Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02052/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 November 2019	**On 12 November 2019**

Before

HER HONOUR JUDGE STACEY
UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NK
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms R Bassi, Senior Home Office Presenting Officer
For the Respondent: Ms E Harris, Counsel, instructed by Nag Law 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 their 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. This is an appeal brought by the Secretary of State against the decision dated 1 May 2019 of First-tier Tribunal Judge Beg which allowed the appeal of NK on asylum and human rights grounds.

2. For the purposes of this decision we refer to NK as the appellant and to the Secretary of State for the Home Department as the respondent, reflecting their positions before the First-tier Tribunal.

3. The appellant is a citizen of Sri Lanka, born in 1973. He came to the UK in 2005 and claimed asylum. The respondent refused his asylum and human rights claim, the decision under challenge here being made on 26 February 2019.

4. In the decision of 26 February 2019 the respondent maintained that the appellant was excluded from the protection of the Refugee Convention under Article 1F(a).

5. Article 1F(a) of the Refugee Convention states:

> "The provisions of this Convention shall not apply to any person to whom there are serious reasons for considering that:
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> Article 1F(a) – he has committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes."

6. The respondent's case was that the appellant had committed acts coming under Article 1F(a) as he had identified suspected LTTE members for the Sri Lankan authorities, knowing that those identified were very likely to be tortured or extrajudicially killed.

7. The respondent also maintained that the appellant was not entitled to rely on the defence of duress. The relevant provision on duress is not found within the Refugee Convention itself but in Article 31 of the Rome Statute of the International Criminal Court. Article 31(d) provides that the defence of duress arises where:

> "The conduct which is alleged to constitute a crime within the jurisdiction of the court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be made by other persons or constituted by other circumstances beyond that person's control."

8. The respondent's position was that the appellant had assisted the authorities "by choice" and "had the opportunity to escape and dissociate yourself but you did not choose to do this at any point"; see paragraph 316 of the refusal decision dated 26 February 2019. It was uncontentious before us that if the appellant could make out the defence of duress that this would be a complete defence to the application of Article 1F(a); see paragraph 54 of AB (Article 1F(a) – defence - duress) Iran [2016] UKUT 00376(IAC)

9. Given her position on Article 1F(a) and the defence of duress not being available to the appellant, the respondent made a certificate under Section 55 of the Immigration, Asylum and Nationality Act 2006. That certificate required the First-tier Tribunal to begin any substantive deliberations on the asylum appeal by first considering Article 1F(a) and whether the appellant was excluded from the protection of the Refugee Convention.

10. Before the First-tier Tribunal, the respondent accepted that when assessing whether the appellant had the defence of duress the refusal letter had relied on an incorrect factual matrix. The appellant had not joined the Tamil National Army (TNA), a pro-government group. He had gone to them to seek protection from the LTTE but had then been handed over to the Sri Lankan Army (SLA). The SLA had tortured him, subjected him to sexual abuse and forced him to identify possible LTTE members. He had not worked as an interpreter for the SLA or identified LTTE members "by choice" and was not free to leave in a meaningful sense. This concession by the respondent is shown in paragraphs 30, 31 and 55 of the decision:

> "30. Mr Das-Gupta submitted on behalf of the respondent that he relied upon the decision letter dated 26 February 2019. He submitted that in respect of Article 1F there has to be mens rea. He said the respondent has not engaged with all the aspects of the appellant's claims. He submitted that he had read the psychiatric report and it should be given weight. He said the respondent accepts that the appellant suffered abuse. He said the respondent did not engage with the ramifications of that abuse.
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> 31. Mr Das-Gupta submitted that some individuals that the appellant pointed fingers at were innocent and the appellant accepts that. He submitted that the Home Office accepts that the appellant was held for seven years. In respect of Article 3, he submitted that the Home Office does not dispute that the appellant was tortured and suffered sexual abuse. He has PTSD. He said if he returns to a place where he suffered the abuse, his mental health is likely to deteriorate. He said the issue relating to Mr Perera falls away. He said the Home Office do not contest the documents the appellant has provided.
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> …
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> 50. Mr Das-Gupta on behalf of the respondent did not dispute the report of Dr Singh or indeed any of the medical evidence. He submitted that the

> respondent accepts that the appellant was tortured and sexually abused by the authorities in Sri Lanka. He also accepted in his submissions, that the appellant was detained by the Sri Lankan authorities for a period of seven years. Ms Harris in her skeleton argument at paragraph 37 states that following the decision in **JS**, the organisation under consideration is the Sri Lankan Army which is not a proscribed organisation. The appellant was never recruited by the Sri Lankan Army. He joined the TNA for his own protection but was handed over to the Sri Lankan Army where he was held as a prisoner for seven years."

