



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002950

First-tier Tribunal No: PA/00056/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 7th of March 2024

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

LF
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Heard at Phoenix House (Bradford) on 6 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) 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 (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. For the purposes of this decision, the parties are referred to as they were before the First-tier Tribunal.
2. The respondent was granted permission by the First-tier Tribunal to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Drake) promulgated 2.4.22 allowing the appellant's appeal against the respondent's decision of 2.11.20 to refuse his further submissions of 17.12.18 in support of a

claim for international protection first made in 2011 and his opposition to the respondent's decision of 10.7.14 to deport him to Eritrea, following his conviction and prison sentence for rape of a teenage girl, and to certify the claim under s72 of the NIA 2002.

3. In summary, the respondent's grounds argued that the First-tier Tribunal failed to engage with the issue of the appellant's nationality; failed to properly consider articles 3 and 8 ECHR; and erred in the application of the Devaseelan principle to the previous decision of the First-tier Tribunal in 2014.
4. By her 'error of law' decision promulgated on 10.11.22, Upper Tribunal Judge Bruce set aside the decision of the First-tier Tribunal but only to a limited extent. The decisions in relation to nationality, risk on return and risk of suicide were upheld. However, error of law was found in relation to the decision in respect of s72, which had found that the appellant had rebutted the presumption, and the sixth question in J as to the article 3 risk of suicide.
5. Judge Bruce rejected the complaint as to nationality, pointing out that the respondent had earlier accepted that he was Eritrean. The Devaseelan-based argument was also rejected. Judge Bruce found that although the appellant entered the UK illegally as an unaccompanied minor, the First-tier Tribunal was entitled to find that on return to Eritrea, he would face punishment for draft evasion which would amount to treatment contrary to article 3 ECHR. The First-tier Tribunal's decision on article 3 on that basis was upheld.
6. However, in relation to the s72 findings of the First-tier Tribunal, Judge Bruce found a material error of fact in describing the OASYS assessment of the appellant as at low risk when at page 37 the 'full risk of serious harm analysis' was that he posed a medium risk of harm to the public. Judge Bruce concluded that the First-tier Tribunal had misunderstood the OASYS report. It follows that the finding that the appellant had rebutted the s72 presumption was set aside.
7. In relation to the article 3 ECHR risk of suicide, Judge Bruce found that the First-tier Tribunal failed to address the evidence relied on by the respondent to the effect that treatment for PTSD and depression would be available to the appellant in Eritrea and Tribunal failed to articulate any reasoning to support a conclusion that such treatment would do nothing to alleviate the risk of suicide identified by Dr Galappathie. There was no challenge to the remaining findings on the suicide risk, so the error found was confined to that narrow issue, namely, the sixth question in J as to whether there are effective mechanisms to reduce the risk of suicide
8. In relation to article 8 ECHR, Judge Bruce noted that the First-tier Tribunal found exceptional circumstances only by reason of the article 3 suicide risk. It was accepted by the appellant's representative that the article 8 claim stood or fell with article 3. The First-tier Tribunal did not allow the appeal by any reference to private or family life circumstances. Judge Bruce observed that "Given the very serious nature of his offence none of that could have come close to establishing very compelling circumstances sufficient to outweigh the public interest in his removal. The Tribunal's own finding on Article 3 was however a benchmark obviously capable of meeting that high test."
9. It follows from the 'error of law' findings that the decision of the First-tier Tribunal was set aside only in part and to a very limited extent. Judge Bruce made the following consequential directions:

"The Tribunal's decisions in respect of the (appellant's) nationality, risk on return and risk of suicide are upheld. The Tribunal's decisions in respect of

s72, and the sixth question in J, must be remade. It is now for the (appellant) to decide whether he wishes to pursue either of those matters, and inform the Tribunal no later than the 28th November 2022 whether he wishes to have a further hearing in order that submissions may be heard on these issues."

