



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2021-001785
PA/03107/2020**

THE IMMIGRATION ACTS

**Heard at Field House
On the 2nd August 2022**

**Decision & Reasons Promulgated
On the 29 September 2022**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

**'PDK'
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court. The reason is that the appeal relates to a protection claim, including allegations of sexual violence, and sensitive mental health issues.

Representation:

For the appellant: *Ms U Miszkiel*, instructed by MTC & Co Solicitors

For the respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 2nd August 2022.
2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Abebrese (the 'FtT'), promulgated on 18th May 2021, by which he dismissed her appeal against the respondent's refusal on 17th March 2020 of her protection and human rights claims.
3. In essence, the appellant's claims involved the following issues: whether, as a Sri Lankan National, she had a well-founded fear of persecution on the basis of *sur place* activities in the UK, specifically attendance at demonstrations outside the Sri Lankan High Commission in the UK and also on the basis of her mental ill-health. The decision was in the context of an earlier tribunal decision of First-tier Tribunal Judge Henderson promulgated on 29th August 2018 which had considered the appellant's claim on a similar basis on 18th of January 2015, and which had also considered scarring evidence. It is unnecessary to recite the full immigration history, suffice it to say that it was not until the appellant's student visa was curtailed that the appellant claimed asylum, having entered the UK on 4th June 2009. In broad terms, the appellant claimed to have suffered adverse treatment, which she says included allegations of rape and physical mistreatment whilst in Sri Lanka because of her association with a LTTE (Tamil Tiger) member.
4. In the refusal decision, the respondent took Judge Henderson's decision as her starting point in which the appellant was found not to be a credible witness. This included Judge Henderson's analysis that the scars identified did not tie in with the appellant's account of her physical treatment. Judge Henderson identified a number of other internal inconsistencies in the appellant's evidence and that she did not fall into any of the risk categories set out in the country guidance case of GJ and others (post – Civil War returnees) Sri Lanka CG (2013) UKUT 00319. Judge Henderson's decision had been upheld by the Upper Tribunal in 2018, which had cited the appellant's acknowledged vulnerability. The respondent considered the appellant's *sur place* activity. The respondent noted that the photographs of the appellant were undated and without description and did not appear to show any significant profile within the LTTE. The appellant's name would not appear in a "stop" or "watchlist" and she had not previously come to the adverse attention of the Sri Lankan authorities. Whilst the respondent considered a medical report of Dr Corbett in 2018 which spoke of a high risk of suicide, this was superseded by more recent medical evidence of May 2019.
5. At §§26 to 28 of the refusal letter, the respondent considered that the 2018 report had not taken as its starting point the weaknesses in the appellant's credibility, The updated evidence of Dr Cohen of 2019 had failed to address the Upper Tribunal's decision of 2018.

6. The respondent concluded that the appellant had family remaining in Sri Lanka, including a mother, with whom she was in very close and regular contact. She had also lived in Sri Lanka for majority of her life.

The FtT's decision

7. Having identified the issues, at §§6 to 9, the FtT noted that photographic evidence had been before Judge Henderson. At §9, the FtT noted the appellant's explanation for not having told her relatives of her fear of persecution because she feared they would cease to continue to support her, not because of any trauma or reluctance or because of the nature of the alleged adverse treatment. The FtT referred to the appellant's mental health issues at §11 and §13. The FtT had referred to her abuse as a child but not any other mistreatment, such as torture. The FtT recorded at §14 the appellant's representative's submission that a PTSD sufferer may not give consistent evidence that she was in a fragile mental state. I cite §15 completely, as this is one of the focuses of the appeal before me:

"It was further submitted that the appellant's activities will be known by the authorities and she would be at risk on return to Sri Lanka. I considered all of the evidence in this appeal and I have dismissed the appeal for the following reasons. The starting point in this appeal is with the decision of Judge Henderson who dismissed the appeal. I have considered the evidence of the appellant and the submissions of the appellant's counsel that the decision of Judge Henderson should be distinguished I see no reason to do for the following reasons. Judge Henderson determined the appeal on the basis of the evidence before him and he found the appellant not to be credible. I accept the submissions of Mr Thompson that in the main the evidence in this appeal is the same as that which was before the earlier tribunal and this point was accepted by the appellant during the course of the evidence. The credibility findings of Judge Henderson stand and are not distinguished. The findings of the earlier tribunal and the comments of Dr Cohen have also been considered and as stated above I see no reason to depart from the findings of the earlier tribunal. I have reached this conclusion after careful reading of the decision and the comments of Dr Cohen and evidence that was before the earlier tribunal."

