IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07831/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 February 2016	**On 5 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

NM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Benfield, Counsel instructed by Jeya & Co Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by [NM] against the decision by First-tier Tribunal K W Brown who heard her appeal on 10 November 2015 and in a Decision and Reasons promulgated on 23 November 2015 dismissed the appeal. The short background to the appeal is that the Appellant came to the United

Kingdom initially as a student on 19 October 2010 and extended her leave until 28 October 2014 when she made an asylum claim. The basis of her claim in essence was that she had been detained by the Sri Lankan authorities on account of her perceived political opinion in December 2009, during which time she had been ill-treated and subjected to rape. She feared if she returned she would again be arrested on suspicion of being an LTTE member and also be subjected to further ill-treatment. It was additionally the Appellant's case that, since 2011, she had participated in pro-Tamil activities in the United Kingdom, in particular, she was a member of the British Tamil Forum [BTF] and had undertaken work for the TGTE in Wembley.

2. The Respondent in refusing her application accepted that the Appellant had been arrested, detained and ill-treated in the way she describes in December 2009 but did not accept the entirety of her claim. The reasons provided by the judge for dismissing the Appellant's appeal were that although he accepted that the Appellant had suffered ill-treatment in the past and that she continues to suffer from depression and possibly PTSD, he found that she would not be at risk on return because of what had happened in the past and that her activities in the United Kingdom did not put her in a category of risk as set out in the country guidance decision of GJ, finding at [55]: "*I do not consider the Appellant's roles in the organisation she has mentioned to be significant when considering the risk that she faces upon return to Sri Lanka*". He also found in respect of the Appellant's mental health at [57] that treatment would be available in Sri Lanka to anyone capable of engaging mental health services.

3. An application for permission to appeal was made in time on 4 December 2015. The grounds of appeal in support of that application are dated 30 November. There are five grounds of appeal.

   (i) Ground 1 - the judge erred materially in failing to properly consider the Appellant's diaspora activities in relation to risk on return.

   (ii) Ground 2 – the judge erroneously failed to consider Article 3 and the risk of torture, inhuman and degrading treatment as a separate ground from the asylum claim.

   (iii) Ground 3 – the judge erred in failing to consider the principles in HJ (Iran).

   (iv) Ground 4 – the judge failed to consider the country guidance in GJ when considering Article 3 in respect of the Appellant's mental health.

   (v) Ground 5 – the judge failed to give any reasons for dismissing the appeal on the grounds of Article 8 of the European Convention on Human Rights.

Hearing

4. At the hearing before me, Ms Benfield made detailed submissions on the Appellant's behalf. In respect of ground 1 and the Appellant's diaspora activities she submitted that the judge had failed to engage or direct himself properly in respect of those activities and their significance and that his analysis at paragraph 55 was not sufficient. He had, in essence, conflated the various risk categories at 356 and 367 of the country guidance decision of GJ whereas in fact neither the Upper Tribunal nor the Court of Appeal had set out any express test as to what would be significant in diaspora activities and found that fact-sensitive enquiries must be made. She drew my attention to the skeleton argument before the First-tier Tribunal Judge which had set out in detail the level and extent of the Appellant's diaspora activities over a substantial period of time in the United Kingdom. She submitted that both the BTF and TFTE were proscribed by the Sri Lankan Government and the judge was made aware of this point but had not taken it into account in assessing whether or not the Sri Lankan Government would be aware of the Appellant's involvement with those organisations in the United Kingdom.

5. She also drew my attention to the grant of permission by the Right Hon Lord Justice Briggs in the case of UB (Sri Lanka) on 29 June 2015 where permission was granted on the same issue i.e. that the evidence about the proscription of the TGTA had not been before the First-tier Tribunal or the Upper Tribunal which had led those Tribunals to proceeding upon the basis of a mistake of fact which might have made a material difference to the outcome of the appeal. Ms Benfield informed me that she was not aware of a judgment or a consent order in respect of this case to date.

