



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

Appeal Number: PA/07778/2019

**THE IMMIGRATION ACTS**

**Heard at North Shields  
On 11<sup>th</sup> December 2019**

**Decision & Reasons Promulgated  
On 19<sup>th</sup> December 2019**

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**NW  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Akram of Counsel

For the Respondent: Ms Petterson, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Sri Lanka.
2. **Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008**  
**Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity as this is a protection appeal. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent.**

- 3.** The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who, in a determination promulgated on the 19<sup>th</sup> September 2019, dismissed his appeal against the decision of the Respondent made on the 1st August 2019 to refuse his protection and human rights claim.
- 4.** Permission to appeal was granted by First-tier Tribunal Judge Froom on the 17 October 2019.
- 5.** The background to the appeal is set out in the decision letter and the determination at paragraphs 1- 3 and at 10-13. It can be summarised as follows. The Appellant entered the United Kingdom on the 30<sup>th</sup> June 2018 with leave as a visitor and he claimed asylum on the 31<sup>st</sup> July 2018. The basis of his claim was that he had been in the Sri Lankan army and been serving under a particular individual. In the year 2000 he started a business hiring out vehicles. That individual had come to the appellant with security personnel to use one of his hire vehicles. The man's assistant gave a bag of guns to motorcyclists and that later the appellant heard shots. The appellant later learned that a journalist been murdered, and the appellant was called to the FC ID as it was considered that he was involved. He was later called in by them again and was threatened to tell the truth about the incident. He was later arrested in February 2018 and asked to give a statement about the incident but refused to do so. He was then released, and then rearrested in June 2018 for a prolonged period where he was beaten so as to give a statement. He later escaped with the assistance of one of the guards. He left Sri Lanka in June. Following his departure, it was stated that his wife had received threats from unknown people believed to be related to the military.
- 6.** His protection and human rights claim was refused in a decision dated 1st August 2019. The protection claim was addressed at paragraphs 22-51 with the respondent rejecting the appellant's claim that he had been arrested, detained or had suffered any injuries and raise credibility issues concerning the documentary evidence provided and surrounding his claim of being forced to give evidence.
- 7.** The Appellant sought permission to appeal and the appeal came before the First-tier Tribunal on the 16 September 2019. In a determination promulgated on the 19 September 2019 the Judge dismissed his protection appeal and the appeal under the Immigration Rules and on human rights grounds.
- 8.** Grounds of appeal were submitted on behalf of the appellant which principally challenge the FtTJ's assessment of the claim and that the judge devoted a large part of the decision to considering whether the appellant should have been excluded from refugee status by virtue of Article 1F of the Convention. This was not an issue either raised in the decision letter or by the respondent at any stage nor were the parties alerted to this. The concern for the appellant was that he had not had a fair hearing and when considering the conclusions reached, the judge noted that the appellant's claim did not engage the Refugee Convention at [42] but this is because in

the view of the FtTJ that he had already been excluded from it. Further concerns were raised in the grounds concerning the view taken of the appellants claim by the FtTJ noting that his “actions over the years have been reprehensible” at [41], and that the events in Sri Lanka were as a result of his “past catching up with him.”

- 9.** Before the Upper Tribunal, the advocates agreed that the decision of the FtTJ involved the making of an error on a point of law. Ms Petterson, in her submissions noted that the FtTJ at paragraphs 27-29 addressed the issue of Article 1F without this being raised as an issue by the respondent and without notifying the parties and that whilst the FtTJ stated that he would “not dwell on it further” (at [29]), nonetheless returned to this issue at [41]. It was therefore a material error of law which had the effect of undermining the overall decision reached.
- 10.** Even if that concession had not been made, I am satisfied that the grounds are made out.
- 11.** It is plain for the decision letter that no issues had been raised in respect of Article 1F nor had it been raised with the parties. At [27] the FtTJ makes reference to this as a “potential issue in this appeal” and from paragraph 27 onwards went on to assess part of his factual account as one which supported his exclusion on Article 1F grounds, and the appearance is given at [27] that the appellant was complicit in a murder. The FtTJ then went on to set out the UNHCR guidelines relating to Article 1F. As Mr Akram submitted, given that this was an issue not raised by any of the parties that was a material error of law which went to the fairness of the proceedings. He further submitted that this had the effect of “prejudicing “the mind of the FtTJ and that it was unclear why such a large part of the decision was dedicated to this area and that the descriptions used by the FTT J had tainted the overall assessment of the appellant’s case.
- 12.** It is correct that the FtTJ after setting out the issue of Article 1F then stated at [29] that as the burden of proof was on the respondent “I will not dwell further on that matter in the course of the proceedings”. The FtTJ then related his surprise that the respondent had not mentioned consideration of this point in the refusal letter. However, as Mr Akram pointed out, the FtTJ did dwell further on this point and returned to it at [41] reaching another finding that the appellant’s actions had at best been “reprehensible.”
- 13.** I accept the submission made by Mr Akram that in the conclusion reached at [42] that the appellant’s claim did not engage the Refugee Convention, the FtTJ had reached that conclusion on the basis that he was excluded from it by reason of the assessment of the factual account and that the decision had been materially affected by consideration of the Article 1F issue. If the FtTJ had any concerns as to the factual basis, it would have been incumbent on the FtTJ to at least raise this with the parties but did not do so and this was therefore procedurally unfair to the appellant who did not have the opportunity to make any challenge to it.

