



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

Appeal Number: PA/10220/2017

THE IMMIGRATION ACTS

Heard at Field House

On 20 March 2019

**Determination
Promulgated
On 1 May 2019**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

**AA
(Anonymity Order Made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Tobin of Counsel

For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka born in 1988. He appealed against a decision of the respondent made on 29 September 2017 to refuse his claim for asylum.
2. The basis of his claim is that in 2006 he was detained and tortured for several days because of his support, while a student, for the LTTE and that in 2014 the authorities, while looking for him, arrested and badly treated his father. As a result of his 2006 detention he developed PTSD and has

attempted suicide. The respondent, while he accepted the appellant showed support for the LTTE, did not believe he was detained.

3. The appeal history is that the case was originally heard and dismissed by Judge of the First-Tier Tribunal Graham ("the FTTJ"). However, having been granted permission to appeal, at a hearing in the Upper Tribunal before Deputy Upper Tribunal Judge Sheridan, the respondent accepted that there were errors of law both in the FTTJ's assessment of credibility and in her assessment of the medical evidence. As a result it was considered that the appeal would have to be heard *de novo*. It was remitted to another FTTJ.
4. Thus, the appeal came before FTTJ AK Hussain who, following the rehearing of the case at Birmingham on 19 December 2018, dismissed the appeal.
5. The appellant sought permission to appeal which was granted on 29 January 2019.

Error of law hearing

6. As the error of law hearing before me Mr Kandola agreed that the decision showed material error of law such that it must be heard once again. The problem is that the FTTJ adopted many of the findings of the original FTTJ for the reasons she gave, despite her decision having been set aside and it being directed that there be a *de novo* hearing.
7. In that regard the DUTJ had stated:-

"6. ... [HOPO] maintained that the judge's error in respect of assessing credibility was such that none of the factual findings could stand and there was no alternative to the matter being heard afresh.

8 In light of the position taken by [HOPO], I find that the decision cannot stand for the reasons he has given and find that the matter should be remitted to [FTT] to be heard afresh before a different judge."

8. However, as indicated, FTTJ Hussain proceeded to adopt many of the findings of the original FTTJ and her reasons for these findings. This was a material error given that the entirety of the decision was found to be infected by errors made in the credibility assessment such that the hearing was to be heard afresh *de novo*.
9. This was not a case of FTTJ Hussain making a simple reference to the decision (or the evidence given in that appeal) but clear adoption of findings of fact (and reasons for these findings) by the original FTTJ on matters which had been challenged to the UT.

10. The following are examples:

At [9] *“... I do not agree for the reasons given by [FTT] at paragraph 50 of her decision, that is, that it was unknown on which basis [appellant’s cousin’s] claim had been accepted ...”*

11. At [11] *“... I reject both these assertions for the same reasons as given by [FTT]. With regard to the arrest of his father in 2014 [FTT] deals with it in this way: ‘Even if I were to accept that the authorities arrested the father and ill-treated him during detention, I note that the father was a well-known LTTE supporter. Therefore, I cannot discount the possibility that the authorities were looking for the father not the appellant.’”*
12. At [12] *“With regard to [cousin’s] interrogation [FTT] dealt with this more comprehensively in paragraph 48 of her decision particularly from point (iv) onwards.”*
13. At [13] *“I therefore place little weight on the evidence of the appellant’s father and [cousin] ...”,* thus basing his conclusions squarely on the findings of the FTT which had been set aside.
14. At [14] *“I pause to add at this stage, as noted by [FTT], that neither the appellant nor [cousin] mention that [cousin], after fleeing Sri Lanka for Singapore in 2006 following his arrest, had returned, a matter of months later, and despite the claimed continuing interest from the authorities, managed to live there from 28 October 2006 until he left for the United Kingdom in 2010. It was his return from the United Kingdom in 2011 to visit his sick mother that precipitated his interrogation ...”*
15. At [15] *“The appellant also relies on the evidence of his mother, a Sri Lankan MP, the pastor at St Anthony’s Church and St Mary’s Boys’ Home. I place little weight on their evidence for the same reasons as [FTT] in the first part of paragraph 42 of her decision.”*
16. And at [16] *“This leaves the appellant’s evidence that he was of adverse interest to the authorities because he was a relative of the local LTTE commander ... I place little weight on this evidence for the same reasons as [FTT] in paragraph 41.”*
17. In **Ortega [2018] UKUT 298** the UT made the following comments on the issue of whether procedural error arose where a second tribunal hearing had relied on matters from the decision of a previous hearing which had been set aside and, it was claimed, the later judge had not treated the appeal as *de novo*:

“51. On examination, it did not appear to us that any of these references to the decision of the first hearing before the First-Tier Tribunal could be said to show that the hearing before Judge Jones

QC and the decision were not made de novo or that improper reference was made to the earlier decision. As above, a clear indication was given that the appeal was to be decided de novo. Nowhere do the grounds identify a finding from the earlier decision that was followed or adopted by the Judge here."

18. While in **Ortega** the UT concluded that the FTTJ had not fallen into error since he had not followed the earlier judge's findings or adopted them, the same cannot be said in the instant case where, as Mr Kandola agreed, the FTTJ clearly adopted and followed both the findings and the reasoning of the original FTT which had been set aside to be heard *de novo*.
19. I agree with both representatives that the approach adopted by FTTJ Hussain was procedurally unfair as the appellant was denied the benefit of a *de novo* hearing and a consideration of his appeal afresh, and was clearly in error since he adopted many of the findings of the previous judge for the reasons she gave which had all been set aside.
20. In light of these failures it was agreed that the case must be reheard once more.

Decision

21. The decision of the First-Tier Tribunal shows material error of law. It is set aside. The nature of the case is such that it is appropriate under section 12(2) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2 to remit to the First-Tier Tribunal for a fresh hearing on all issues. No findings stand. The members(s) of the First-Tier Tribunal chosen to consider the case are not to include Judge AK Hussain or Judge Graham.

An anonymity order is made. Unless and until a tribunal or court directs otherwise the appellant is granted anonymity. Failure to comply with this order could lead to contempt of court proceedings.

Signed

Date 26 April 2019

Upper Tribunal Judge Conway