Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08138/2019 (P)

THE IMMIGRATION ACTS

Determined without a hearing Pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008	**Decision & Reasons Promulgated On 20 August 2020**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GRANVILLE [M]
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: written submissions provided by Ms A Fijiwala, Home Office Presenting Officer
For the Respondent: written submissions provided by Mr M D Templeton of Quinn Martin & Langan Solicitors

DECISION AND REASONS (P)

1. This is an 'error of law' decision determined without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, paragraph 4 of the Practice Direction made by the Senior President of Tribunals: *Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal* on 19 March 2020, and paragraphs 4 – 17 of the Presidential Guidance Note

No 1 2020: Arrangements During the Covid-19 Pandemic, 23 March 2020.

2. The appellant appeals against the decision of Judge of the First-tier Tribunal Doyle (the judge) who, in a decision promulgated on 1 November 2019, allowed the respondent's appeal (on humanitarian protection grounds and protection based human rights grounds [Articles 2 and 3 ECHR]) against the appellant's decision dated 9 August 2019 to refuse his asylum and human rights claim and his claim for humanitarian protection.

3. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Sheridan on 7 January 2020. The 'error of law' hearing was listed for 2 April 2020 but was vacated due to the Covid-19 panedmic. On 11 May 2020 the Upper Tribunal issued directions to the parties expressing its provisional view that, in light of the pandemic, it was appropriate to determine the questions (i) whether the judge's decision involved the making of an error of law and, if so, (ii) whether the decision should be set aside, without a hearing.

4. The appellant should have served her further submissions in respect of the two questions by 25 May 2020. These were not however received by the Upper Tribunal until 10pm on 1 June 2020. The appellant requested an extension of time citing the difficulties caused by limited resources due to the pandemic. The respondent provided his response to the further submissions on 8 June 2020. A brief reply from the appellant was sent on the same day.

5. Although there was a breach of the time limits by the appellant (and, as a consequence, by the respondent), both parties have now provided their written submissions. The delay has not prejudiced either party or the general administration of justice. Given the difficulties posed by the pandemic, and having regard to the overriding principle in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the principles set out in **SSHD v SS (Congo) & Ors** [2015] EWCA Civ 387 and **Hysaj** [2014] EWCA Civ 1633, I consider it appropriate to extend time to both parties for the filing of written submissions.

6. Following the provision of their submissions in respect of questions (i) and (ii), neither party made any further submissions in respect of the Upper Tribunal's provision view that questions (i) and (ii) could be appropriately and fairly determined without a hearing.

7. Having regard to the overriding interest in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to deal with cases justly and fairly, and having considered the nature of the appellant's challenge to the judge's decision (which does not involve the need for further evidence to be considered), and having regard to the narrow focus of the legal challenge and the concise written submissions from both

parties, and having satisfied myself that both parties have been given a fair opportunity to fully advance their cases, I consider it appropriate, in light of the Covid-19 pandemic, to determine questions (i) and (ii) without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Background

8. The respondent is a national of Trinidad and Tobago. He was 47 years old at the date of the First-tier Tribunal's decision. He entered the UK on 21 December 2004 having been granted entry clearance as the spouse of a British citizen. He was granted Indefinite Leave to Remain (ILR) on 20 December 2006. On 9 February 2017 the respondent was convicted of affray and received a 13-month custodial sentence. An appeal against a refusal of a human rights claim was dismissed by Judge of the First-tier Tribunal O'Garro on 29 September 2017 and the respondent became appeal rights exhausted on 16 October 2017. Further representations were eventually treated as a fresh claim following judicial review proceedings, but the respondent's protection claim was refused on 9 August 2019.

9. I briefly summarise the respondent's protection claim. In his capacity as a soldier providing support to a police operation he shot and wounded the leader of the 'Young and Restless gang' during a gunfight in Trinidad and Tobago in 2001. The gang leader was arrested and imprisoned. The gang leader threatened to kill the respondent as he held the respondent responsible for his arrest and incarceration and had recognised the respondent as someone who had been involved with the national football team. The respondent remained in the military until 2003. He believes the gang leader was released from prison in 2003. In the respondent's asylum interview (question 32) he claimed that his cousin was kidnapped by the gang some time in November 2004. The gang informed the respondent that he had to exchange himself for his cousin. The respondent had married a British citizen in early 2004 and was issued with a spousal entry clearance on 19 December 2004. The respondent entered and remained in the UK pursuant to this entry clearance. He claimed in his asylum interview that his cousin was killed in early 2005 (question 31). A death certificate provided by the respondent indicated however that his cousin died on 1 March 2008. The respondent was informed by his sister that the gang were offering a reward for anyone who could provide information on his whereabouts. The respondent did not make a protection claim until after he lost his ILR in 2017 and after his first appeal was dismissed.

