Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00732/2020

THE IMMIGRATION ACTS

Heard at Manchester via Skype	**Decision & Reasons Promulgated**
On 21 October 2020	**On 17 November 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MSHM
(Anonymity direction made)

Respondent

Representation:
For the Appellant: Mr Tan, Senior Home Office Presenting Officer.
For the Respondent: Mr Thompson, instructed by L&L Law Solicitors.

ERROR OF LAW FINDING AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Maka ('the Judge') promulgated on the 10 March 2020 in which the Judge allowed the appeal under the Refugee Convention and Articles 2 and 3 ECHR.
2. Permission to appeal was considered by another judge of the First-tier Tribunal who in the section of the notice appearing above the bold line,

below which the reasons for the decision are given, writes "Permission to Appeal is GRANTED".

3. In the section below the bold line headed **REASONS FOR DECISION (including any decision on extending time)** the judge granting permission writes:

> "1. The application is in time.
>
> 2. The grounds argue that the Judge erred in the assessment of risk against the adverse credibility of the Appellant. The decision was inadequately reasoned, evidence that should have been provided (such as documentation and the Appellants claimed prescription) were missing.
>
> 3. Given the time available to prepare the appeal given the period since the previous appeal it is not clear why the arrest warrant would not have been produced or why the Appellant and his representative had not sorted the issue out. It is not clear where the misunderstanding lay. The observation in the decision that it was not clear what the previous judge had decided does not sit with those parts of the previous decision referred to in the Refusal Letter. The complaint that the decision is adequately reasoned is arguable.
>
> 4. The grounds disclose no arguable errors of law and permission to appeal is refused."

4. Mr Thompson raised as a preliminary point that the grant of permission should be struck out on the basis there had been some procedural irregularity pursuant to rule 43(2)(d) Upper Tribunal Procedure Rules on the basis it is claimed the grant of permission is ambiguous and lacks the required degree of clarity.
5. Mr Thompson also refers to the Joint Presidential Guidance No.1 Permission to Appeal to UTIAC which states at [46] that if permission to appeal is granted the reasons for doing so must be clear.
6. The answer to this point can be found in Isufaj (PTA decisions/reasons; EEA reg. 37 appeals) [2019] UKUT 283 (IAC) the first headnote of which reads: "*(1) Judges deciding applications for permission to appeal should ensure that, as a general matter, there is no apparent contradiction between the decision on the application and what is said in the "reasons for decision" section of the document that records the decision and the reasons for it. As was said in Safi and others (permission to appeal decisions) [2018] UKUT 388 (IAC), a decision on a permission application must be capable of being understood by the Tribunal's administrative staff, the parties and by the court or tribunal to which the appeal lies. In the event of such an apparent contradiction or other uncertainty, the parties can expect the Upper Tribunal to treat the decision as the crucial element.*"
7. The 'decision' recorded by the judge considering the permission application is that permission to appeal is granted. Whilst [4] does create some ambiguity [3] does not and clearly sets out the reasons why the judge granted permission to appeal.
8. For this reason, Mr Thompson's submission was rejected.

Error of law

9. The appellant is a citizen of Sri Lanka born on 4 October 1991 who entered the United Kingdom lawfully as a student on 28 March 2010 with leave valid to 11 June 2011, which was extended so as to expire on the 25 August 2014.
10. Following the revocation of the licence of the college where MSHM was purporting studying his leave was curtailed on 22 November 2012 with no right of appeal.
11. On 10 January 2013 MSHM requested an appointment with the Asylum Screening Unit in Croydon and made a formal claim for international protection when he attended the appointment on 21 January 2013.
12. The Secretary of State refused his application against which the MSHM appealed. That appeal came before First-tier Tribunal Judge Lingard who in a decision dated 21 February 2013 dismissed the appeal on both protection and human rights grounds. Unsuccessful applications for permission to appeal were made resulting in MSHM becoming 'appeal rights exhausted' on 5 March 2013.
13. Further submissions made on 15 August 2019 were refused on 10 January 2020. It is the appeal against that refusal which came before the Judge
14. Mr Tan's first submission is that although the Judge purported to consider the previous decision carefully from [36] of the decision under challenge what was said by the Judge at [38] is at odds with the previous decision and subsequent refusal of permission to appeal to the Upper Tribunal in that case.
15. At [38] the Judge writes:

> "38. It is not my role to definitively dissect the previous determination nor do I seek to do this. There is however, with respect to the Judge, no definite findings, one way or another, on the Appellant's account, its plausibility and whether that account is accepted or rejected and why. Given these concerns, while I accept the previous determination is the starting point and its findings definitive, I am satisfied that there are issues, besides the 2005 Rules, which I find, allow me to depart from some of the findings of the previous First-tier Tribunal. In particular, the risk factors as they now apply are relevant and the medical evidence, psychiatric report and the fact-finding report are all relevant to the issue of risk on return for this Appellant now."

