Upper Tribunal
(Immigration and Asylum Chamber)Appeal Number: PA/06327/2019 (V)

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 13 May 2021	**On : 24 May 2021**

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE KEBEDE

Between

TV
(Anonymity Order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Mackenzie, instructed by Bindmans Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was skype for business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. The appellant is a citizen of Sri Lanka of Tamil ethnicity, born on 14 March 1996. He arrived in the UK on 27 October 2008, aged 12 years old, and claimed asylum on 31 October 2008. His claim was refused on 15 December 2008 but,

owing to his age, he was granted discretionary leave until 15 December 2011 under the Home Office policy for unaccompanied asylum seeking children ("UASC"). Prior to the expiry of his leave he applied for further leave to remain, but his application was refused on 3 July 2014. An appeal against that decision was dismissed on 25 March 2015 by First-tier Tribunal Judge Coll and the judge's decision was upheld by the Upper Tribunal in a decision of 21 September 2015. The appellant became appeal rights exhausted on 5 October 2015.

3. On 4 March 2016 the appellant made further submissions which were refused on 17 January 2018. Following a successful judicial review claim, those submissions were re-considered by the respondent together with additional submissions received on 14 March 2019. In a decision dated 20 June 2019 the respondent treated the submissions as a fresh protection and human rights claim but refused the claim, with a right of appeal.

4. The basis of the appellant's claim, as set out before First-tier Tribunal Judge Coll in February 2015, was that the appellant feared persecution if returned to Sri Lanka on account of his Tamil ethnicity and his mental health. The appellant claimed to have resided in Sri Lanka with his mother, his step-father and his step-brother. He claimed that his father was killed by the Sri Lankan army in around 1999 when he was pushed into a well. He, the appellant, was three years of age at the time. The army also killed a relative of his and he was unable to live a normal life because of the artillery fire, curfews and round-ups, general violence and the constant presence of soldiers near his home. His step-father used to beat him up and eventually his mother decided to send him to the UK due to his heightened anxiety. He was taken to Colombo and then handed over to a family who brought him to the UK on 27 October 2008. He was handed to a woman whom he now referred to as "aunt" and he lived with her for some time.

5. At the hearing before Judge Coll reliance was placed upon the appellant's mental health condition as he was suffering from PTSD due to his experiences in Sri Lanka and was receiving therapy. The appellant had been placed with a foster family in 2012 following an incident when his aunt attacked him and he had then moved into semi-independent accommodation with support from the local authority's Looked After Children team. It was submitted that his mental health would significantly deteriorate if his support was withdrawn and if he was returned to Sri Lanka. The judge found the appellant's fears to be genuinely held but did not accept that he would be of any adverse interest to the Sri Lankan authorities as he had had no personal involvement with the LTTE when in Sri Lanka and had not engaged in sur place activity in the UK. The judge considered that the appellant's mental health was not a risk factor for persecution. It was accepted that he was no longer in contact with his mother but the judge considered that the Red Cross may be able to help him trace her and his brother and did not consider there to be very significant obstacles to integration in Sri Lanka. The judge noted that the appellant had made a good recovery in terms of his mental health and considered that he could not succeed on Article 3 grounds.

6. The appellant's further submissions were based upon his mental health and the risk on return arising from his sur place activities in the UK. It was stated that the appellant had been attending various demonstrations and had become a member of the British Tamil Forum and Tamil Solidarity, which would put him within the risk factors in GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319. The submissions made following the judicial review proceedings, received on 14 March 2019, were based mostly on Article 3 and 8 and provided a more detailed account of the appellant's history giving rise to his mental health problems. The submissions were accompanied by a significant number of medical and psychiatric reports as well as a country expert report and background materials. It was asserted that the appellant had attempted suicide since receiving the decision of the First-tier Tribunal and was being treated by mental health specialists. He had been diagnosed as having complex PTSD and depression caused by multiple traumatic experiences and that he was functioning at an age far younger than his years. There were concerns about him breaking down if he was separated from his significant level of support in the UK. It was considered that there was a high risk of suicide if he was removed to Sri Lanka.

7. The submissions were accompanied by the appellant's statement dated 6 February 2019, in which he gave details of his experiences in Sri Lanka including the abuse suffered at the hands of his step-father and the traumatic experiences of the conflict, his journey to the UK at a young age, the abuse he suffered from his aunt with whom he was living when he came to the UK, the harsh treatment he received in foster care, the difficulties he faced living in semi-independent accommodation, his studies in adult nursing, his mental health problems and four suicide attempts between the age of 18 and 19 including cutting himself, drinking weedkiller and attempting to hang himself, and his introduction to Tamil groups and to Christianity. He referred to being baptised in 2017 and to his fear of being discriminated against in Sri Lanka as a Tamil and a Christian and being at risk because of his father's past involvement with the LTTE and his own involvement with Tamil groups in the UK.

