



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02042/2018

THE IMMIGRATION ACTS

Heard at Field House
On 11 June 2018

Decision & Reasons Promulgated
On 22 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

K S

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Ms C Physsas, Counsel, instructed by Lova Solicitors

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.

DECISION AND REASONS

1. I shall refer to the parties as they were before the First-tier Tribunal. Therefore the Secretary of State is once more the Respondent and K S is the Appellant.

2. This is a challenge by the Respondent to the decision of First-tier Tribunal Judge Rowlands (the judge), promulgated on 9 April 2018, in which he dismissed the Appellant's appeal against the Respondent's refusal of his protection claim but allowed the appeal on human rights grounds. The Appellant's appeal to the First-tier Tribunal had essentially been put on two bases: first, that he had been involved with the LTTE and in pro-Tamil activities in the United Kingdom, as a result of which he would be at risk on return to Sri Lanka; second, that he had significant mental health problems and could succeed on Article 3/Article 8 grounds in light of the risk of suicide on return.

The judge's decision

3. At [31] to [38] of his decision the judge makes several adverse credibility findings in respect of the Appellant's protection claim. Ultimately he finds the account to be untrue and concludes that there will be no risk on return to Sri Lanka. At [39] to [42] the judge considers Article 3, taking into account and clearly placing very significant weight upon a psychiatric report by Dr Dhumad. The judge states that whilst he had rejected the Appellant's account of past events, Dr Dhumad had accepted this, and had reached professional conclusions on the Appellant's mental state. It was said by Dr Dhumad that the risk of suicide was currently "moderate" but would become "significant" if what is described as "deportation" was to occur. A couple of passages from the judge's decision are worthy of quotation. First, at [39] the judge states:

"Whatever my views on his [the Appellant's] ability or inability to prove to the required standard what he says happened to him and what might happen on his return, what is clear from all the medical evidence including the psychiatric report, is that he believes it all and is very fearful that it would recur on his return."

4. Then, at [42], the judge finds that:

"As I have already said, my view is that he has not proven the facts to the required standard but I am prepared to accept that the psychiatrist is entitled to reach his opinion and to conclude that the Appellant is telling the truth to the standard that he sets. I am satisfied that the doctor's diagnosis is correct and that he has made a correct diagnosis of PTSD."

5. The judge then concludes that the Appellant was entitled to succeed under Article 3. Finally, Article 8 is considered and it is said that the mental health issue amounted to an insurmountable obstacle to the Appellant's return to Sri Lanka.

The grounds of appeal and grant of permission

6. There are three grounds stated, the third of which did not ever appear to bear much relevance to this particular case and has in any event been put to one side by Mr Duffy.
7. In respect of ground 1, it is said that there is a real tension between the judge's adverse credibility findings on the Appellant's account on the one hand, and his complete reliance on the medical report, on the other. It is said that the judge failed to resolve

this tension. Ground 2 asserts that the judge has failed to deal with the correct approach in light of J [2005] EWCA Civ 629.

8. Permission was granted by First-tier Tribunal Judge Kelly on 1 May 2018. The grant simply says that all grounds are arguable.
9. There has been no cross-appeal by the Appellant.

The hearing before me

10. Miss Physsas provided myself and Mr Duffy with a detailed Rule 24 response. She confirmed that no cross-appeal had been made and no application for one was being put forward before me.
11. Mr Duffy relied on grounds 1 and 2. He submitted that the judge had failed to relate his adverse credibility findings on the protection claim to the Article 3 assessment in any way. The judge should have re-assessed Dr Dhumad's report in light of the adverse credibility findings. The fact that the Appellant's account was deemed to be untrue must have had an affect on the weight attributable to the report. The judge has failed to approach the matter correctly, or at least had failed to provide reasons as to why he was apparently attributing so much weight to the report despite the adverse findings.
12. Miss Physsas relied on her Rule 24 response. She submitted that the judge was entitled to rely on the medical report as it stood, notwithstanding the fact that the Appellant's fears of return to Sri Lanka were not well-founded. She referred me to the Court of Appeal judgment in Y [2009] EWCA Civ 362. Dr Dhumad had been entitled to reach the conclusions that he had. It was submitted that if there were errors in approach, in light of GJ the appeal would have been allowed in any event, given the absence of relevant care in Sri Lanka as regards those at risk of suicide. It was also submitted that the Appellant's subjective fear was deemed to be true, and that this was enough.
13. At the end of the hearing I reserved my decision.

Decision on error of law

14. I have to say that I have found this a very difficult case to decide. At the hearing itself it felt at times as though the discussion was becoming circular. In saying this I mean no disrespect to either of the representatives. The difficulties really have arisen from the way in which the judge's decision is drafted. In addition, whilst on the face of the decision there might well appear to be a clear error in approach because of the judge's complete failure to have regard to the medical evidence whilst assessing the Appellant's overall credibility, there has been no cross-appeal. I have to say that I am somewhat bemused by this, but that is the situation as it stands.
15. I have sought to read the judge's decision as a whole and in a sensible manner. Before reaching my decision I have read and re-read Dr Dhumad's report and indeed the other medical evidence contained in the Appellant's bundle.

