Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/04775/2016**

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 31 July 2017	**On 8 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

S N
(ANONYMITY DIRECTON MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Hashmi (counsel) instructed by Losanna & Co, solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, preserving the anonymity order made by the First-tier.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Hands promulgated on 05/01/2017, which dismissed the Appellant's appeal on all grounds.

3. The Appellant was born on 30/10/1982 and is a national of Sri Lanka. On 28/04/2016 the Secretary of State refused the Appellant's protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Hands ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 09/05/2017 Upper Tribunal Judge Rintoul gave permission to appeal stating

> It is arguable, in the light of UB (Sri Lanka) v SSHD [2017] EWCA Civ 85, at [23] in particular (a decision not available to FtTJ Easterman when refusing permission) that FtTJ Hands erred in the assessment of the risk to the appellant on account of his involvement with the TGTE, a proscribed organisation. While there is less merit in the other grounds, I do not consider it appropriate to limit the grant of permission.
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> Permission is granted on all grounds.

The Hearing

6. (a) Ms Hashmi, for the appellant, moved the grounds of appeal. She told me that the respondent's own country information and guidance relating to Sri Lanka had been renewed in June 2017. She then took me through various parts of the renewed guidance. She told me that the respondent's own country guidance document indicated that the appellant fell within a risk category identified in GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). Ms Hashmi told me that at the date of hearing there was a similar policy document prepared by the respondent, dated 9 December 2016. She told me that the respondent failed to draw that country information and guidance material to the attention of the Judge. Ms Hashmi referred me to UB (Sri Lanka) v SSHD [2017] EWCA Civ 85.

(b) Ms Hashmi took me to [27] and [28] of the decision and, again relying on UB (Sri Lanka) v SSHD [2017] EWCA Civ 85, told me that the Judge's findings there are unsafe, because TGTE is a proscribed organisation. She told me that the Judge's evaluation of risk was flawed. She then returned to the respondent's own country information and guidance document dated June 2017 and read extracts from the Home Office website.

(c) Ms Hashmi turned to the second ground of appeal. She referred me to the appellant's bundle and told me that the bundle contained a wealth of medical evidence. She told me that, between [22] and [24] of the decision, the Judge had incorrectly found that the appellant's mental health difficulties were caused by the respondent's refusal of the appellant's protection claim. She told me that that finding is unsafe in the light of the report from Dr Dhumad, which indicates that the appellant's mental health had deteriorated in 2010. She told me that between [22]

and [24] the Judge failed to engage with paragraphs 451 to 456 of GJ (Sri Lanka).

(d) Ms Hashmi moved the third ground of appeal. She took me through the subparagraphs of [21] of the decision and made criticisms of the Judge's assessment of the appellant's credibility. She told me that the Judge's findings are contrary to the evidence that was placed before her, and that the Judge's credibility findings are not safe.

(e) Ms Hashmi turned to the fourth ground of appeal and told me that the Judge had incorrectly applied section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, and attached too much weight to the appellant's delay in claiming asylum. She took me to [30] where the Judge records that there is a low standard of proof, and told me that the quality and quantity of evidence before the Judge discharged the burden of proof.

(f) Ms Hashmi urged me to set the decision aside and then to remit this case to the First-tier to be determined of new.

7. For the respondent, Mr Diwnycz relied on the rule 24 response dated 24 May 2017. He told me that after looking through the Home Office file he was unable to find a copy of the country information guidance dated December 2016. I had already indicated that there was not a copy of that guidance on the case file. He accepted that the country information and guidance document dated December 2016 had not been drawn to the Judge's attention. However, he told me UB (Sri Lanka) v SSHD [2017] EWCA Civ 85, post-dates the date of hearing and so had no application at the date of decision. He told me that the grounds of appeal were little more than a disagreement with the facts as the Judge found them to be. He urged me to allow the decision to stand and to dismiss the appeal.