16. The previous decision was challenging by an application for permission to appeal on the basis the appellant claimed Judge Lingard had not given the claim the required degree of anxious scrutiny and that the findings were flawed. The Designated Judge refusing permission found Judge Lingard set out clearly a number of evidential reasons why she found MSHM's account lacked credibility and that it was a careful determination in which Judge Lingard gave anxious scrutiny to the claim.
17. The existence of clear and understandable findings is also evidenced by the Secretary of States reasons for dismissing the current claim where there is a specific reference to the decision of Judge Lingard and pertinent findings made therein at [15] of the reasons for refusal letter.

18. At [16 -19] of the refusal letter is written:

> "16. The Immigration Judge found you to be incredible and stated that he could not discount that you had concocted a simple story and committed it to memory for the sole purpose of trying to obtain asylum in the UK.
>
> 17. The Judge did not accept that the Sri Lankan authorities would wait three years to issue an arrest warrant for an individual who, bailed by a court, had not adhered to his reporting restrictions. He also noted that no evidence was received to support your claims of medical treatment and diagnosis in Sri Lanka following your alleged ill-treatment, and no arrest warrant has been provided or any court documents relating to your bail. It is of note that despite you being aware of this lack of documentary evidence since your appeal on 21/02/2013 none of the aforementioned evidence has ever been produced.
>
> 18. The Immigration Judge found you inconsistent in several parts of your evidence including your alleged treatment during your detention, your subsequent injuries, your fathers and uncles supposed arrest and the advice you claim to have received regarding claiming asylum, again despite being aware of these inconsistencies since your appeal in 2013 no explanation has been given for these discrepancies.
>
> 19. The Judge concluded that the risk you faced by returning to Sri Lanka was that of having made an asylum claim abroad."

19. There is arguable merit in Mr Tan's submission that the Judge failed to consider the earlier decision with the required degree of anxious scrutiny as the Judge was required to in accordance with the Devaseelan principles. The Devaseelan principles do not prevent another judge from making a decision that is different to that previously considered if the evidence warrants such a finding, but there is merit in the submission that the Judge's incorrect understanding of the earlier decision formed part of the belief by the Judge that he was able to depart from the earlier findings or not give them appropriate weight.
20. Mr Tan also refers to the Judge's finding at [39] where it is written:

> "39. I consider the Appellant's detention. It is the Appellant's case he was detained in 2009 and was ill-treated for about 5 days. It transpired the Appellant also stated he was sexually abused whilst in detention. This was not mentioned previously. In oral evidence the Appellant said he did not want to mention it to his own Solicitor, who was female, and he was embarrassed and ashamed by it. I was not provided with the asylum interview but accept it was not mentioned. I also accept it was not mentioned before the previous Immigration Judge. I note it was mentioned in the fresh representations but not dealt with specifically in the refusal letter."

Mr Tan criticises the Judge for not engaging with MSHM's explanation especially as at the previous hearing MSHM was represented by a male advocate from his previous solicitors, Liyon Legal Limited, which it was

said undermined his claimed reason he was unable to disclose any sexual assault was as a result of his having a female solicitor.

21. Mr Tan also referred to [41] in which the Judge finds:

> "41. In the objective context, I note the fact-finding report states at 6.1.5 that there is torture in police detention and that this is random, widespread and across the board. There was a perception 'without assault you won't get the truth'. I note the previous Judge noted some discrepancies in the account of ill treatment (see paragraph 49). I was not provided with the interview from which these discrepancies were taken. Notwithstanding this, I am satisfied having regard to the psychiatric evidence before me, the fact-finding report and the Appellant's oral evidence on this, I accept he was sexually ill-treated in Sri Lanka by the authorities at the time."

