Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01114/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd June 2019	**On 24th June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

MR M.K.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Solomon of Counsel
For the Respondent: Mr Tarlow, Senior Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction is made. As a protection claim, it is appropriate to do so.

DECISION AND REASONS

1. The Appellant, a citizen of Sri Lanka (born 25th March 1973), appeals with permission against the decision of the First-tier Tribunal (Judge Geraint Jones QC) promulgated on 15th March 2019 dismissing his appeal against

the Respondent's refusal of his protection claim and refusal of his Article 8 ECHR claim.

2. In summary the Appellant is a Sri Lankan of Tamil ethnicity. From to 2004 until 2007 the Appellant worked for the Danish demining group in Jaffna but was forced to leave his job when it became clear that he was wanted by the authorities. He had two older brothers and a younger brother, all of whom were LTTE combatants. His older brothers were killed in action in 2008 and the whereabouts of his younger brother is unknown. His mother and sisters are presumed to have died during the war.

3. The Appellant claims to have been detained by the Sri Lankan authorities for two years between May 2009 and March 2011. His claim is that he was tortured during that time and as a result of this he confessed to being a member of the LTTE. An uncle arranged his release from detention with the help of a politician and on payment of a bribe. After his release he left Vavuniya with the politician who acted as his agent and accompanied him to the UK.

Immigration History

4. The Appellant entered the UK in March 2011 and claimed asylum on 12th April 2011. His claim to asylum was refused by the Respondent and a subsequent appeal (the first appeal) came before Judge Geraint Jones QC. The appeal was dismissed but nevertheless the FtTJ made several findings including one that the Appellant had been taken to a camp based upon suspicion that he was an LTTE sympathiser and also that he may have been tortured there to procure a confession that he had been a member of the LTTE.

5. By the 28th September 2011 the Appellant became appeals rights exhausted. He did not leave the UK because further submissions were made on his behalf to the Respondent. These were initially refused but subsequently the Respondent agreed to issue a further decision in the Appellant's case. This resulted in the Respondent's decision of 22nd January 2019 refusing once again to grant the Appellant asylum or Human Rights protection (second appeal).

6. The appeal against the decision of 22nd January 2019 came before FtTJ Geraint Jones QC, who had been the judge who heard the first appeal.

7. The basis of the second appeal relied upon several grounds:

   - there was new evidence to show that the authorities in Sri Lanka had taken an interest in the Appellant's whereabouts after he had left the country
   - since arriving in the UK, he had engaged in diaspora activity
   - the Appellant suffered from and continues to suffer from mental health problems with a report dated 2012 from Dr Dhumad assessing the Appellant as a high suicide risk if removed

- the Appellant had now formed a relationship with a Miss J., a woman with refugee status. She and the Appellant met at a TGTE event at the end of 2016 and in January 2017 they undertook a cultural Hindu marriage ceremony

8. The Appellant did not give oral evidence at the second appeal hearing but Miss J. did. There was a large amount of documentary evidence placed before the FtTJ. This included the Appellant's written witness statement; an updated report of Dr Smith, a country expert attesting to whether records were kept of those who had escaped by payment of a bribe; an affidavit from the Appellant's uncle who remains in Sri Lanka and which refers to procuring the Appellant's release from detention by bribery; and supporting testimony that the Appellant's uncle had been harassed by the authorities. There was evidence of the Appellant's attendance at TGTE events. Additionally there was a large body of medical evidence supporting the Appellant's claim that he is at high risk of suicide if removed.

9. The FtTJ made several findings concluding that he did not accept the evidence of the Appellant's uncle, did not accept that the evidence of sur place activity was of a sufficient level to place the Appellant at risk, and that in any event it did not arise from genuine political motivation. So far as the Article 3 claim is concerned, the Judge concluded that it had no real prospect of success.

10. So far as the evidence of the Appellant's partner is concerned, the judge came to the conclusion that he was not satisfied that the Appellant and Miss J. were cohabiting in terms that would be akin to recognising them as a married couple. He dismissed the appeal on all grounds.