8. In the decision of 20 June 2019 refusing the appellant's claim, the respondent considered that the evidence provided by the appellant did not demonstrate that his political activities in the UK were likely to be perceived as a significant role such as to make him of ongoing interest to the Sri Lankan authorities. It was considered that even if the appellant had genuinely converted to Christianity he would not be at risk of persecution on that basis and would be able to continue practising that religion in Sri Lanka. The respondent, therefore, did not consider that the appellant was at risk on return to Sri Lanka. Further, the respondent considered that there were no very significant obstacles to the appellant's integration in Sri Lanka and that he could not meet the requirements of paragraph 276ADE(1) of the immigration rules. It was considered that his medical condition was not such that his removal would breach Article 3 or 8 and that he would be able to access medical treatment in Sri Lanka. The respondent accepted that the appellant's PTSD and depression were fairly severe and that he gained significant support

from the Boabab Centre where he was receiving psychotherapy, but his condition was not considered sufficient to meet the Article 3 threshold.

9. The appellant appealed against the respondent's decision and his appeal was heard in the First-tier Tribunal on 13 February 2020 by Judge Khawar. The appellant was represented by Counsel, Ms C Meredith, and the respondent was represented by Mr G Mavrantonis, also Counsel. There was some discussion at the commencement of the hearing about the appellant's appearance as he was wearing a hat which he did not wish to remove for the proceedings. Ultimately the judge permitted the appellant to keep his hat on, but in any event the appellant did not give oral evidence. The judge heard oral evidence from Sheila Melzak, a Consultant Child and Adolescent Psychotherapist from the Baobab Centre and two other witnesses. He also had before him an appeal bundle and supplementary appeal bundle amounting to around 1000 pages.

10. The judge considered that there was no adequate explanation for the appellant's decision not to give oral testimony and that there was no evidence to suggest that he was not fit to give evidence, although he accepted that he was a vulnerable witness and that he would be treated as such. The judge agreed with Mr Mavrantonis that there were a number of credibility issues arising in relation to the appellant's claim to have been politically active in the diaspora and that the limited evidence produced did not warrant a departure from the conclusions of Judge Coll in relation to risk on return on that basis. The judge concluded likewise in relation to the appellant's claim as to his conversion to Christianity and considered that there was no objective evidence to show that he would be at risk on that basis even if his conversion was genuine. With regard to the appellant's medical condition in relation to Article 3, the judge noted that the medical experts had based their reports upon the appellant having no support network available to him in Sri Lanka whereas he did not accept that there was such a lack of a support network on return. Having considered the appellant's ability to undertake university studies in adult nursing in the UK, the judge concluded that he was a long way removed from his earlier troubled years and from being suicidal. He therefore concluded that the appeal failed on Article 3 grounds and he dismissed the appeal on protection and Article 3 human rights grounds.

11. The judge, however, allowed the appellant's appeal on Article 8 grounds on the basis of his private life, as a result of a cumulation of factors. Those included the fact that the appellant would be bound to succeed under paragraph 276ADE(1)(v) in a short period of time as he would have reached the criteria of having been spent more than half of his life in the UK, the delays in the consideration of his claim, the fact that he had reached a critical stage in his education in the second year of his adult nursing degree and would be unable to continue studying in Sri Lanka, the fact that he had come to the UK as a 12 year old child and that he had suffered from PTSD and depression for a number of years.

12. The Secretary of State did not seek to appeal that decision and the appellant was granted 30 months' leave to remain in the UK until 15 September 2023, under Article 8.

13. The appellant sought permission to appeal the judge's decision on his protection and Article 3 claim to the Upper Tribunal on 20 May 2020. Following the refusal of permission in the First-tier Tribunal, he renewed his grounds of appeal to the Upper Tribunal on 1 July 2020. Permission was sought on the following grounds: that there was a failure by the judge to take proper account of the expert medical evidence and the seriousness of the appellant's vulnerability which led him to a legally erroneous approach to credibility; that the judge failed to take account of expert country evidence in the assessment of credibility and risk; that the judge failed to make an objective evidence-based assessment of credibility and risk; that the judge misdirected himself in law in relation to the assessment of risk and failed to apply country guidance; that the judge made legally unsustainable findings on Article 3 medical grounds and failed to take into account material matters; and that there was procedural unfairness/irregularity and apparent bias by the judge.

14. Permission was granted by the Upper Tribunal on 7 October 2020. The responded provided a Rule 24 response dated 12 November 2020 opposing the appeal.

15. The appellant's solicitors, in a letter dated 6 April 2021, gave notice under section 104(4B) of the Nationality, Immigration and Asylum Act 2002 that the appellant intended to proceed with his Article 3 and protection appeal. They subsequently accepted that the Article 3 claim had to be treated as abandoned owing to the grant of leave to remain to the appellant and the appeal therefore proceedings on asylum grounds only.