8. At §16, the FtT concluded that the appellant had sought to bolster her protection claim through attendance at demonstrations, the nature of which the appellant had not been able to describe clearly. In particular, it was unclear whether the demonstration was in the presence of General Persaud. At §17, the FtT went on to comment that the findings of Judge Henderson also stood in respect of scarring, notwithstanding Dr Corbett's report. The report had been challenged by respondent at the hearing.
9. Having considered the evidence as a whole, the FtT dismissed the appellant's appeal.

The grounds of appeal and grant of permission

10. The appellant lodged grounds of appeal which are lengthy, and which I do no more than summarise.

11. Ground (1) is that the FtT had erred in concluding that Judge Henderson's decision should not be departed from, given Dr Cohen's medical report. The country evidence further highlighted the appellant's credibility.
12. The FtT had stated at §15 that the appellant had accepted that the evidence before the FtT was the same as that before Judge Henderson. This was not correct. The basis of the appeal before the FtT was the subsequent medical evidence of Dr Cohen and country evidence that had not been before Judge Henderson. The FtT further erred at §17 when stating that the Dr Corbett's medical report was challenged at the FtT hearing. It had not been so challenged. Moreover, Dr Cohen had given her medical opinion on Judge Henderson's findings regarding the appellant's scarring and PTSD on which she was entitled to give expert evidence. The FtT had given inadequate or no reasons for rejecting Dr Cohen's evidence.
13. Ground (2) is that the FtT had failed to assess Dr Corbett's report which had been consistent with scarring, albeit the same scarring had been considered by Judge Henderson at §§46 and 54. Dr Cohen's report dealt with the issue of additional disclosure by a victim, in the context of scarring evidence and why certain aspects of torture may not have been previously mentioned. Dr Cohen was also critical of Judge Henderson's comment that the scars were not consistent with the appellant's account, which was contrary, in Dr Cohen's view, with the expert opinion of Dr Corbett.
14. Moreover, the FtT's assumption that it was not credible that the appellant would not inform her family of her rape was irrational, given the stigma attached to rape victims in certain cultures.
15. In relation to ground (3), whilst the FtT stated that the appellant had not alleged mistreatment such as torture, Dr Corbett had referred to allegations of torture and rape at §89 of her report, and the same allegations had been referred to elsewhere in the appellant's bundle before the FtT.
16. Ground (4) is that the FtT had not considered whether any inconsistency or lack of recall by the appellant in her witness evidence could be explained because she was a vulnerable witness.
17. Ground (5) is pursued on the basis that at §18 of his decision, the FtT had erred by failing to consider whether the appellant was a real risk of persecution on account of being a failed asylum seeker and being perceived as having a link the TGTE. The FtT had specifically been invited to depart from GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) on the basis that deported Sri Lankan asylum seekers had been transferred to Sri Lankan CID on return, as reported in a 'Daily Mirror' newspaper article. Even if, which was not admitted, the appellant's attendance at demonstrations were contrived, she would still

be at risk on return, noting the respondent's own Country Policy and Information Note ('CPIN') of May 2020.

18. Ground (6) is that the FtT had failed to make any assessment of the real risk of suicide contrary to article 3 ECHR, despite the issue being specifically raised in medical evidence that the appellant was suffering from depression, PTSD and remained at chronic increased risk of suicide, with a suicide attempt in May 2019.
19. First-tier Tribunal Judge Ford granted permission on 8th June 2021. The grant of permission was not limited in its scope.

The hearing before me

Discussion and conclusions

20. I do not recite the parties' submissions, except where it is necessary to do so to resolve the appeal.

Ground (6) - concession

21. Ms Cunha conceded that the FtT had failed to analyse and decide the appellant's Article 3 ECHR claim in respect of her mental health. She accepted that there was evidence before the FtT as to the appellant's ill-health and a potential sustained risk of suicide, to which the FtT had not referred or at the very least had provided no reasons for analysing that evidence and rejecting the article 3 ECHR claim. Ground (6) therefore succeeds.

