



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

Appeal Number: PA/04199/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 27 February 2018**

**Decision & Reasons  
Promulgated  
On 26 March 2018**

**Before**

**DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**O A H H M  
(ANONYMITY DIRECTION CONTINUED)**

Respondent

**Representation:**

For the Appellant: Mr P Nath, Home Office Presenting Officer

For the Respondent: Ms D Revell, Counsel instructed by MTC & Co Solicitors

**DECISION AND REASONS**

1. The respondent (hereinafter “the claimant”) is a national of Sri Lanka. Following the appellant’s (hereinafter “the Secretary of State” or “SSHD”) decision dated 22 April 2016 refusing her claim for asylum the appellant’s appeal came before First-tier Tribunal (FtT) Judge Birk. In a decision posted on 23 August 2017 the judge allowed her appeal on asylum and human rights grounds. She was satisfied that the appellant had given a credible account of facing risk on return arising from the fact that she had fled Sri Lanka in 2011 having been released from detention

during which she was accused of assisting a key member of the LTTE intelligence wing.

2. The SSHD's grounds of appeal essentially submit that the judge failed to conduct an "in the round" assessment of credibility and effectively failed to weigh in the balance against the appellant several adverse findings she herself made regarding (i) discrepancies between the sponsor and the witness' evidence and the seeming failure to act upon a reconsideration for further treatment by a therapist; (ii) inconsistencies in the appellant's evidence as to continuing interest in her after leaving Sri Lanka; (iii) the implausibility of the appellant's reason for her delay in claiming asylum. Mr Nath argued that the judge's statement at paragraph 21 that "I make a very mixed assessment of the Appellant's credibility" was symptomatic of a failure to weigh negative findings in the balance.
3. As I stated to the parties, I see nothing wrong in principle with a judge recording that he or she makes mixed findings on credibility. That is part and parcel of many judicial assessments – some aspects are accepted but others are rejected. However, I consider Mr Nath is entirely right to assert that a rational assessment of credibility in a case in which mixed findings of fact are made requires the judge to explain or convey why it was concluded that the appellant's core account is credible. In the case of this judge's decision there are two main problems.
4. First, in relation to one of the judge's positive finding that was highly material to the outcome, does not reflect a proper understanding of the fact that the burden of proof rested on the appellant and that s/he could only be relieved from the duty to substantiate relevant elements of his/her application in limited circumstances as set out in Article 4(5) of the Qualification Directive. This problem arises in acute form at paragraphs 24 and 25 where the judge wrote:
  - "24. The Appellant has provided no medical evidence of the mistreatment that she claims to have suffered whilst detained. She only attended her GP on 26.10.15 which was shortly before making her application for asylum to report that she was suffering from anxiety and stress which she reports started from episode of sexual harassment some years previous but which was not ongoing. There is a letter from her psychological wellbeing practitioner dated 5.1.16 which states that she will be referred onto a high intensity therapist but there is nothing forthcoming that was presented to me.
  25. However, I find that she gave a clear account of the physical mistreatment whilst she was detained. Also in view of the beatings and rapes in 2011 and the lack of injuries save for swelling at the time, I find that it would be difficult to provide medical evidence now in support and so I find that the lack of evidence does not detract from the credibility of the Appellant's account."
5. Whilst it might have been open to the judge to rely on the fact that a medical report in 2017 regarding alleged beatings and rape in 2011 would

have limited value, it was incumbent on the judge to examine why the appellant had failed to get a medical report in 2011 when she arrived in the UK and her claimed injuries would still have been visible. Article 4(5) states that:

- “5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant’s statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:
- (a) the applicant has made a genuine effort to substantiate his application;
  - (b) all relevant elements, at the applicant’s disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
  - (c) the applicant’s statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant’s case;
  - (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
  - (e) the general credibility of the applicant has been established.”

6. There is nothing to suggest that the judge asked whether the claimant had made a genuine effort to substantiate her claim to ill-treatment or that she had given a satisfactory explanation for not seeking a medical report in 2011.
7. Further, on the judge’s own findings, the claimant had not shown good reason for applying for asylum at the earliest possible time. In such circumstances, the judge’s reasons fail to explain why the claimant was excused the need for confirmation.
8. This problem coalesces with the judge’s problematic treatment of aspects of the claimant’s account which were not accepted. Separately from the issue of confirmation of her account, the judge’s own finding was that “her considerable delay in claiming asylum does undermine her generally credibility“. Yet nowhere in the decision does the judge explain why she nevertheless accepted that the claimant’s core account was credible.
9. Of particular concern also is the judge’s treatment of the claimant’s evidence regarding continuing interest in her since departure from Sri Lanka. At paragraphs 29-30 she writes:

“29. She states that she last contacted her family in Sri Lanka in 2015. She says that they reported that the CID were still asking about her whereabouts and to be informed if she returned. I find that

she has been inconsistent in her account as to the frequency of their visits. She stated in interview that it was many times (q.34) and then she stated that it was from time to time (q.133) and in her statement at paragraph 11 she states that it was occasionally. In interview (q.139-148) she talks about calls from unknown people asking about her. She said that her father said it was often but not how often. She goes onto say that the calls were from time to time and then when why were looking for her the calls came often. They were from different people and she thinks it was the CID. She did not know why if they were the CID they did not identify themselves.

30. I find that the evidence about the adverse interest in her in terms of the frequency of visits did vary and was inconsistent on her account. However, overall I find that she gave an account of adverse interest in her subsequent to her leaving and that the reason why she is no longer in contact with her parents is because she was concerned about the phone being tapped.”
10. It is hard to follow the logic of the reason given in paragraph 30 for deciding to disregard the claimant’s significant inconsistencies. That the judge did disregard it entirely is clear from subsequent paragraphs – e.g. at 33 she relies as one of the main reasons for allowing the appeal the fact of “persistent adverse interest in her by the CID”. The judge’s use of the word “persistent” might suggest that what was relying on was that frequent or occasional the CID visits were persistent, but if so that would still leave the problem of explaining why the inconsistencies did not undermine the claim to there being any visits or adverse interest in the first place. The only reasons advised by the judge in paragraph 30 are (a) that she gave an account of adverse interest; and (b) the reason why she was no longer in contact with her parents was because she was concerned about the phone being tapped. As regards (a) giving an account cannot be equated with a credible account. As regards (b), the evidence the claimant gave about continuing adverse interest related to her last contact with her family in 2015. What contact she had had since - or rather the reason for non-contact after that - had no obvious bearing on the truth or otherwise of her claim about the 2015 contact. Upon analysis the judge’s treatment of this issue lacks any coherent or intelligible reasoning.

### **Notice of Decision**

11. For the above reasons I consider that the judge’s reasons for accepting the claimant’s core account as credible are legally flawed. They lack coherence and although she states at para 19 that she “considered all the evidence in the round”, her decision fails to explain why the positive findings were considered to outweigh the negative findings. The Upper Tribunal will not lightly interfere with a judge’s findings on credibility but in the circumstances of this decision the nature of the errors in this case leave me no alternative.
12. To conclude:

The judge's decision is set aside for material error of law.

In the nature of the judge's errors, the case needs to be remitted to the FtT, to be dealt with by a judge other than Judge Birk.

**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 her or any member of her 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: 22 March 2018

A handwritten signature in black ink that reads "H H Storey". The signature is written in a cursive style with a large, looped 'S' at the end.

Dr H H Storey  
Judge of the Upper Tribunal