



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/07346/2013

THE IMMIGRATION ACTS

Heard at Field House
On 17 December 2013

Determination Promulgated
On 24 March 2014

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

SUTHARMINI BALASUNTHARAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Pinder, Counsel, instructed by Patricks Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who was born on 17 March 1989, is a national of Sri Lanka. She originally entered this country on 8 April 2013, pursuant to entry clearance granted

to her on 16 March 2013 as a student. She claimed asylum on 20 June 2013, but was served with papers as an illegal entrant, the respondent having considered that she had entered using deception.

2. Following interviews, the respondent refused her claim for asylum and served removal directions on her.
3. The appellant appealed against these decisions and her appeal was heard before First-tier Tribunal Judge Oxlade, sitting at Hatton Cross on 3 September 2013. In a determination prepared on 20 September 2013 and promulgated shortly thereafter, Judge Oxlade dismissed the appellant's appeal.
4. The appellant now appeals against this decision, permission to appeal having been granted by First-tier Tribunal Judge J M Holmes on 17 October 2013.
5. The appellant's case is contained within the detailed grounds prepared by Iain Palmer of Counsel and submitted on her behalf and was succinctly but very ably argued before me at the hearing by Ms Pinder. It is not necessary for the purposes of this determination to set out these arguments in full, but I have had regard to everything which was said during the course of the hearing as well as to all the documents contained within the file when reaching my decision.
6. Among the grounds on which it is claimed that the First-tier Tribunal determination should be set aside is that there was a procedural irregularity, as will be discussed below. Judge Oxlade essentially rejected the appellant's claim on the basis of the adverse credibility findings which she made, but in the course of her determination, at paragraph 53, she stated, when dealing with some of the evidence adduced on behalf of the appellant, as follows:

“The appellant relies on evidence of torture from her captors, in the form of a medical report. It confirms the injuries that the appellant bears, and refers to them being consistent with history. However, it does not say when they were caused nor identify if they were caused by friend or foe. The location suggests that the appellant could not have self-harmed. It makes no comment about whether or not the injuries are consistent with the appellant's timeframe, nor specify the width of the possible timeframe. The medical evidence does not eliminate as a realistic possibility that these were caused in 2009 when the appellant was in the IDP or in a rehabilitation camp. He did not say why the injuries were considered to be so severe that they would not have been done with the appellant's permission. In short there is medical evidence of scarring consistent with the appellant's case, but there is room for other explanations, however unpalatable the implications of that may be.”

7. It is common ground that at no stage during the hearing before the First-tier Tribunal was it put to the appellant either in cross-examination or by the judge that the injuries might have been inflicted with the permission of the appellant, in order to bolster a subsequent asylum claim. It is submitted on her behalf that if such a serious allegation is to be considered, this should in fairness to the appellant have been

raised, in order to give the appellant an opportunity of dealing with this suggestion. As was noted by the Tribunal during the course of the hearing, at the very least if such a suggestion had been made, the appellant's Counsel would have had an opportunity of addressing such concerns as the judge might have had in this regard in his closing submissions. An obvious point which might have been considered by the judge, had this been canvassed, was whether if the injuries had indeed been inflicted with the consent of the appellant, she would have waited so long before making her asylum claim (the claim was not made until over two months after her arrival in this country).

8. Although there are other grounds upon which it is asserted that Judge Oxlade's decision should be set aside, for the reasons which follow, it is not necessary for me to address these grounds.
9. It is clear from the determination of the First-tier Tribunal that the appellant's credibility or, as the judge found, lack of credibility, was central to the decision. It is also clear that the judge gave less weight to the medical evidence which had been adduced because, as she has stated, the report did not express any view as to whether or not the injuries which the appellant had suffered could have been inflicted with her consent. In my judgment, if this was a concern which was held by the judge, in circumstances where this had not been raised by the respondent, this concern ought to have been raised at the hearing, so that at the very least the appellant's representative could have addressed such concern as the judge might have. Also, if need be, further medical evidence could have been obtained to deal with this possibility. I agree that there was a procedural unfairness in taking this point without giving the opportunity to the appellant to deal with it, if she could.
10. As the evidence needed to be dealt with in the round, before any credibility findings were made, and as the judge appears to have given less weight to the medical report than she otherwise would have because her concern, which had never been expressed, had not been dealt with within the medical report, this error was, in my judgment, material to the outcome of this appeal. Had the medical evidence been given greater weight, as it might have had the appellant been given an opportunity of addressing the concerns which the judge had, it cannot be said that the judge would have been bound to make the same findings. It follows that this determination must be set aside and the decision remade.
11. Before me, on behalf of the respondent, Mr Melvin accepted that if the Tribunal was to find that the determination contained an error of law such that the decision had to be remade, in the circumstances of this case it would be difficult for the respondent to argue that any part of the decision could be maintained. In my judgment Mr Melvin must be right, because the error identified above affected her consideration of credibility throughout.
12. Having had regard to paragraph 7 of the President's Practice Statement to the Immigration and Asylum Chamber of the Upper Tribunal, with regret I consider that the effect of the error contained within the determination as identified above was

such that the appellant was effectively deprived of a fair hearing, because the judge's consideration of the appellant's credibility was coloured by her failure to afford her an opportunity of dealing with her concerns as indicated above. I consider further that the nature and extent of the judicial fact-finding which will now be necessary in order for this decision to be remade is such that, having regard to the overriding objective, it is appropriate to remit the case to the First-tier Tribunal, and I shall so order.

Decision

I set aside the determination of First-tier Tribunal Judge Oxlade as containing a material error of law, and direct that this appeal now be remitted for a re-hearing by the First-tier Tribunal, sitting at Hatton Cross, to be put before any judge other than First-tier Tribunal Judge Oxlade.

Signed:

Date: 14 March 2014

Upper Tribunal Judge Craig