Onward Appeal

11. The grounds seeking permission are lengthy and make several criticisms of the judge's findings and decision. The grant succinctly sets out the issues before me and therefore the relevant parts of it are reproduced below:

> "2. The grounds assert that the Judge erred in failing to make a finding on whether the Appellant was a vulnerable witness; in rejecting the evidence which showed that the Appellant was of interest to the authorities; in making erroneous findings in relation to the Appellant's diaspora activities; in failing to address suicide risk and in relation to Article 8 failing to have regard to material evidence and erring in his consideration of whether Article 8 was engaged.
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> 3. It is arguable that the First-tier Tribunal Judge erred in failing to make a finding as to whether the Appellant was a vulnerable witness particularly given that this was highlighted in the skeleton argument. It is also arguable that he erred in the approach to the evidence of the Appellant in the manner set out in paragraphs 3 to 6 and paragraphs 7 to 13 of the grounds. Whilst the grounds in

> relation to Articles 3 and 8 are less arguable I do not refuse permission in light of **Safi and others (permission to appeal decisions)** [2018] UKUT 0388 (IAC)."

The Respondent did not serve a Rule 24 notice.

12. Thus the matter comes before me to decide whether the decision of the First-tier Tribunal discloses such material error of law that it requires it to be set aside and be remade.

Error of Law hearing

13. Before me Mr Solomon appeared for the Appellant and Mr Tarlow for the Respondent. Mr Solomon's submissions kept to the lines of the grounds seeking permission. He emphasised in particular that the greatest criticism of the decision centred on the fundamental error of the FtTJ's complete failure to address the central issue, namely what will happen to the Appellant at the airport if returned to Sri Lanka? Developing this theme Mr Solomon said that the Judge had sidelined the evidence from the Appellant's uncle which was cogent evidence that the authorities had an interest in the Appellant. The judge had failed to deal with the question of whether the Appellant's release from detention would be recorded as escape (by virtue of having been secured by a bribe) and thus he would be of interest on return. The Appellant had engaged in diaspora activities; the fact that they were of a low level would not be enough to allay the suspicions of the authorities on return. The Appellant would be questioned at Colombo airport and his profile would become known.

14. The next criticism that Mr Solomon put forward centred on the judge's treatment of the medical evidence. There were two strands of criticism. A large body of medical evidence spanning from 2012 -2019 had been placed before the judge. This showed that the Appellant is someone with significant mental health problems. The Appellant did not give oral evidence; he relied upon his witness statement. The skeleton argument put forward at the hearing said that the Appellant should be treated as a vulnerable witness. The judge appears to have completely ignored this aspect of the Appellant's claim. Nowhere does the judge turn his mind to, and make a record of, whether the Appellant is a vulnerable witness and its impact on the overall assessment of the Appellant's evidence.

15. Turning to the medical evidence itself, the Appellant's claim is that he is at risk of suicide if returned to Sri Lanka. There was cogent evidence available from Dr Dhumad who assessed the Appellant to be at high risk of suicide if removed. The judge had given no proper consideration to Dr Dhumad's report that the Appellant would not be fit for interviewing by the Sri Lankan authorities on return, and if so interviewed, it would create a state in him in which he would be unable to think sufficiently clearly to explain himself properly. This aspect of the Appellant's claim was backed up by the further report from the country expert, Dr Smith. He confirmed that all failed asylum seekers are interviewed by the Sri Lankan authorities

at Colombo airport and, if the Appellant is unable to respond to questions put to him by the authorities, it will arouse suspicion such as to create a real risk of a breach under Article 3. The judge has simply ignored this aspect of the claim. Altogether these are serious errors and the decision should be set aside and a fresh hearing ordered.

16. Mr Tarlow on behalf of the Respondent made no spirited defence of the decision. He confined his response to simply saying that the judge had given adequate reasons for his decision.

