IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006381

First-tier Tribunal Nos: PA/53386/2021
IA/12824/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 13 July 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

PBC
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Hoshi, Counsel instructed by P.B.C solicitors
For the Respondent: Mr A Basra, Home Office Presenting Officer

Heard at Field House on 18 April 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. The Appellant is a citizen of Sri Lanka. His date of birth is 16 March 1974.

2. The First-tier Tribunal (Judge Austin) granted the Appellant permission to appeal against the decision of the First-tier Tribunal (Judge Maka) to dismiss the Appellant's appeal on protection grounds.

3. The Appellant's case in a summary is that he worked as a private secretary to Nirupama Rajapaksa who was then a government minister and a member of the ruling Rajapaksa family. While working for her he became aware of information indicating that she was involved in corruption. He introduced one of his students to another member of the Rajapaksa family, namely Namal who was currently a cabinet minister. In 2023 this person told the Appellant she had been drugged and raped by Namal Rajapaksa and his bodyguards. He helped her make a complaint to the police and the Appellant was detained and tortured by the police as a result. He attempted to leave Sri Lanka in 2014 but he was again detained, tortured and sexually abused. He was told to provide evidence supporting the allegation of rape. He was able to escape by means of bribery and able to leave Sri Lanka by paying further bribes. While he was in the UK his wife was kidnapped in order to force him to return to Sri Lanka. He returned to Sri Lanka in November 2014 and continued to be pressured by the police to provide evidence of Namal Rajapaksa's crimes. He left Sri Lanka in January 2015 fearing that he was at risk from both Namal Rajapaksa and his allies and from those seeking to prosecute Namal Rajapaksa.

4. The Appellant's wife and children were refused entry clearance and moved instead to stay in a convent for their own safety. They have been threatened. In March 2017 his family were attacked by people demanding information about the Appellant. He possesses information showing that members of the ruling Rajapaksa family have been involved in corruption and rape. He is believed by the authorities to present a risk of exposing that information and as a result has suffered detention and torture including sexual abuse and his family have suffered harassment and persecution. The Appellant suffers from severe mental health and this may deteriorate if he is removed to Sri Lanka. Mental health services in Sri Lanka are inadequate.

5. The Appellant has a very lengthy immigration history. It is not necessary for me to set this out.

6. Before the First-tier Tribunal the Appellant said that he was fit to give evidence and therefore he was not called as a witness. The Appellant relied on the reports of Dr Chisholm, a registered clinical psychologist, of 25 August 2020 and 3 December 2021. Dr Chisholm assessed that the Appellant would encounter difficulty giving a clear and coherent account of both traumatic and non-traumatic experiences. Dr Chisholm found that the Appellant is likely to find the experience of an appeal hearing particularly stressful and is likely to have more difficulty than the ordinary person giving his account in court and that in doing so this would be likely to have a detrimental impact on his mental health. The judge said about the decision not to give evidence (at [6]) "given what Counsel

had said and the medical evidence before me on this issue, it was the right thing to do. The presenting officer agreed".

7. At [42] the judge returned to the issue of the Appellant not giving evidence and stated as follows:-

> "... This was also his own wish. It is not for me to challenge the evidence on this issue. However, I agree with the presenting officer that merely because the Appellant is deemed unfit and vulnerable does not mean I am obliged to attach weight to his written evidence. It does not follow that his evidence is somehow weightier. I do, however, find myself in agreement with the presenting officer when she questions how the Appellant could give realms of evidence in his lengthy witness statements (which seemingly are cohesive and coherent) and to his experts and professionals but then not be available or be able to deal with cross-examination or questions before me, which test that evidence. There are safeguards in place for vulnerable witnesses and this Court is experienced in using them. Having not given oral evidence, I accept the Respondent's submission that she has been denied the chance to test the totality of the evidence in Court".

8. The first ground of appeal is that the judge's approach to the Appellant's failure to give evidence where he was vulnerable and unrepresented was unlawful. It is a serious error to equate providing an account to a highly trained and experienced legal and medical professional in private to being cross-examined in adversarial Tribunal proceedings (with reference to HF (Algeria) v SSHD [2007] EWCA Civ). The judge erred when finding that the Appellant would be incapable of providing a detailed reliable account to professionals because of his mental health condition. The reasoning is wrong because with the skill, care and patience, experienced legal and medical professionals are well capable of eliciting high quality evidence from vulnerable asylum seekers. There was a statement from the Appellant's former solicitor explaining the painstaking process of taking the Appellant's evidence. Similarly, the preparation of Dr Chisholm's report required her to assess him over five days. The Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal and the Equal Treatment Bench Book make it clear that a vulnerable witness will only be required to give evidence at a hearing where the Tribunal determines that the evidence is necessary to enable a fair hearing of the appeal. If the judge considered that it was necessary for the Appellant to give evidence and that his failure to do so subject to appropriate safeguards would be held against him he ought to have raised this with the Appellant at the outset. The judge made a series of adverse findings based on the plausibility of the Appellant's account and the absence of documentary corroboration. The matters were not raised with the Appellant. If the judge was concerned by them he ought to have raised them with the Appellant at the outset. The approach of the judge contravened the approach to vulnerable witnesses and litigants in person mandated by the Equal Treatment Bench Book and the Tribunal's guidance.

9. At the hearing before me, Mr Basra resiled from the Rule 24 response, he conceded on behalf of the SSHD that the judge materially erred in respect of Ground 1. He agreed with Mr Hoshi that the decision should be set aside and heard afresh in the First-tier Tribunal .

10. I find that the judge materially erred in law. His failure to distinguish between giving evidence as an Appellant at a hearing (and being cross-examined) and giving instructions to a solicitor or expert is irrational. Moreover, having seemingly accepted the evidence that the Appellant is unfit to give evidence at [6], what the judge said at [42] goes behind this. Furthermore there was evidence that from the Appellant's former solicitor seeking to explain matters which the judge did not take into account. These matters infected the assessment of the Appellant's credibility.

11. The judge's decision and the grounds of appeal are lengthy; however, in the light of the SSHD's concession it is not necessary for me to determine each ground.

12. In the light of my conclusions, I set aside the decision of the judge to dismiss the Appellant's appeal. In the light of the nature of the error which is properly characterised as an issue of fairness, taking into account Begum v SSHD [2023] UKUT 00046 (IAC), I agree with the parties that following the setting aside of the decision of the First-tier Tribunal, the matter should be remitted to the First-tier Tribunal for a rehearing.

13. The decision of the First-tier Tribunal is set aside. The appeal is remitted to the First-tier Tribunal to be heard afresh.

Joanna McWilliam

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 May 2023