Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00363/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 October 2019	**On 29 October 2019**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

KSU
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Lewis, instructed by York Solicitors
For the Respondent: Mr Kotas, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Sri Lankan national who was born on 13 October 1984. He appeals against a decision which was issued by the First-tier Tribunal on 16 July 2019, dismissing his appeal against the respondent's refusal of protection under the Refugee Convention.

2. The appellant entered the UK in 2010 and claimed asylum in 2012. His claim was refused and an appeal dismissed. Following

his arrest for working unlawfully in 2014, however, further submissions were made and those submissions were accepted by the respondent to amount to a fresh claim for asylum. Whilst that claim was refused, the appellant was entitled to appeal to the First-tier Tribunal, which he did.

3. Before the FtT, the appellant advanced two principal submissions. Firstly, that he would be subject to enhanced interest on the part of the Sri Lankan authorities because of his involvement with a proscribed organisation - the Transitional Government of Tamil Eelam ("TGTE") - in the United Kingdom. Secondly, that his mental health was so poor that to remove him would be in breach of Articles 3 and 8 ECHR, whether on account of the risk of suicide or the suffering which would be brought about by his removal to Sri Lanka.

4. The judge in the FtT received a significant amount of documentary evidence, including expert medical evidence from Dr Lingam, Dr Longman, Dr Dhumad and Dr Persuad. She also heard evidence from an official within the TGTE – Sockalingam Yogalingam – who said that the appellant was his 'right hand man' in that organisation. The judge of the FtT scrutinised the evidence thoroughly and concluded that the appellant was of no interest to the authorities in Sri Lanka and that his mental health was not such that his removal would be contrary to the ECHR.

5. Notwithstanding the apparent care which went into the judge's analysis of the extensive evidence in this case, it is accepted by Mr Kotas, who appears for the respondent before me, that her decision is vitiated by legal error and that it cannot stand. It is agreed between the parties, in those circumstances, that the proper course is for the appeal to be remitted to be heard de novo by a different judge at Hatton Cross. Given the agreement between the parties, I can summarise fairly shortly the reasons which quite properly led Mr Kotas to make the concessions he did.

6. The first accepted error on the part of the judge is the subject of the first ground of appeal, by which it is submitted that the appellant did not receive a fair hearing. Before the First-tier Tribunal, the appellant was represented by Mr Paramjorthy of counsel. Due to the nature of the complaint which is raised, Mr Paramjorthy has made a witness statement in support of this appeal. In that statement, Mr Paramjorthy describes how the hearing before the FtT straddled the short adjournment. He called Mr Yogalingam to give evidence before the judge rose for luncheon, and the oral evidence was completed just before the lunch break. What happened immediately after the adjournment is recorded at [9] of Mr Paramjorthy's witness statement:

> "The FTTJ then rose for the lunch recess and returned and prior to submissions commencing she stated that she had spoken with other Judges about Mr Yogalingam over the lunch break and that his evidence as to how many times he had attended the Tribunal was inconsistent with his evidence in court."

7. Mr Paramjorthy explains in his statement that he expressed concern to the judge about the view she had seemingly formed as a result of conversations to which he had not been privy. He asked her to record the exchange in her decision. She did not do so. There is however no reason to doubt what is said by counsel in his statement and supported by a contemporaneous email which he sent to his instructing solicitor after the hearing before the FtT. Mr Kotas did not attempt to do so.

8. What is said in the grounds of appeal about this exchange is that the judge's assessment of the evidence was procedurally improper and that there was an appearance of bias, although there is obviously no suggestion of actual bias. Mr Kotas was content to accept the first of these complaints. In his submission, he asked rhetorically how counsel could have hoped to address the view which the judge had seemingly formed as a result of the conversation with other judges over the luncheon adjournment? To my mind, that summarised the problem very accurately. If this conversation was to have a bearing on the judge's assessment of the evidence, the appellant had to have a fair opportunity to address it and it is not clear how he could have hoped to do so, given the private nature of the conversation between the judge and other un-named judges at Hatton Cross.

9. In the circumstances, I need not say a great deal about the second way in which the complaint is put. The test for whether there is an appearance of bias is now well-established and was reviewed at some length by Stanley Burnton LJ (with whom Jacob and Lloyd LJJ agreed) at [42]-[53] of Virdi v The Law Society & SDT [2010] EWCA Civ 100; [2010] 1 WLR 2840. The overarching test remains that which was formulated by Lord Philips in Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

10. Applying that test to the circumstances in this case, I am driven to the conclusion that there was an appearance of bias as a

result of what the judge said to Mr Paramjorthy after the lunch adjournment. This did not arise because of her conversation with other judges during the short adjournment but because of the view she had seemingly formed as a result of that conversation. She had seemingly decided that Mr Yogalingam had not told her the truth because of what she had been told outside court. A fair-minded and informed observer would conclude, to my mind, that the judge had taken against the witness for reasons which it was beyond the applicant's power to address. This was not, as considered in Sivapatham [2017] UKUT 293 (IAC), the expression of a provisional view on the part of the judge; it was the judge conveying to counsel a problem with which he could not hope to deal. The fact that there is no reference to this exchange in the judge's decision serves to compound, and not to reduce, the concern which necessarily results.

11. Mr Kotas accepted that there was a second error in the decision of the FtT. At [21] of her decision, the judge set out in full the headnote from the Upper Tribunal's decision in KV (Sri Lanka) [2014] UKUT 230 (IAC). The judge heard the appeal in June 2019. KV was decided on appeal to the Court of Appeal on 7 March 2017 and on further appeal to the Supreme Court on 6 March 2019. The decision of the Supreme Court was very different from the decision of the Upper Tribunal, in that Lord Wilson (with whom the other Justices agreed) emphasised at [34] a number of considerations which had to be weighed when assessing whether an individual's scars were the result of self-infliction by proxy ("SIBP"). Unfortunately, because she made no reference to the Supreme Court's decision, the judge did not consider those matters when she came to the conclusion, at [39] of her decision, that she found Dr Longman's reason for rejecting SIBP unpersuasive. Had she referred to the guidance given by Lord Wilson, she might have been entitled to reach that conclusion but, having directed herself instead in accordance with the Upper Tribunal's overturned decision, her conclusion is unsustainable.

12. The final error identified in the grounds and agreed by Mr Kotas is to be found at [80] of the judge's decision, in which she stated that the appellant had first been given Mirtazapine in 2015. She rejected the evidence given by Dr Persuad, which included a suggestion that the appellant had been receiving the maximum dose of this drug since he arrived in the UK in 2010, because this was 'not borne out by his medical records'. In fact, as Mr Kotas accepted, there is reference in the appellant's medical records (at p208 of the bundle) to his being prescribed Mirtazapine in at least 2012. It seems, therefore, that one of the principal reasons given by the judge for doubting that the appellant was as mentally unwell as claimed was not based on the evidence before her.

13. As a result of these accepted errors, the result is also agreed between the parties. Mr Kotas and Mr Lewis agreed that the only proper course was for the decision of the FtT to be set aside and for the matter to be remitted to a different judge in that Tribunal for redetermination de novo. I agree and will so order.

Notice of Decision

The decision of the First-tier Tribunal was erroneous in law and is set aside. The appeal is remitted to be heard de novo by a different judge in the FtT.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

25 October 2019