16. Ultimately, I have concluded that the judge has materially erred in law in his approach to the suicide/ Article 3 issue. My reasons for this are as follows.
17. First, the judge has approached his decision making in this case by considering the Appellant's account of past events in isolation from the consideration of the medical evidence. Whilst in principle this might appear to be erroneous, as I have said already there is no cross-appeal here. Therefore, that credibility assessment was his starting point.
18. Second, it is undeniable that in preparing his report and reaching his conclusions, Dr Dhumad took full account of what the Appellant had told him about past events in Sri Lanka. Dr Dhumad was entitled to take this account at face value and then to apply his professional judgement (which incorporated issues of presentation and the application of diagnostic criteria, etc.) before reaching his diagnosis and stating his opinions. The conclusion that the Appellant suffered from PTSD and was at risk of committing suicide was, on any view, predicated at least in significant part, upon the claimed traumatic events relayed by the Appellant to Dr Dhumad.
19. Third, this account of events had of course already been rejected by the judge earlier in his decision. In my view once the judge had made his adverse credibility findings and went on to consider Dr Dhumad's report, he was bound to assess that report in light of those adverse findings. This is because the very cause of the PTSD had been put down by Dr Dhumad himself to claimed past events that were not, on the judge's findings, true. This did not necessarily mean that the Appellant was not suffering from PTSD, or that there might not have been some other cause for his mental condition, but the judge's rejection of the entire account must have been relevant to an assessment of the weight attributable to the report.
20. On the judge's approach, he seems to have been moving from the premise that the Appellant's subjective fear was based on events that had not in fact occurred. This somewhat unusual situation distinguishes this case from that in Y. In Y the Appellant had had his account of past persecution accepted. The point in that case was that a tribunal had concluded that notwithstanding those past events, there was no longer a well-founded fear of persecution on return to Sri Lanka. The absence of the objectively justified fear did not, said the Court of Appeal, necessarily preclude the existence of a real risk of suicide. In the present case, the Appellant could not show the existence of accepted past events: indeed the opposite is the case. Further, it is not a case involving what might be described as a "freestanding" mental health condition such as schizophrenia in which an individual may be delusional and providing an account of events that had never occurred. Here, the diagnosis was of PTSD, a condition that would, by definition, have a genesis in particular past circumstances. It is this condition, and this condition only, which Dr Dhumad has linked to the risk of suicide.
21. Sixth, in light of the above I simply cannot see how the adverse credibility findings could have been completely isolated from a proper assessment of the expert evidence. In my view, there has been a fundamental error in approach.
22. Further or alternatively the judge has provided no reasons as to why, in light of his adverse findings, he would nonetheless be attributing such significant weight to the

report of Dr Dhumad that this evidence, and this evidence alone, was sufficient for the Appellant to succeed in his Article 3 claim, particularly in light of J and the well-established high threshold in such cases.

23. Seventh, it is right also that no reference whatsoever is made to the J criteria and whilst the failure to cite relevant case law is not necessarily an error, in a case such as this, it is indicative of an erroneous approach. The judge's omission really only goes to compound the errors identified previously.
24. In light of the above I set aside the judge's decision.

Disposal

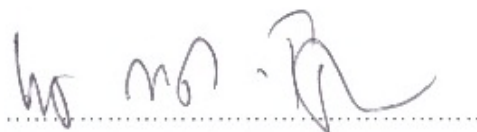
25. I asked the representatives at the hearing what they thought should happen to this case if I found material errors of law to exist. Both agreed that this case should be remitted to the First-tier Tribunal. Mr Duffy, in his customary fair and realistic manner, accepted that the medical evidence was bound up with the assessment of credibility and, notwithstanding the absence of a cross-appeal at the error of law stage, the Appellant's case needed to be looked at again as a whole. The credibility findings on a protection claim were flawed because the judge had entirely failed to consider the medical evidence as part and parcel of the approach to credibility. Miss Physsas agreed.
26. Having particular regard to paragraph 7.2 of the Practice Statement, I am of the view that this matter must be remitted to the First-tier Tribunal. It is of course the case that there has been no cross-appeal here. That omission really goes to the initial error of law challenge. Once I have found material errors to exist, the way is potentially open to the Appellant to rely once again on the protection claim issues. I appreciate that the judge's adverse credibility findings have not been specifically challenged thus far. However, it is abundantly clear that the judge should have considered the medical evidence as part and parcel of his credibility assessment in the first place.
27. Now that his decision has been set aside, and in light of Mr Duffy's position, it is in my view quite clearly correct for this matter to be reheard afresh with no findings of fact preserved. To this effect I will issue appropriate directions, below.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I remit this appeal to the First-tier Tribunal.

Signed



Date: 20 June 2018

Deputy Upper Tribunal Judge Norton-Taylor