IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02162/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 March 2020	**On 15 April 2020**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

'PV'
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

By virtue of the appellant appealing an asylum decision, 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 his family. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the appellant: Mr V Lingajothy, Legal Representative, instructed by L & L Law Solicitors

For the respondent: Ms A Everett, Counsel

DECISION AND REASONS

These are a written record of the oral reasons given for my decision at the hearing.

Introduction

This is an appeal by the appellant against the decision of First-tier Tribunal Judge A Davies (the 'FtT'), promulgated on 18 July 2019, by which he dismissed the appellant's appeal against the respondent's refusal on 21 February 2019 of his protection and human rights claims. That decision had in turn refused the appellant's application for leave to remain based on a claimed fear of persecution because of perceived links, as a Sri Lankan national of Tamil ethnic origin, to the LTTE, and '*sur place*' activities in the UK. The appellant's background was that he had entered the UK from India on a temporary student visa in May 2010, his family having been granted refugee status by the Indian authorities many years earlier (although the respondent did not regard the grant of such status as necessarily meaning that the appellant had refugee status within the meaning of the Refugee Convention). The appellant claimed that on arrival to the UK, he lost his claimed refugee status in India and so was unable to return there (albeit that claim was rejected by Upper Tribunal Judge Plimmer in 2012, but not disputed during an First-tier Tribunal hearing before Judge Anstis in 2016). The respondent disputed the appellant's perceived or actual links to the LTTE or *sur place* activities in the UK, which she regarded as contrived.

The FtT's decision

As well as rejecting the appellant's protection claims, the FtT assessed the appellant's article 8 ECHR rights on the basis of a return to Sri Lanka ([76]) and also considered his ability to return to live with his parents and family in India.

The FtT took as his starting point the decision of Judge Anstis in 2016, recording that the appellant conceded that he did not meet the requirements of the Immigration Rules, including very significant obstacles to integration to the country to which he would be returned ([78]). The FtT did not regard interference with the appellant's private life as any greater than in 2016 and so rejected the appeal in respect of a breach of the right to enjoy a private life ([82]).

While the relationship between the appellant and his UK relatives was close, the FtT did not regard it as constituting family life for the purposes of article 8 ECHR and there was no reason to depart from Judge Anstis' s findings.

The FtT rejected the appellant's appeal in its entirety.

The grounds of appeal and grant of permission

The appellant lodged grounds of appeal, which were initially rejected by Designated Judge Manuell in a decision dated 6 January 2020. Upper Tribunal Judge Stephen Smith granted permission on a single ground, namely whether the FtT had erred in considering, for the purposes of an article 8 ECHR assessment, whether Judge Plimmer's conclusion in 2012 that the appellant would have retained leave to enter and remain in India would still be valid, particularly as India is not a signatory to the Refugee Convention; and had also erred on the basis that the respondent was proposing to remove the appellant to Sri Lanka, not India, in her most recent decision of February 2019.

The hearing before me

At the hearing before me, two preliminary matters arose. The first matter was a submission by Mr Lingajothy that in the event that I found there to be an error of law in relation to article 8, Mr Lingajothy sought to renew an application for permission for me to consider errors of law in the remaining grounds. I provided him with an opportunity during an adjournment to seek any authority on the point. He was unable to identify any authority for the proposition that he could renew his application, permission having already been refused twice. In response, Ms Everett referred to the Joint Presidential Guidance 2019 No 1: Permission to appeal to UTIAC, paragraphs [48] and [49] in relation to the extent of limited permission of grounds to proceed and I also referred the parties to Safi & Ors (permission to appeal decisions) [2018] UKUT 00388 (IAC).

Second, Mr Lingajothy sought to rely on evidence which he suggested which was produced in January 2020, albeit on review of the documentation it in fact is dated December 2019, of which no notice had been given. When I asked him for an explanation for the lateness in the production and lack of notice, he was unable to provide any explanation. The document was evidence in the form of a news article, said to demonstrate the inability of Sri Lankan refugees to maintain immigration status in India.

I mention these two preliminary points because although their resolution was ultimately unnecessary for a fair disposal of the appeal, where a representative wishes to rely on particular propositions which go to the scope of an appeal, it is very unhelpful if they make general propositions without being prepared to assist this Tribunal by reference to authorities which are relevant to that proposition. In this case, Mr Lingajothy' s lack of prior preparation for the hearing resulted in an unnecessary lengthening of the hearing while I attempted to establish the relevant authorities. That being said, I was ultimately able to establish the correct legal authorities and apply them to the facts in this case. The lack of notice of an intention to adduce new evidence might otherwise have derailed the hearing, had it been relevant to the respondent's decision (which it was not).

The grant of permission was limited to the appellant's rights under article 8 ECHR and the extent to which the FtT had failed to consider whether the appellant's ability to return to India would have changed since Judge

Plimmer' s decision in 2012; or alternatively, whether the FtT had failed to consider that the respondent proposed to return the appellant to Sri Lanka, as stated in the refusal letter, rather than India. In granting permission, Judge Smith regarded it as arguable that the First-tier Tribunal had failed to consider the fact that the appellant would be returning to Sri Lanka, rather than India.