11. Where the appellant's account was not materially challenged by the respondent, the First-tier Tribunal Judge went on to find that the appellant had committed acts capable of coming within Article 1F(a) of the Refugee Convention but that he was entitled to the defence of duress. Her consideration of whether the appellant was entitled to claim duress is at paragraphs 56 and 57:

> "56. Ms Harris accepts that the appellant was granted a degree of freedom during his captivity over seven years. However, at all times he remained a prisoner. I find that although the appellant was taken out on raids, he was aware that at all times he was under the control of the Sri Lankan Army. I find that the appellant's relative freedom was to enable him to assist the Sri Lankan Army by identifying LTTE members. I find that all the activities that he did, he was directed to do. I find that despite the appellant's torture and sexual abuse, he nonetheless remained with the Sri Lankan Army. I find that if the appellant considered that it was viable for him to escape without coming to further harm, he would have done so. I accept Ms Harris' submission that the appellant had the lowest position in the organisation and had no rank or influence of any kind.
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> 57. He did have knowledge of the Sri Lankan Army's activities, he was involved as an interpreter and as an identifier of LTTE carders. In light of the appellant's position as a prisoner under the direct control of the Sri Lankan Army, I find that the defence of duress is made out. Consequently, I find that the appellant does not fall within Article 1F of the Refugee Convention."

12. The respondent's challenge to the decision of the First-tier Tribunal concerns only the approach taken to the availability of the defence of duress. The respondent accepts that whilst he was detained by the SLA, the appellant was under "a threat of imminent death or of continuing or imminent serious bodily harm" and had acted "reasonably to avoid this threat". The respondent maintained that the First-tier Tribunal erred in law in not going on to assess the final limb of Article 31(d), the question of whether the appellant had the intent "to cause a greater harm than the one sought to be avoided".

13. We accepted that the decision of the First-tier Tribunal does not show that this part of the definition of duress was considered by the First-tier Tribunal. We did not find that this omission amounted to a material error on a point of law.

14. We drew further assistance from the case of AB. The head note of that case states:

> "1. In response to an allegation that a person should be excluded under Article 1F(a) of the Refugee Convention because there are serious reasons for considering that the person has committed a crime against peace, a war crime or a crime against humanity as defined in the Rome Statute, there is an initial evidential burden on an appellant to raise a ground for excluding criminal responsibility such as duress.
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> 2. The overall burden remains on the respondent to establish that there are serious reasons for considering that the appellant did not act under duress.

15. The Upper Tribunal elaborated on this principle in paragraph 62 of AB:

> "62. Having considered the matter in the light of the various authorities, textbooks and commentaries set out above, as explained, we propose to proceed upon the basis that Article 31 paragraph 1(d) of the ICC Statute makes available a defence of duress which the appellant is entitled to state in response to the Secretary of State's claim that there are serious reasons for considering that she has been guilty of crimes against humanity. We propose to proceed upon the view that an evidential burden is imposed on the appellant to raise the existence of circumstances such as would permit the defence to be given effect to, and that if that burden is met a persuasive onus shifts to the Secretary of State to establish that there are serious reasons for considering that the appellant did not act under duress. We would treat the phrase 'serious reasons for considering' in this context as having the same autonomous meaning as before. We consider that this approach is in line with the terms of the ICC Statute, with the views of the Commentators mentioned and with the interpretation of international criminal law by the United Nations Special Tribunal for East Timor, subject only to an adjustment on the approach to onus of proof."

16. We therefore asked ourselves this question: before the First-tier Tribunal, did the respondent identify evidence showing serious grounds for believing that the appellant intended to cause a greater harm than the one he sought to avoid? Our answer to this question was negative for the following reasons.

17. Firstly, it was undisputed before us that the appellant was tortured when he was passed to the SLA and during his seven year period being forced to work for them faced a threat of further torture. He also experienced sexual abuse – rape – continuously during that period, submitting only because he feared being subjected again to other forms of torture. It was also his evidence that if he left the SLA he faced the risk of being killed by them or LTTE; see paragraph 50 of the First-tier Tribunal decision. It was therefore our conclusion that he cannot be said to have intended to cause a greater harm than the one sought to be avoided. His intention was to avoid further acts of torture and sexual abuse being perpetrated against him. Furthermore we find that that the harm arising from the acts committed

by the appellant cannot be characterised as "greater" than that the appellant sought to avoid.

18. Further, Ms Bassi conceded that it was not the Secretary of State's position that even if the appellant did not fear extrajudicial killing but only torture and rape, that he could be expected to submit to or accept that treatment even if he knew that those he identified could well face not only torture but being killed. Ms Bassi accepted for the respondent that this was a "grotesque" or "abhorrent" premise on which she did not seek to rely.

19. For these reasons, therefore, we concluded that the omission of consideration of the final limb of Article 31(d) of the Rome Statute could not be material where nothing before the First-tier Tribunal permitted a finding that the appellant had the requisite intent to cause a greater harm than the one he sought to avoid.

20. For these reasons we do not find a material error of law in the decision of the First-tier Tribunal.

Notice of Decision

21. The decision of the First-tier Tribunal does not disclose a material error on a point of law and shall stand.

Signed: Date: 7 November 2019
Upper Tribunal Judge Pitt