17. At the end of submissions, I announced my decision that I was satisfied that the decision of the FtTJ contained material error requiring the decision to be set aside and remade. I now give my reasons for this finding.

Consideration

18. I am satisfied that there is merit in all of the grounds argued by Mr Solomon. I am satisfied that a reading of the decision shows that the judge has simply not made any reference or finding on whether the Appellant was to be treated as a vulnerable witness. This is despite this matter being specifically raised in the skeleton argument before the judge. The absence of direct reference to this aspect of the claim may not in itself necessarily be fatal if it can be shown that the judge has adhered to the principles set out in the Joint Presidential Guidance for dealing with vulnerable witnesses. I find that in this appeal, the FtTJ has not done so. Nowhere is there any mention in the decision which would lead the reader to conclude that those principles have been followed.

19. I am further satisfied that the FtTJ has failed to properly consider the medical evidence before him. There was medical evidence spanning the period from 2012-2019. The FtTJ considers the Appellant's Article 3 claim at [50-54]. At [51] he states that it would be unrealistic to try to summarise the medical evidence. At [52] he states, "The appellant has sought to lay the ground for an Article 3 claim in his witness statement (undated) at B271-279, where, in paragraph 16, he, as I find, *self-servingly asserts that he is seriously thinking of ending his own life*" (my italics). So far as the Article 3 claim is concerned, the Judge concluded at [54] that it was "*very much a make-weight* (my italics) given that when viewed objectively, it never had, and does not have, any real prospect of success."

20. In my judgment to approach the medical evidence in this manner lends itself to the criticism that the judge has narrowed his view of the evidence without properly considering it as a whole. The medical evidence supported the Appellant's claim that he was suffering from severe depression and PTSD and has contemplated suicide. Indeed in 2012 Dr Dhumad had assessed the Appellant's suicide risk as "high" and then "very high" if he were told for certain that he would be returned to Sri Lanka. I find that such evidence cannot be dismissed as "self-serving". Nowhere do I find that the FtTJ has properly addressed the medical

evidence holistically. This I am satisfied renders the decision unsustainable.

21. I am reinforced in this finding in that the judge makes no reference in his analysis of the medical evidence to show that he has kept in mind a fundamental point of what was being argued before him which was whether or not there would be a risk to the Appellant if returned to the airport at Colombo, on the basis that he is someone who displays mental health problems. According to Dr Dhumad's opinion the Appellant would be extremely frightened if questioned by the authorities in Sri Lanka and this would create a psychological state in him in which he would be unable to think sufficiently clearly to explain himself properly. This evidence is central to the Appellant's claim and requires proper consideration. This I find the FtTJ has failed to do. These findings are sufficient to allow me to set aside the decision for material error.

22. I record that I am satisfied on a reading of the decision that I find that the FtTJ has not fully engaged with the evidence put forward on the Appellant's behalf and contained in his uncle's affidavit. Likewise I am satisfied on a reading of the decision that the FtTJ has overlooked material evidence when assessing the significance of the Appellant's diaspora activity.

23. So far as the Article 8 claim is concerned I am persuaded that there is material evidence which has not been addressed by the FtTJ. This is set out in paragraphs 18-20 of the grounds. I find therefore that the decision must be set aside in its entirety. The matter will need to be heard afresh. No findings are preserved.

24. I canvassed with the parties how the remaking of the decision should proceed. Both parties were firmly of the view that the matter should be to be remitted to the First-tier Tribunal. Mr Solomon's view was that fairness demanded it in view of the substantial fact-finding exercise which is necessary. I agree with those views.

Notice of Decision

The decision of the First-tier Tribunal promulgated on 15th March 2019 is hereby set aside for legal error. The matter is remitted to that Tribunal (not Judge Geraint Jones QC) for a fresh hearing.

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.

Signed C E Roberts Date 19 June 2019

Deputy Upper Tribunal Judge Roberts