The appellant's submissions

Mr Lingajothy submitted that for the purposes of an article 8 family life claim, Judge Anstis had accepted the relations between the appellant and his uncle's family in the UK, at [16] to [24] of the 2016 determination, which the FtT should have taken as his starting point. Second, the FtT had not had the benefit of SSHD v BK (Afghanistan) [2019] EWCA Civ 1358, which was authority for the proposition that in considering the guidelines set out in Devaseelan [2002] UKIAT 00702, an FtT should not regard previous findings as a 'straitjacket' and should be willing to consider fresh evidence. Mr Lingajothy submitted that the FtT had failed to consider the ability of the appellant to integrate into Sri Lanka, where he had left since he was 4 years old, and there had been an inadequate assessment of the proportionality of the refusal of leave to remain.

The respondent's submissions

Ms Everett said that the brevity of the FtT's reasoning about article 8 reflected the fact that the applicant had not pursued the article 8 issue with any vigour, either before Judge Anstis or more particularly before the most recent FtT. There was no suggestion in the grounds before me of any failure to consider family life in the UK and reality, the only focus remained on the appellant's return either to India or, alternatively, to Sri Lanka. The FtT had considered, in that context, issues such as the availability of family support for the appellant.

Discussion and conclusions

I do not accept Mr Lingajothy's submission that the FtT treated either of the previous determinations of Judges Anstis and Plimmer as "straitjackets." First, the FtT reflected the changed positions between the Judge Plimmer's 2012 decision, at [24], that the appellant had been residing in India and would be able to return there; and the position in 2016, considered by Judge Anstis, in which it was not argued that the appellant could return to India. Second, Mr Lingajothy did not develop his argument beyond a generalised assertion.

Third, Mr Lingajothy's submission ignores the point which goes to the heart of this appeal, namely the very limited evidence before, and submissions made to, the FtT on the article 8 issue. A criticism might be made that a First-tier Tribunal Judge has failed to consider the fresh evidence before him or her or has failed to engage with an issue which has been the subject of detailed submissions before them. That is not the case in this

appeal, which indeed Mr Lingajothy confirmed, as he was the appellant's representative before the FtT. In these circumstances, the FtT cannot be criticised for failing to depart from the findings of a previous First-tier Tribunal, when there is no other evidence to depart from those findings, and no submissions on the issue. The FtT reflected that at [77]:

> *"Article 8*
>
> *77. The appellant did not deal with the article 8 issue in his witness statement. Nor was the matter dealt with in the skeleton argument or in submissions."*

In other words, the FtT was in the position of carrying out an assessment of an element of the appellant's appeal without the assistance of either additional evidence that was not before the previous First-tier Tribunals, or any further submissions. Nevertheless, for completeness, the FtT did go on to consider the appellant's family and private life at paragraphs [78] to [82], including by reference to paragraph 276ADE(1)(vi) of the Immigration Rules and Section 117B of the Nationality, Immigration and Asylum Act 2002.

I accept the force of Ms Everett's submission that in terms of the appellant's family life in the UK, the FtT had clearly considered this at paragraph [81]; and in relation to ongoing financial assistance from UK relatives, this was also referred to and considered by the FtT at [79]. In essence, the FtT's conclusion at [81]that there was nothing new in this appeal that makes it appropriate to depart from the decision of Judge Anstis was not to treat Judge Anstis' decision as a straitjacket, but was simply a reflection, as already stated in paragraph [77], that there was no additional evidence before the FtT by way of a witness statement nor was the matter dealt with in any skeleton argument or in legal submissions.

I considered next the ground that the FtT had confused, in his decision, where the appellant would be removed to, noting that the respondent was only proposing to remove the appellant to Sri Lanka. The additional evidence which Mr Lingajothy attempted to adduce was only relevant to the appellant's return to India, not Sri Lanka, as it suggested the Indian authorities' refusal to recognise Sri Lanka refugees as having Refugee Convention status. However, the respondent's refusal had clearly been on the basis of the appellant's return to Sri Lanka. The FtT's consideration of article 8, at [76], [78] and [88] to [107], was on the basis of a return to Sri Lanka. Indeed, the FtT noted at [76] that the respondent had made the assessment on the basis of a return to Sri Lanka and had referred at [78] to the respondent's refusal letter.

In the absence of new evidence and submissions, the FtT was unarguably entitled to conclude that there was no reason to depart from the previous findings of Judge Anstis and Judge Plimmer, albeit in circumstances where one had considered a return to India, and the other, in the context of a return to Sri Lanka. The burden of proof was on the appellant and that was a burden that the FtT was entitled to conclude that the appellant had

failed to discharge. There was no confusion by the FtT about where the respondent was proposing to return the appellant and he considered the appeal on that basis, without any error of law.

It was unnecessary for me to resolve Mr Lingajothy's submission that if I were to conclude that the FtT had erred in relation to article 8, he could renew permission to proceed with the appeal in relation to the appellant's protection claims.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law. The decision of the First-tier Tribunal stands.

Signed J Keith Date: 18 March 2020

Upper Tribunal Judge Keith