The remainder of the grounds

22. I turn to the remainder of the grounds, in particular with reference to the protection claim. I am conscious that the FtT will have had the benefit of the full evidence, in more detail than I have been able to consider and there is always a danger of what is described as "island-hopping" between particular passages of evidence. This was a theme that Ms Cunha specifically referred to when reviewing the FtT's consideration (or lack of consideration) of the appellant's evidence. I am also conscious that it is not an error of law simply because I would have reached a decision other than that of the FtT. Also, brevity in a judgment, particularly when it assists clarity, can be of real benefit.
23. The danger in brevity, as in this case, is where there are limited findings. The FtT includes a brief recital of the appellant's evidence at §§7 to 9. At the end of §9, the FtT makes the first finding, about the lack of credibility in the appellant's evidence. I cite the relevant passage, which Ms Cunha accepts could have been clearer and bordered on being an error of law, although she submitted that it was not a material one:

"She stated that she does have family in the UK but they do not know her situation in this country. I did not find this aspect of her evidence to be credible because she went on to add that the reason why she has not told

them is because if they become aware of her situation she feared that they would cease to continue to support her”

24. The finding ends partway through the sentence. If it merely misses a full stop, rather than any additional part of the finding, Ms Cunha pragmatically accepts the meaning of is far from clear.
25. At §10, the FtT then makes a finding about the appellant’s vagueness in her evidence about whether the Sri Lankan authorities visited her family home
26. The FtT then refers at §11 to the appellant claiming to have mental health issues, but that matter is only explored on the basis that the appellant explains it as the reason for not being unable to complete her studies in the UK.
27. At §12, the FtT evaluated and rejected concerns about an interpreter in attendance at the FtT hearing, but, as Ms Cunha accepted, that was a concern about an interpreter rather than any concern in relation to the effect of the appellant’s mental ill-health or its affect on her ability to give evidence.
28. At §§13 to 14, the FtT summarised the parties’ submissions. At §§15 to 19, the FtT then gave his reasons, based on the limited findings to which I have already referred.

Ground (1)

29. On the one hand, it was appropriate for the FtT to take Judge Henderson’s decision as his starting point. On the other hand, the FtT’s analysis and reasons of whether to depart from Judge Henderson’s conclusions were not adequate. I accept Ms Miszkziel’s submission that Dr Cohen provided a medical opinion as to why some of Judge Henderson’s conclusions might have missed certain aspects of the medical evidence. The FtT says at §15 that he has considered Dr Cohen’s comments but finds no reason to depart from Judge Henderson’s judgment. However, that raises the question why he finds not reason. I do not regard that sentence, which comprises the FtT’s reasoning, as adequate, where, as is clear from Dr Cohen’s correspondence, Dr Cohen has provided specific comments on the extent to which Judge Henderson may not have had a full appreciation of aspects of the appellant’s medical condition, for example why the appellant may not have been able to recall all of the adverse treatment or may have been reluctant to describe it, particularly where there was an allegation of rape. The FtT’s analysis in this passage, such as it is, is at the heart of the analysis of the appellant’s credibility. It was not adequate and that inadequacy of analysis amounts to a material error of law. The appellant succeeds on ground (1).

Ground (2)

30. I also accept that ground (2), which was that the FtT had failed to assess Dr Corbett's scarring report, in the light of Dr Cohen's comments, succeeds, for the same reason as ground (1). Dr Cohen's comments about Dr Corbett's attribution of thirteen scars, and the FtT's rejection of the appellant's claims, are not analysed. The reader is left unable to understand why Dr Cohen's opinion is without merit or has been discounted. Ground (2) also succeeds.

Ground (3)

31. In terms of ground 3, the FtT refers at §13 to the appellant making "*reference to her abuse as a child but not to any other mistreatment such as torture.*" I accept that this is a record of the respondent's submission, rather than a finding, but this submission is then accepted at §19. The FtT fails to explain why the allegation of rape, referred to by Dr Corbett at §89 of her report, said to have been perpetrated by uniformed people while the appellant was in detention as an adult, and allegations of being hit and kicked by those detaining her, are not regarded as allegations of torture. Once again, the FtT's analysis and reasons were not adequate. Ground (3) succeeds.