10. The appellant was not satisfied the respondent gave a credible account of events in Trinidad and Tobago. In particular, the appellant considered that the inconsistency relating to the cousin's date of death "severely undermined" the respondent's credibility. Nor was the appellant satisfied that there was adequate evidence that the

person named in the death certificate was the respondent's cousin, or that the gang leader would know the respondent shot him in the back. The appellant additionally considered that the respondent's failure to raise his asylum claim fears during his appeal before Judge O'Garro "severely damaged" his credibility.

The decision of the First-tier Tribunal

11. In summarising the respondent's claim the judge stated (at 7(b)) that the respondent's cousin was murdered the week before he travelled to the UK. The judge also summarised the appellant's position, but neglected to mention the inconsistency in respect of the death of the respondent's cousin.

12. Having indicated that the respondent was not pursuing his appeal on Article 8 grounds, and having found that the respondent was not a member of a particular social group so as to trigger the operation of the Refugee Convention, the judge considered whether the respondent was nevertheless entitled to a grant of humanitarian protection and whether his deportation would breach Articles 2 and 3 ECHR.

13. At [27] the judge noted the respondent's claim, mentioned in is screening interview, that his life was under threat in Trinidad and Tobago because of his military service, and that in his substantive asylum interview he went into detail about his involvement in supporting the police during the gang gun battle. The judge stated,

> "What the [respondent] says in his asylum interview is consistent with his written submission when he claimed asylum, and is consistent with his detailed witness statement, and is consistent with his oral evidence."

14. At [28] the judge summarised the respondent's evidence in cross-examination in respect of his delay in claiming asylum. The respondent's 1st appeal proceeded on Article 8 grounds only because he had been granted ILR on Article 8 grounds and because he had 3 British citizen children. It was only when arrangements were made for his removal that it finally dawned on the respondent that he could claim asylum. At [29] the judge stated,

> "The delay in the [respondent's] claim for asylum 2017, because, until that point, he had indefinite leave to remain in the UK."

15. The judge then considered an expert country report dated 12 August 2018 prepared by Prof Shirley Anne Tate. The judge said this at [31].

> "Dr Tate's conclusion is that, despite the passage of time, the [respondent] could still be at risk from the Young and Restless gang and their affiliates. Dr Tate finds that gangs have pervasively infiltrated organs of state and state protection against gang violence is ineffective. Dr Tate also finds that the

> [respondent] could not qualify for the witness protection programme, and internal relocation would not guarantee the [respondent's] safety because gang networks are widespread and the [respondent] was a renowned football player."

16. At [32] the judge stated,

> "There is reliable documentary evidence that the [respondent] played football for his national team. There is reliable evidence that the [respondent] was a member of the Army of Trinidad and Tobago. When I consider each strand of evidence I find that the [respondent] gives a consistent and detailed account of being involved in action against two warring drug gangs, and a consistent and detailed account of shooting and wounding a gang leader."

17. Then at [36] the judge stated,

> "Placing reliance on Dr Tate's opinion, and the country guidance caselaw, I find that the Young and Restless gang merged with other gangs and are now under the umbrella of Jamaat al Muslimeen (JAM). Both Dr Tate's opinion and the country guidance caselaw tell me that the passage of time does not remove the threat, and that there is not a sufficiency of protection available for the [respondent], so that there is no viable alternative of internal relocation."

18. The judge concluded that the respondent was entitled to humanitarian protection and that his deportation would breach Articles 2 and 3 ECHR. The appeal was dismissed on asylum grounds but allowed on humanitarian protection and Articles 2 and 3 human rights grounds.