- 14.** For those reasons I am satisfied that the decision involved the making of an error on a point of law and therefore the decision reached cannot stand and shall be set aside.
- 15.** The issue relates to what, if any, findings of fact can be preserved from the decision of the FtTJ. Mr Akram relies upon the grounds of permission at paragraph 5 where it is stated that the FtTJ accepted everything that happened but had allowed the appellant's purported complicity to affect the assessment of risk on return. When he was asked to identify what factual findings had been made by the FtTJ, he could only point to paragraph 36 where the FtTJ accepted that he had been in the army and had a business providing vehicles and at paragraph 37 where the FtTJ considered it was credible that the FCT would investigate the murder of the journalist. Beyond that, he accepted that there was difficulty in distilling the findings of fact made by the judge in the light of the overall conclusions reached which had related to the issue of Article1F and his complicity in crimes.
- 16.** Ms Petterson on behalf of the respondent submitted that the only factual finding that could properly be preserved was that at paragraph 36 and that the finding at paragraph 37 was partially inconsistent with the appellant's own case.
- 17.** I have carefully considered those submissions and in doing so I have reached the conclusion that the only finding of fact that could properly be preserved from this decision is that at paragraph 36. Whilst the grounds to assert that the FtTJ accepted the appellant's account, on closer inspection that is not position and when reading the decision in my judgement it is difficult to discern what findings of fact the judge made on the relevant factual issues including events in Sri Lanka and also those which went to the issue of risk on return. By way of example, the appellant's account was that he was arrested and detained and suffered ill-treatment which formed part of the factual account. The FtTJ recited this account at paragraph 33 - 35 but made no findings of fact on this issue or on the evidence in support (the documentary evidence of injuries). The appellant's account was also that the appellant's wife had received threats from the military and the appellant provided documentary evidence including an extract from the police station and also that after the report that his wife had moved home. There were no findings made on that part of his account.
- 18.** The thrust of the grounds relate to the FtTJ's consideration of Article1F, which had not been raised by the respondent or raised with the advocates and that the judge had dedicated a large part of the decision to this. The concern being raised was that the appellant did not have a fair hearing. Mr Akram pointed to parts of the decision where the appellant was referred to "having blood on his hands" at [27] and his "reprehensible actions" [41]. Given the nature of the error, in my judgement it has affected the whole of the assessment of the appellant's claim as it has been considered on a wholly erroneous basis and consequently it is not possible to properly

discern what factual findings the judge made, what was accepted and importantly the basis upon which it was accepted.

**19.** I have therefore reached the conclusion that beyond paragraph 36 there are no other factual findings that can be preserved. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

**20.** As it will be necessary for the appellant to give evidence and to deal with the evidential issues, further fact-finding will be necessary alongside the analysis of risk on return in the light of the relevant country guidance and in my judgement the best course and consistent with the overriding objective is for it to be remitted to the FtT for a further hearing.

Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law, the decision to dismiss the appeal is set aside and shall be remitted to the First-tier Tribunal for a rehearing. The only preserved finding is that at paragraph 36.

Signed

Date: 12 December 2019

Upper Tribunal Judge Reeds

Upper Tribunal Judge Reeds