10. By email of 28.11.22, the appellant's solicitors wrote to the Upper Tribunal to confirm that: "(the appellant) wishes to have a further hearing in order that submissions may be heard in relation to the issues of section 72 and the sixth question in J."
11. The appeal was due to be heard before Judge Bruce for remaking of the decision on 24.4.23 but was taken out of the list on 18.4.23 with the judge's consent, for the appellant to obtain up-to-date medical evidence. By the transfer order of 28.6.23, the matter was then listed before me for remaking of the decision in the appeal, limited to the narrow issues identified by Judge Bruce. I refer to my adjournment and directions decision issued by the Upper Tribunal on 2.10.23.
12. As agreed by the parties, the remaining narrow issues before the Upper Tribunal were:
 - (i) whether the appellant has rebutted the s72 presumption that he remains a danger to the community of the UK;
 - (ii) Whether there are effective mechanisms in Eritrea to reduce the appellant's risk of suicide.
13. For the reasons set out in my decision, the remaking decision was not able to proceed. In particular, further information was required as to further criminal offences committed by the appellant and/or failure to comply with Sexual Offences Act notification requirements, which I considered to be directly relevant to the issue of whether he remains a danger to the community.
14. In relation to the narrow article 3 issue as to treatment to mitigate the risk of suicide, the respondent intended to challenge whether his current mental state crosses the high article 3 threshold. At the hearing before me, I canvassed with Mr Karnik whether there was any practical purpose in pursuing this aspect of the appeal, as the appellant has already succeeded under article 3 on the risk of punishment or other adverse treatment on return to Eritrea by being regarded as a draft-evader, a finding of the First-tier Tribunal which remains undisturbed.
15. I then made a number of directions for the future conduct of the appeal, primarily relating to the provision of information as to the appellant's criminal record.
16. Since my decision was issued on 2.10.23, there has been considerable correspondence from the parties, which has now been drawn to my attention.
17. I note that on 24.11.23, the respondent confirmed the position that the grant of leave under article 3 on medical grounds would have been the same as that under the "general" risk on return to Eritrea under article 3 (arising from punishment for draft evasion). It was therefore submitted that there was no practical purpose in the appellant pursuing the risk of suicide issue under article 3. However, the respondent confirmed that if it remained a live issue, the original position and ground of appeal would be maintained. The respondent suggested that the only live issue was whether the appellant had rebutted the s72 certificate.
18. The appellant's solicitor emailed the Upper Tribunal, stating that they wanted to withdraw the appeal on the basis that the respondent would grant the appellant

leave under the article 3 risk on return finding made by the First-tier Tribunal and upheld by the Upper Tribunal. The respondent emailed on 7.12.23 to state that the withdrawal of the appeal was not opposed and that on that event would grant the appellant the relevant leave.

19. The appellant's solicitors then wrote to the Upper Tribunal on 2.1.24 purporting to withdraw the appeal. This was pursued in further correspondence and when drawn to my attention I indicated on 21.2.24 that as the appeal is that of the respondent, it would be for the respondent to withdraw it.
20. The appellant's position is as per Judge Bruce's decision, it was for the appellant to decide whether to pursue the outstanding issues within the appeal. As stated above, the appellant did state that those issues were to be pursued. The appellant has now changed his mind. It is argued that in those circumstances, it is open to the appellant to withdraw the challenge on those issues.
21. Taking account of the above history, I am satisfied that on the basis that the appellant no longer challenges the s72 certification and no longer pursues the article 3 claim on medical risk of suicide grounds, there is no purpose in this matter proceeding to a contested appeal hearing. I can, therefore, resolve the matter by confirming the decision of Upper Tribunal Judge Bruce setting aside the First-tier Tribunal decision in relation to both those issues but affirming that the decisions of the First-tier Tribunal in respect of nationality and article 3 risk on return arising from punishment as a draft evader. It follows that the appellant's original appeal should be allowed to that limited extent.

NOTICE OF DECISION

1. The respondent's appeal to the Upper Tribunal is allowed to the extent that the findings of the First-tier Tribunal that the s72 certification had been rebutted and on risk in relation to suicide are set aside.
2. Having withdrawn the challenges to those matters set aside, the appellant's original appeal is allowed on article 3 EHCR grounds only, for the reasons set out above.
3. I make no order as to costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 February 2023