The challenge to the judge's decision

19. The 1st ground takes issue with the judge's reliance on the expert report. At 4.2 of her report the expert stated, "Bearing in mind the makeup of gangs in Trinidad and Tobago this gang could well still exist and also have links with 'Rasta City' and Jamaat al Muslimeen which both have an African Trinidadian base." The appellant contends that the report contained very little information on the Young and Restless gang and that the expert only speculates about potential links with other gangs without any objective information in support. The judge accepted the expert's findings uncritically without providing any proper explanation to support why this conclusion had been reached. This was relevant given that neither the respondent nor his family members had been harmed or threatened since 2004. The judge failed to reach his findings "with the necessary realism and attention to fact" when finding that the respondent would be at risk on return despite the absence of evidence that the gang still operated after 15 years.

20. The 2nd ground contends that the judge failed to resolve a conflict of fact in respect of a material matter. In her Reasons for Refusal Letter the appellant took specific issue with the evidential inconsistency relating to the death of the person described as the respondent's cousin. The judge however failed to make any findings in relation to this issue and failed to resolve the inconsistency. This inconsistency went to the core the respondent's claim and the judge's failure to deal with it materially undermined the sustainability of his ultimate conclusion.

21. The 3rd ground contends that the judge acted perversely when approaching the issue of the respondent's delay in claiming asylum on the basis that the delay only stemmed from 2017 and not from when the respondent 1st arrived in the UK. The judge was required to consider the respondent's delay under section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 but failed to consider that the relevant considerations applied to the moment that the respondent was in fear of returning to his home country. The judge failed to adequately consider the respondent's failure to raise his protection concerns during the appeal before judge O'Garro and failed to attach relevant weight to this failure, which affected the respondent's credibility.

22. In granting permission Upper Tribunal Judge Sheridan explained,

> "At para. 7(b) the judge stated that the [respondent's] claim was that his cousin was murdered a week before he travelled to the UK in December 2004. At para. 27 the judge stated that the [respondent's] asylum interview, witness statement and oral evidence was consistent. It is arguable that the judge failed to address the [appellants] claim that the evidence in relation to the death of the [respondent's] cousin was not consistent given that the death certificate showed the date 2008, the [respondent's] claim at the hearing was that the death was in 2004 (a week before he travelled to the UK) and in the asylum interview and witness statement it is said that the death was in 2005."

23. Although Judge Sheridan did not refer to the 1st and 3rd grounds, he did not expressly restrict the scope of the appeal.

24. In his submissions the respondent contends that permission was only granted in respect of the 2nd ground and not in respect of the 1st and 3rd ground. This was because the permission Judge made no reference to either ground 1 or ground 3. The respondent requested the Upper Tribunal to consider the scope of the appeal as a preliminary issue.

25. The respondent contends that 1st ground was "not a stateable ground." The judge had accepted the respondent's account, a position previously taken by the appellant herself in an earlier refusal decision. The judge did not accept the expert's opinion uncritically and without consideration of all the evidence. The judge detailed the experience and expertise of the expert and had considered the

relevant country guidance (**MB (Inability to Provide Protection – JAM) Trinidad & Tobago CG** [2010] UKUT 448). No issue was previously raised in the Reasons for Refusal Letter with this element of the expert's report. The judge was entitled to his opinion for the reasons given.

26. The respondent characterises the 2nd ground as a requirement that the judge exhaustively set out every challenge raised by the appellant. There is however no such requirement. The judge's positive credibility findings were based not only on the consistent elements of the respondent's account set out in paragraphs 32, 33 and 34 of the decision, but on a consideration of the expert report, the Country Guidance decision, "and all other evidence." If however a material error did arise, it was submitted that the remittal should be to the same judge to provide a specific finding in respect of the inconsistency.

27. In respect of the 3rd ground, the respondent contends that the judge correctly identified the delay as stemming from 2017 when the respondent's ILR was revoked. The delay was not significant and had been clearly considered by the judge, who had a wide area of discretion in respect of the weight to attach to any delay. The judge's conclusion was not unreasonable.

Discussion

28. I can deal briefly with the preliminary issue raised by the respondent. As pointed out by the appellant in her email reply dated 8 June 2020, the failure to specifically refer to grounds 1 and 3 do not mean that permission was refused in respect of those grounds. This is abundantly clear from **Safi and Others (permission to appeal decisions)** [2018] UKUT 388. In the section of the standard form document containing his decision, Judge Sheridan stated, "Application for permission is granted." He did not grant permission on limited grounds and there are no exceptional circumstances that could persuade me that he intended to limit the grounds.