16. It is relevant to mention that, at the same time, written statements from Ms Meredith, Mr Palfi, a paralegal at Bindmans Solicitors and Ms Melzak who had given evidence before Judge Khawar, all of which had been annexed to the grounds seeking permission, were also included as part of a formal complaint made by Ms Meredith to the President of the First-tier Tribunal in a letter dated 21 May 2020. The complaint was made against Judge Khawar, alleging that he had failed to treat the appellant appropriately in light of his mental health and vulnerabilities, that he had taken a closed approach to the evidence, that he had been rude, aggressive and critical to herself and to Ms Melzak, that his approach had been unfair and hostile and that he had displayed irritation and crossed the line into bullying. Mr Mavrantonis was invited to make comments in relation to the complaint and he responded in a letter dated 14 September 2020, annexing his minutes of the hearing.

17. Judge Khawar was invited to respond to the complaint and did so at length in a letter dated 11 November 2020, refuting the suggestions of bullying or being hostile and dismissive and providing his own account of the proceedings.

Hearing and submissions

18. The matter then came before us and both parties made submissions.

19. Mr Mackenzie, in his submissions, referred to the evidence relating to the appellant's diaspora activities. He submitted that the respondent had not disputed the appellant's activities based on the evidence at the time of the refusal decision, but had only challenged the question of risk on return as a result of those activities. There was further evidence before the judge including evidence of the appellant's attendance at a protest in February 2020 including supporting photographs. Likewise, there was no express challenge by the respondent in the refusal decision to the appellant's conversion to Christianity. Mr Mackenzie also referred to the expert evidence which referred to the appellant's PTSD and his limited capacity to cope with giving evidence and to his fragile and vulnerable state, none of which actually stated that he was unfit to give evidence but which made it clear that he would be overwhelmed by having to do so. He submitted that the judge's conduct at the hearing and his adverse comments on the appellant's decision not to give oral evidence ran "a coach and horses" through the Senior President's Practice Direction and the Joint Presidential Guidance Note No.2 for vulnerable witnesses. The judge had failed to read the papers before the hearing which meant that he was unaware of the appellant's level of vulnerability and therefore erred by finding there to be no adequate explanation for him not giving oral evidence. Mr Mackenzie submitted that the judge gave limited, unsustainable and contradictory reasons for making adverse credibility findings in relation to the appellant's sur place activities, in particular when that had not been challenged in the refusal letter. With regard to the appellant's claim based on his conversion to Christianity, the judge erred by rejecting the appellant's account on the basis of him not having given oral evidence, again when that had not been challenged in the refusal decision but also when there was expert evidence to which he had failed to refer. In relation to the complaint of unfairness, and having read Judge Khawar's response, Mr Mackenzie submitted that there was little dispute as to what had happened at the proceedings and he accepted that the judge had not intended to come across as he had. He submitted that the relevant matter was how his manner was perceived by the parties.

20. Mr Melvin submitted that whilst the refusal letter accepted that the appellant was involved in some diaspora activities, the author of the refusal letter did not have the benefit of the later witness statements. It was therefore for the appellant to give evidence on those subsequent matters and the burden was on him to make out his case before the Tribunal. Mr Mavrantonis had been right to comment on the fact that the more recent evidence could not be tested if the appellant was not giving evidence and the judge was entitled to reach the conclusions that he did on the limited evidence before him. The judge had considered the medical evidence and was entitled to question why the appellant was not giving oral evidence.

21. Mr Mackenzie provided a brief response.

Discussion and conclusions

22. The main focus of the appellant's challenge is the judge's approach to credibility. It is asserted that the judge's credibility assessment was unlawful as it unfairly took against the appellant for not giving oral evidence and went behind matters unchallenged by the respondent in the refusal letter.

23. The appellant's challenge in that regard is problematic because it takes as its starting point the fact that the appellant's evidence before Judge Coll in February 2015 was accepted and that his credibility was not challenged by the respondent in the refusal decision of 20 June 2019, whereas the appellant was relying upon matters post-dating Judge Coll's decision which had not been the subject of any concession in the refusal decision. Whilst there was no specific challenge in the refusal decision to the appellant's claim in regard to his sur place activities and his conversion to Christianity, there was by no means a concession that the claim was unchallenged in either respect. Accordingly, in so far as Ms Meredith approached the proceedings on that basis, she was clearly wrong to have expected the appellant's evidence to be accepted at face-value. Although a further reason for the appellant not giving oral testimony was his vulnerability and mental health concerns, we agree with Mr Melvin that the Tribunal would have treated him as a vulnerable witness and exercised appropriate caution and sensitivity when he was giving his evidence. In deciding to take the step of not making him available for cross-examination, Ms Meredith ought not to have been taken by surprise by adverse findings made in that regard, particularly where the evidence did not specifically state that the appellant was unfit to give evidence. Accordingly, we conclude that the judge was perfectly entitled to make the observations that he did at [31] and [37].