Ground (4)

32. Turning to ground 4, Ms Cunha accepts that the FtT did not refer to the appellant as a vulnerable witness, or consider how any vulnerability could impact on the appellant's evidence. On the one hand, Judge Henderson had specifically considered the appellant's vulnerability and the FtT had in turn considered Judge Henderson's decision. On the other hand, Judge Henderson's decision (as well as a later Upper Tribunal decision which upheld it) predated the decision of SB (vulnerable adult: credibility) Ghana [2019] UKUT 00398 (IAC) (vulnerable adult). The FtT did not consider the extent which the appellant was vulnerable and how that might have affected the reliability of her evidence. This is highlighted in the FtT's analysis that the appellant's evidence was vague in relation to her recall of visits by those said to be persecuting to her family home in Sri Lanka (§10) and her later reason for attending demonstrations in the UK (§13). None of this is considered in the context of the appellant's alleged mental ill-health, and Dr Cohen's opinion that differences in recall and detail could be explained accordingly. The appellant's mental health issues are not touched upon at all except fleetingly at §11, as the reason for the appellant not continuing her studies.
33. In summary, the FtT's error in failing to analyse the appellant's mental ill-health goes beyond the article 3 error and undermines the FtT's assessment of the appellant's credibility, not only in relation to alleged torture in Sri Lanka, but the appellant's recall of *sur place* activities. I therefore conclude that ground (4) is also sustained.

Ground (5)

34. Ms Miszkziel cited the irrelevance of motivation referred to the risk as a result of *sur place* activities, as per the case of KK and RS (Sur place activities: risk) Sri Lanka CG [2021] UKUT 130 (IAC), §494.

“494. In terms of the evaluative assessment of an individual's profile as it is reasonably likely to be perceived by GoSL, we agree with the appellants' submission that motivation is not relevant. The reason for this lies within the previous sentence: the critical question is what the authorities will make of the activities in respect of which they have obtained information. They will have little or no inclination to enquire into an individual's good faith or lack thereof. We acknowledge that there must exist the possibility of opportunistic "hangers on" making out a claim for international protection. Unattractive as this may seem, it cannot act as a valid basis for rejecting a risk.”

35. In response, Ms Cunha referred to the earlier paragraphs, §§483 to 493 and the appellant's profile, extent of activities and such like. However, whilst Ms Cunha's point is a valid one, which is that presence alone at a demonstration may not be sufficient, that does not resolve the problem of a lack of analysis by the FtT, other than to consider the appellant's attendance at gatherings as “staged” (§18). Once again, the conclusion at the end of §18 ends without a full stop. To the extent that this is intended to comprise the full reasoning, and a part has not been missed out, a focus on motivation alone does not address the point in KK & RS and the appellant's profile. The appellant also succeeds on ground (5).
36. For the above reasons, I conclude that all of the six grounds are sustained. The errors are material, such that it is appropriate to set aside the FtT's decision. That does not, of course, affect Judge Henderson's decision. Judge Henderson's decision will need to be considered as a starting point for the judge remaking the appeal, in the normal way. It is not appropriate that I lay down any guidelines in this error of law decision.

Decision on error of law

37. I conclude that there are material errors here and I must set the FtT's decision aside, without any preserved findings. Judge Henderson's decision remains undisturbed. It will be for a remaking judge to evaluate the relevance of Judge Henderson's findings on the current appeal, in line with the well-known authority of Devaseelan v SSHD [2002] UKIAT 00702.

Disposal

38. With reference to paragraph 7.2 of the Senior President's Practice Statement, this is clearly a case that has to be remitted to the First-tier Tribunal for a complete rehearing. Both representatives were agreed on this course of action should I find there to be material errors of law.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I remit this appeal to the First-tier Tribunal for a complete rehearing.

Directions to the First-tier Tribunal

This appeal is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact. The remitted appeal shall not be heard by First-tier Tribunal Judges Abebrese and Henderson.

The anonymity directions continue to apply.

Signed **J. Keith**

Date: 15th August 2022

Upper Tribunal Judge Keith