29. I shall consider the 2nd ground of appeal first. The Reasons for Refusal Letter clearly raised, as a central credibility issue, the inconsistency between the approximate date given by the respondent in his asylum interview for the death of his cousin and the date of death contained in the death certificate. In his statement dated 17 October 2019 the respondent acknowledged the inconsistency in respect of the murder of his cousin stating that his sister confirmed the murder occurred in January 2005. It is additionally apparent from the judge's notes of the hearing that this was a point specifically raised in cross-examination.

30. At 7(b) the judge stated, "In December 2004 the [respondent] travelled to the UK. The week before travelled to the UK, his cousin was murdered." I have considered the judge's manuscript notes of

the hearing. To the extent that they are legible, I can find no reference to the respondent claiming that his cousin was killed in 2004. This suggests that the judge erroneously stated in his decision that the respondent's cousin was killed in 2004. The grounds however focus on the wholesale failure by the judge to engage with the inconsistency raised in the Reasons for Refusal Letter and during cross-examination, that is, the respondent's claim that his cousin was killed in early 2005 and the death certificate which identified the date of death as 1 March 2008. I find considerable merit in this ground.

31. At no stage in his decision does the judge refer to or engage with this inconsistency. This inconsistency was material when assessing whether the appellant gave a credible account of the events he claimed caused him to fear for his safety in Trinidad and Tobago. The inconsistency was both apparent from the face of the papers and was specifically raised in the Reasons for Refusal Letter and during cross-examination. The judge's assertion at [27] and (although to a lesser extent) at [32] that the respondent gave a consistent account of events that gave rise of his fear of returning to Trinidad and Tobago, and the inference drawn by the judge that, as a result of other consistencies in the respondent's evidence, the respondent's account was truthful (a finding made at [34]), failed to take into account or resolve the central inconsistency relating to the death of his cousin. Whilst a judge is not obliged to deal with every nuance of an individual's account, it is incumbent on him or her to resolve central issues in dispute. The judge failed to do so in this appeal. Whilst I appreciate that the judge additionally found the respondent's account to be consistent with the country expert report, I cannot say that, but for the failure to engage with and resolve the inconsistency, the judge would inevitably have reached the same conclusion. The error of law is therefore material.

32. My assessment of ground 2 is enough to require the judge's decision to be set aside. I am however independently satisfied that the 3rd ground is made out. Regardless of whether s.8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 required the judge to consider the delay in claiming asylum from 2004 or from the point in July 2017 when his ILR ceased, the judge failed to consider, when assessing the respondent's credibility, his failure to raise his protection concerns during his previous appeal before Judge O'Garro. Whilst the judge recites the reasons advanced by the respondent for his delay at [28], the judge fails to make any finding in respect of the delay. The judge has failed to make a relevant finding or to take into account a relevant consideration when assessing how the respondent's credibility is affected by his failure to raise his protection concerns at any stage during the previous appeal. I find this materially undermines the sustainability of the judge's credibility findings.

33. I am additionally, and independently, satisfied that the judge has erred in law in his approach to the expert report, as outlined in the 1st ground. Whilst the judge was entitled to treat Prof. Tate as a country expert, this did not oblige him to accept all aspects of her report. Prof. Tate gave no explanation as to why the makeup of gangs in Trinidad and Tobago supported her observation that the Young and Restless gang "could well still exist." Her opinion, at page 12, that the Young and Restless gang had "merged or at least cooperate" with the Rasta City gang because this 'also has leaders in Maloney' is entirely speculative. Her opinion, as an expert, is entitled to have weight attached to it, but there is no indication that this particular aspect of the expert's opinion has been critically considered by the judge given the dearth of information relating to the Young and Restless gang and in the absence of any further threats to the respondent or his family members since 2004.

34. Given that there are at least two material legal errors in the judge's approach to the issue of credibility it is, in my judgment, necessary for the decision to be remade de novo in the First-tier Tribunal by a judge other than Judge of the First-tier Tribunal Doyle.

Notice of Decision

The decision of the First-tier Tribunal contains errors on points of law requiring it to be set aside.

The case is remitted back to the First-tier Tribunal to be decided afresh by a judge other than judge of the First-tier Tribunal Doyle.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his 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.

D.Blum

Signed

Upper Tribunal Judge Blum Date: 17 August 2020