24. However, having said that, and whilst we consider Ms Meredith's approach to have been somewhat misguided as stated above, there clearly were reasons why the appellant was reluctant to give live evidence and we do not consider that the judge was sufficiently appraised of his medical background at the start of the hearing to appreciate that that was the case. The judge openly admitted that he had not had sufficient opportunity to read all the papers fully before the hearing. Whilst it is not in general a criticism that a judge has not been able to read the papers in advance, it is unfortunate in this case that he was unable to do so as it led to some of the problems with his decision. Had the judge had such an opportunity he would no doubt have understood why the appellant was wearing his hat, so avoiding the lengthy discussion on the matter, and would have appreciated the extent of his vulnerability beyond the mere diagnosis of PTSD and depression. He would also have been in a position to address the appellant's reluctance to give evidence and to direct the evidence to the matters which were in dispute. We consider, therefore, that the judge's approach to the proceedings was erroneous owing to his lack of appreciation of the extent of the appellant's vulnerability and we do not consider that his indication, as recorded at [37] of his decision, that he would treat the appellant as a vulnerable witness, was sufficient to show that that was what he did in practice.

25. That the judge erred in that respect is particularly evident from the fact that his adverse credibility findings appear to be based upon little more than the appellant's failure to give oral evidence. That is apparent from his comments at [36] and [41]. At [36] the judge said that Mr Mavrantonis "*properly submitted that a great many questions arise in relation to the appellant's alleged diaspora activities (or lack of them), about which the appellant could have given oral evidence. He failed to do so*" and at [38] he said, "*I entirely agree with Mr Mavrantonis that a considerable number of credibility issues arise in relation to the appellant's claims to have been active in the Diaspora in demonstrating against the Sri Lanka state and his motives for any such activity*." The judge did not elaborate on what those credibility issues were and neither did he explain, at [38], why the absence of further evidence to warrant departure from Judge Coll's decision on risk on return reflected upon the credibility of the appellant's account, when Judge Coll's decision was not based on credibility grounds. Indeed, the appellant's evidence at that time was that he was not involved in diaspora activities, whereas his current claim is based upon activities carried out subsequent to that decision. At [35] the judge found it reasonably likely that the appellant had only become involved with the Tamil groups as a consequence of the refusal of his appeal by Judge Coll, but he gave no reasons for reaching that conclusion and did not engage with the appellant's explanation for the timing of his involvement in political activities in the context of his mental health. At [41] and [42] there was no proper assessment by the judge of the appellant's claim in regard to his conversion to Christianity other than a simple dismissal of the claim on the basis of a lack of oral evidence.

26. Clearly those were entirely inadequate reasons for rejecting the credibility of the appellant's account. The appellant's claim was supported by a significant amount of letters and witness statements, together with oral evidence from witnesses other than the appellant and medical and country expert reports, none of which were considered, or considered in any detail, by the judge. On the contrary much of the evidence, in particular that of the medical experts, was simply dismissed by the judge without proper reasons given – notably, at [45] and [50], where the judge criticised the experts for taking at face value the appellant's claim to have no support from family in Sri Lanka, yet giving no reasons for rejecting his claim in that regard.

27. For all of these reasons we agree with the assertion in the grounds that Judge Khawar erred in his approach to credibility and failed properly to engage with the evidence. The decision has to be set aside in its entirety as a result. With regard to the ground making assertions of procedural impropriety, Mr Mackenzie properly accepted that it was not a matter of apportioning blame and that there were no adverse intentions on the part of the judge. To the extent that the judge did not appear to have a proper appreciation of the appellant's vulnerability, having not considered the papers fully prior to the hearing, we agree that there was a degree of procedural unfairness in the proceedings, but we otherwise consider there to be no need to engage with that ground of appeal any further.

28. Accordingly, we set aside Judge Khawar's decision and remit the case to the First-tier Tribunal to be heard again before a different judge. The decision on Article 8 is, of course, preserved, the respondent having accepted that and granted the appellant leave to remain. The Article 3 ground has been abandoned pursuant to section 104(4A) of the Nationality, Immigration and Asylum Act 2002. The protection ground is therefore the only remaining ground on which the decision is to be re-made.

DECISION

29. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law and the decision is set aside to the extent stated above. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard before any judge aside from Judge Khawar.

Anonymity

The anonymity direction made by the First-tier Tribunal is maintained.

Signed: S Kebede Dated: 17 May 2021
Upper Tribunal Judge Kebede