Analysis

8. The first ground of appeal relies on the case of UB (Sri Lanka) v SSHD [2017] EWCA Civ 85. In UB (Sri Lanka) v Secretary of State for the Home Department [2017] EWCA Civ 85 the appellant's appeal against the refusal of his asylum claim based on his membership of proscribed groups and participation in political demonstrations was allowed. The First-Tier Tribunal and Upper Tribunal had not been referred to the 2014 Home Office policy guidance entitled "Tamil Separatism" which was material to the decision and might realistically have affected the outcome. The appellant had claimed membership of TGTE which material in that policy guidance indicated to be an organisation proscribed by the Sri Lankan government.

9. The decision in UB (Sri Lanka) was handed down on 22nd of February 2017. The hearing in this case took place on 27 December 2016. The Judge's decision was promulgated on 5 January 2017.

10. At [27] of the decision the Judge finds that membership of TGTE is not of great interest to the Sri Lankan authorities. At [28] of the decision the Judge finds that TGTE features on a list of organisations which the Sri Lankan government view to be terrorist organisations. It is, at least in part, on the reasoning at [29] that the Judge finds that the appellant's activities in the UK will not draw him to the adverse attention of the Sri Lankan authorities.

11. Following the case of UB (Sri Lanka), it seems to me that the Judge was prevented from making a full assessment of the risk created by the appellant's sur place activities because the respondent did not refer the Judge to the respondent's own country information and guidance dated December 2016. The Judge's fact-finding was hampered because neither parties' representative referred to that country information and guidance.

12. The Judge's fact-finding is at [21] of the decision. There, the Judge made findings of fact drawn from the evidence placed before her. Despite what is said in the second, third and fourth grounds of appeal, there is nothing wrong with the Judge's fact-finding exercise. The Judge gives clear reasons for drawing her conclusions. The Judge carefully analyses each strand of evidence and provides adequate reasons for drawing the conclusions that she does. Those conclusions are well within the range of reasonable conclusions available to the Judge. The second, third and fourth grounds of appeal amount to nothing more than a disagreement with the facts as the Judge found them to be.

13. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her

14. The fourth ground of appeal is an argument that the Judge incorrectly applied section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004. At [21] the Judge sets out a comprehensive fact-finding exercise. Between [22] and [24] of the decision the Judge considers the psychiatric evidence. At [25] the Judge takes a holistic view of each strand of evidence before concluding that the appellant is neither a credible nor a reliable witness. It is only then that, at [26], the Judge turned her attention to section 8 of the 2004 act. She reminds herself of the limits of the application of section 8 of the 2004 act, before finding that delay is a factor which undermines the appellant's credibility. There is nothing wrong with the Judge's assessment of credibility. The Judge considers

section 8 of the 2004 Act correctly. The fourth ground of appeal has no substance.

15. Although there is no flaw in the Judge's fact-finding, the difficulty that is created is that, because parties' agents agree that the Judge did not have the benefit of the respondent's country information and guidance, and because I am told that that the country information and guidance could have made a difference to the decision, there is a flaw in the Judge's assessment of risk. An error in the assessment of risk is a material error of law. I therefore set the decision aside.

16. Although I set the decision aside, I preserve the Judge's findings of fact (contained between [21] and [26] of the decision). Even though this appeal succeeds on the basis that the respondent's up-to-date country information and guidance is critical to the risk assessment, that up-to-date country information and guidance is not made available to me today by either representative.

17. What is required in re-making of this decision is a fully informed assessment of risk. There is nothing wrong with the Judge's fact-finding. The Judge's findings of fact between [21] and [26] of the decision therefore stand. It is the consideration of the risk created by sur place activity which requires reconsideration.

Remittal to First-Tier Tribunal

18. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

19. In this case I have determined that the case should be remitted because both parties require the opportunity to lodge and make submissions on the up to date country information and guidance so that the assessment of risk can be completed

20. I remit the matter to the First-tier Tribunal sitting at North Shields to be heard before any First-tier Judge other than Judge Hands.

Decision

21. The decision of the First-tier Tribunal is tainted by a material error of law.

22. I set aside the Judge's decision promulgated on 5 January 2017. The Judge's findings of fact between [21] and [26] of the decision are preserved. The appellant's appeal is remitted to the First-tier Tribunal so that an assessment of risk on return can be completed.

Signed Paul Doyle Date 8 August 2017
Deputy Upper Tribunal Judge Doyle