning as a whole the other 50% being pure speculation. In any event the passing of a note between co-defendants was not necessarily failing to comply with the standards expected of contractors such as Serco. It was the agreed position of the Appellant and Respondent that the Judge was wrong in law and it was a material error. The risk as a lone woman had not been dealt with in the decision. The matter should be remitted to the First-tier Tribunal. The Appellant would wish to produce evidence in due course of the death of the Appellant's son who was murdered.
14. In response the Presenting Officer said that the Judge had found the Appellant to be credible in relation to her previous experience in 1993. Of the two reasons why he did not accept the claim of threats one was not a safe finding. It was impossible for the Respondent to ring fence the first reason for disbelieving the Appellant (that Serco employees would not pass threatening messages) from the reason to do with delay. The Judge had not dealt with the Appellant's claim about the difficulties as a mentally ill lone woman but had focused instead on the international protection claim. Both grounds were conceded by the Respondent. I indicated at the conclusion of the hearing that I would consider the matter and either direct that the appeal be reheard or the decision at first instance would stand. I would not, if I were minded to set aside the decision of the First-tier Tribunal, proceed to deal with the rehearing there and then.

Findings

15. The Respondent wrote a detailed refusal letter rejecting the claim that the Appellant had been threatened by [BC] during the court hearings, see (12) to (20) of the refusal letter. At (17) it was not accepted that an employee of the prison or of the courts would act in the unprofessional and irresponsible manner described by the Appellant, in passing on threats. The Respondent's position has now reversed and the Respondent no longer wishes to stand by that part of the refusal letter which the Judge relied upon in the first part of [112]. Arguably, if the Respondent was going to take that view he should have written a third refusal letter in this case withdrawing that argument. However, that did not happen. Instead at

a very late stage in the proceedings the Presenting Officer indicated that the Respondent no longer stands by his refusal letter.

16. What the Respondent did indicate in replying to the grant of permission by letter dated 20 September 2018 was to point out that the Judge had given two reasons why did not accept the claimed threats, the 2nd reason being the delay in notifying the existence of those threats. Before me the Presenting Officer sought to resile from that position indicating that as she put it the 2nd reason for not accepting the threats, the delay in passing on the information, could not be “ring fenced”. It is not entirely clear why at the hearing before me the Respondent fundamentally changed his position in this case and appears no longer to be standing by his own refusal letter. Without a coherent refusal letter, it is tempting to consider whether the appeal should be allowed outright.
17. I do not consider it appropriate in this case to do that in view of the very serious nature of the Appellant’s offending and consequently the significant weight to be given to the public interest. I indicated to the parties I would not re-hear this appeal myself. I have considerable sympathy for the position that the Judge found himself in having heard the evidence and having written a careful determination largely agreeing with the reasoning of the Respondent having exercised his own judgment in the matter. Nevertheless, in view of the Respondent’s refusal to support the contents of his own refusal letter I have no option but to find a material error of law in the Judge’s determination and remit it back to the First-tier for a rehearing. I would strongly urge the Respondent to review his position in this case and if necessary write a further refusal letter rather more coherently setting out the Respondent’s position which at present is confusing.
18. The Respondent gave two reasons for not accepting the existence of the threats, that a Serco employee would not be involved in the way described by the Appellant and because of the substantial delay by the Appellant in revealing the existence of the threats. If the Respondent is now right in the submissions to me that the Judge could not ring fence the two separate reasons for rejecting the Appellant’s claim, it is difficult to see how the Respondent could ring fence the two separate reasons. If the Judge’s upholding of probity in Serco employees is such a glaring error that it infects all other findings, the same must be said of the Respondent’s own remarks in the refusal letter.
19. The Respondent’s reply to the grant of permission is understandable given that the extract from counsel’s skeleton argument cited in the grounds of onward appeal (which were settled by counsel who had represented the Appellant both before Judge Buckwell and before me) did not refer to the Appellant being mentally ill. The grounds did refer to the Appellant suffering from moderately severe PTSD and depression citing [111] although those words do not in fact appear in that paragraph of the determination. They appear to come from the report by Doctor Lohawala dated 10 March 2016. The Judge’s view of the medical evidence was that

the Appellant's condition did not meet the threshold in **N** and that there were potential medical facilities available for the Appellant in Guyana.

20. The refusal letter had considered medical facilities in Guyana at (43) and (44) concluding that Guyana had a healthcare system capable of assisting the Appellant if necessary. It is not entirely understandable why the Respondent in submissions to me appeared to resile from the contents of the refusal letter by not supporting the determination. The refusal letter had clearly been approved by the Judge who had considered both the further medical evidence produced by the Appellant and the background information supplied by the Respondent. The Respondent's stance should be clarified before the next hearing. Because of the muddled approach of the Respondent in this case I cannot be satisfied that a determination, not supported by the Respondent is free from material errors.
21. The Judge's conclusions were understandable on the basis of what was then the Respondent's case but as this appears no longer to be so I find there is a material error of law and allow the Appellant's appeal against the decision of the First-tier Tribunal. I direct that the matter be remitted back to the First-tier Tribunal for the appeal to be re-heard de novo. The Appellant has indicated she wishes to produce further evidence regarding the death of her son. This evidence and any other material should be produced at least 28 days before the remitted hearing. Importantly the Respondent should clarify what his position in this appeal is and whether he does or does not accept that the Appellant is entitled to international protection on the basis of her claim of threats and/or the need for medical treatment (which she says she would not obtain in Guyana). I make no anonymity order as there is no public policy reason for so doing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I set it aside. The appeal will be remitted to the First-tier Tribunal to be reheard with no findings of fact preserved.

Appellant's appeal allowed to the limited extent stated

Signed this 1 November 2018

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was payable and therefore there can be no fee award.

Signed this 1 November 2018

.....
Judge Woodcraft
Deputy Upper Tribunal Judge