22. The Judge is criticised on the basis the information in the 2020 fact-finding report was available to the Judge in the 2013 country guidance case and prior. The Secretary of State asserts the Judge failed to give adequate reasons for why it was accepted that evidence had established a claim to the required lower standard especially in light of the lack of material evidence and what is said to be the bare acceptance of the core aspects of MSHM's claim without adequate reasoning or justification.
23. Even though there is reference in the country material to ill-treatment by some members of the security forces in Sri Lanka, the Judge was still required to consider the subjective assertion made by MSHM and give adequate reasons as to why it was found weight could be placed upon that which, when combined with the country evidence, established that the required lower standard of proof had been discharged.
24. A similar argument arises in relation to the report of Dr Dhumad, which covered some but not all matters to which the Judge appears to accept as being determinative of the issue. There is merit in the submission that there was no cross-referencing in the report to the previous judicial findings and how that would impact upon MSHM's account and diagnosis based upon the same.
25. The original judge commented upon the lack of evidence which had still not been provided before the Judge, which is the basis for the assertion that ample time had been allowed to provide the same which had not been provided.
26. The Judge is also criticised for finding at [44]:

> "44. I note the Appellant has not produced the arrest warrant or documents that he wanted to produce previously. In oral evidence, he said he believed it was before the Court as it had been handed in previously by his last solicitor. His current solicitor was not aware of this. I accept this was a genuine misunderstanding by the Appellant and do not hold this against him."

27. There was no evidence before the Judge other than MSHM's contention that the document had been handed in and it is not mentioned in the decision that the document was in the Court file. The Judge appears to

have failed to contemplate another plausible explanation of the reason such documents had not been provided, which was that they did not exist. The Secretary of State's criticism is that the Judge made a concession to the relevant evidential requirements rarely afforded to the Home Office without giving adequate reasons or an explanation for why that concession was given. I find there is arguable merit in the Secretary States concerns that raise the issue of the Judge's failing to consider the evidence properly and making finding without having properly considered the matter in sufficient detail and that are not supported by adequate reasons. MSHM's claim came as a surprise to the current solicitor which is relevant, for had the documents existed and been handed in there would no doubt have been copies on the file or a note to reflect the fact they had been handed to the court previously. The Judge also appears to have failed to consider the Upper Tribunal decision of TK (Burundi) in relation to this issue.

28. The Judge is also criticised for accepting MSHM's oral evidence that his prescription of sertraline had increased to 100 mg when there was no evidence to support this or to show that his GP had made such a prescription.
29. A further example of the Judge appearing to accept MSHM's assertions without more is at [43] in relation to MSHM's claim that since being in the United Kingdom he has attended some Tamil events and assisted the TGTE voluntarily. At [50] the Judge finds MSHM will be identified as a Tamil activist involved in the diaspora violating the territorial integrity of Sri Lanka. The Judges findings do not identify the source of such evidence. Mr Tan refers to there being no evidence of this in the appeal bundles. This submission was not countermanded by Mr Thompson. The absence of any evidence of sur place activities of a sufficient degree so as to create a credible real risk undermines the Judges findings both as to whether MSHM was involved in the same and any risks that may arise on return.
30. The Judge's finding that MSHM will appear on a 'watch list' is also based upon the Judge's assessment of the merits but there is arguable merit in Mr Tans assertion the decision is infected by material error, including the assertion the Judge failed to properly apply the country guidance case of GJ and others [2013] UKUT 319 when assessing whether MSHM would face a current risk from current activities.
31. Mr Thompson did his best to counter the Secretary States submissions but disagreement with them is not enough, on the facts. Whilst I have in mind the recent decision of the Court of Appeal in KB (Jamaica) v Secretary of State for the Home Department [2020] EWCA Civ 1385 reminding the Upper Tribunal and other appellate courts that they should not interfere with findings of fact or decisions of judges whose determinations they are considering unless there is good reason to do so, I find that even though cumulatively individual aspects of Mr Tan's challenge may not warrant interfering with the Judge's decision the cumulative effect of the issues set out above, including concerns regarding the Judge's starting point as per the Devaseelan principles, leads me to find the decision is un-safe. It has not been made out that

had all aspects of the appeal been considered properly the decision would have been the same. It was incumbent upon the Judge to analyse the material carefully and resolve any disputes that arose and to give adequate reasons for the findings made. The Secretary of State's case raised a number of relevant issues creating a conflict between the parties which the Judge failed to adequately deal with.

32. It was accepted that in light of the errors and the need for substantial fact-finding on the basis of the correct approach and assessment of the evidence, and in accordance with the Presidential Guidance on the remittal of appeals, that it is appropriate in all the circumstances for this appeal to be remitted to the First-tier Tribunal to be considered afresh by judge other than Judge Maka.

Decision

33. **The First-tier Judge materially erred in law. I set aside the decision of the Judge. I remit the appeal to the First-tier Tribunal sitting at Hatton Cross to enable it to be heard afresh by a judge other than Judge Maka, de novo.**

Anonymity.

34. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated the 13 November 2020