6. In respect of the second ground, this concerned a failure by the judge to engage with the risk of ill-treatment on return in light of the country guidance and it was Ms Benfield's contention that this was a separate ground of appeal based on the fact that the Appellant is an accepted victim of rape by the Sri Lankan authorities. The Appellant was particularly vulnerable to detention because of her fear as to a repetition of that treatment upon facing the Sri Lankan authorities on return to Sri Lanka.

7. Ground 3 in respect of the HJ (Iran) and RT (Zimbabwe) principles states simply that it was clear the Appellant would not be able to express her political opinion in Sri Lanka given the context for Tamil people there.

8. Grounds 4 and 5 were both concerned with the judge's assessment of the Appellant's mental health and Ms Benfield submitted that the Upper Tribunal found in both MP and GJ that it was possible to succeed on mental health grounds and this was drawn to the judge's attention at paragraph 31 of the skeleton argument. The judge had erred in failing to consider the diagnosis, the prognosis and the treatment requirements and had erred in simply addressing the decision of the House of Lords in N [2005] UKHL 31 without going any further.

9. Similarly, in respect of the Appellant's physical and moral integrity, it was submitted that the judge did not go far enough in giving reasons as to why the appeal should not succeed given the Appellant's particular history and it was clear that she was at risk of suicide and that her mental health would deteriorate if she were to be removed to Sri Lanka.

10. Mr Wilding in helpful submissions defended the judge's decision and stated that it was open to the judge to conclude that the Appellant was no more than a face in the crowd. The Judge did not ignore her involvement with NGOs but did not agree that this would put her in a category of risk and his finding was adequate and sustainable in this respect. He submitted in respect of ground 2 that there was no causal link in respect of the Appellant's mental health condition invariably leading to her detention. Similarly, in respect of ground 3, he submitted that this is inextricably linked to ground 1 so unless that succeeds then HJ (Iran) does not bite. In respect of grounds 4 and 5 Mr Wilding submitted that the judge clearly considered the Appellant's mental health with respect to Articles 3 and 8 of the Human Rights Convention and he submitted that whilst in GJ the Tribunal looked at the issue of mental health in respect of one of the Appellants, it was quite clear from 456 that they allowed that appeal on the facts of the case and were not in fact giving country guidance on the issue of mental health and Sri Lanka. He submitted that the judge had considered the medical evidence and came to the conclusion which was sustainable that there would be no breach of Article 3 by removal of the Appellant nor of Article 8 of the Human Rights Convention.

Decision and reasons

11. I find, for the reasons set out in the grounds of appeal that the judge did err materially in law. It is clear from the Appellant's bundle of evidence and from the skeleton argument that there was substantial evidence of her involvement with proscribed organisations in the United Kingdom and that this arguably would put her at risk on return for the reasons set out in the country guidance decisions of GJ, MP and NT. I find that the judge's consideration of this aspect of the Appellant's claim was insufficient at [55] in simply stating that he does not consider that the Appellant's roles in the organisation she has mentioned are significant when considering the risk she faces upon return and in describing her simply as just "a face in the crowd." I find that being the case and that an error has been established in respect of the judge's analysis of the Appellant's activities in the United Kingdom, then it is also the case that ground 3 is made out in that it would not be possible for the Appellant to continue that political involvement and express her political opinion if she were to be returned to Sri Lanka.

12. I also find that there is a material error of law in the manner in which the judge addressed Article 3 of the European Convention on Human Rights. As ground 2 submits, there is no separate consideration of the impact upon the Appellant of being detained given her particular history of ill-

treatment by the Sri Lankan authorities and I find that the judge further erred in respect of his analysis of the application of Article 3 given the Appellant's mental health issues and that the same applied in respect of Article 8 of the Human Rights Convention in terms of the Appellant's physical and moral integrity.

13. I accept the submission of Ms Benfield that it is possible in the light of GJ to succeed on the basis of mental health and therefore the errors by the judge in that respect are material.

Notice of Decision

14. The appeal is allowed to the extent that it is remitted for re-hearing by a First-tier Tribunal Judge other than First-tier Tribunal Judge K W Brown

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.

Signed Date: 16 March 2016

Deputy Upper Tribunal Judge Chapman

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date: 16 March 2016

Deputy Upper Tribunal Judge Chapman