



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2024-002744  
First-tier Tribunal No:  
PA/53628/2023  
LP/00308/2024

**THE IMMIGRATION ACTS**

Decision & Reasons Issued:  
On the 05 September 2024

Before

**UPPER TRIBUNAL JUDGE STEPHEN SMITH**  
**UPPER TRIBUNAL JUDGE LOUGHRAN**

Between

**KS (Sri Lanka)**  
**(ANONYMITY ORDER MADE)**

Appellant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Paramjorthy of Counsel instructed by Satha & Co Solicitors  
For the Respondent: Mr Melvin, Senior Presenting Officer.

**Heard at Field House on 6 August 2024**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant and any members should not be identified and are granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the Appellant and her family members, likely to lead members of the public to identify them. Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. The Appellant appeals with permission of Designated Judge Shaerf against the decision of First-tier Tribunal Judge Phull ('FtTJ') dismissing the Appellant's appeal

in a determination dated 19 March 2024. The Appellant appealed against the refusal of her protection and human rights claim dated 14 June 2023.

2. We informed the parties at the hearing that this appeal would be allowed, that the decision of the FtTJ would be set aside, and that the appeal would be remitted to the First-tier Tribunal with no findings preserved, to be heard afresh by a different judge. We reserved our reasons, which we now give.

#### Factual Background

3. The Appellant is a citizen of Sri Lanka born on 17 July 1960. She arrived in the UK on 17 March 2019 on a family visit visa valid until 14 September 2019. She claimed asylum on 17 September 2019. She claims to be at risk from the Sri Lankan authorities on account of her husband's connections to the LTTE. She claims that her son was arrested and killed and that her husband is in hiding.

#### The Appeal to the First tier Tribunal

4. In the appeal before the FtT the Appellant relied on the following medical evidence:
  - a. A report by Dr Dhumad a Consultant Psychiatrist, dated 23 January 2024. It is Dr Dhumad's opinion that the Appellant's presentation is consistent with a diagnosis of Severe Depressive Disorder with Psychotic symptoms. He explained that *'she has been feeling low in mood; she feels lethargic, suicidal, hopeless, and unable to sleep with poor appetite and concentration.'* In respect of suicide risk Dr Dhumad considered that it was *'significant if she were to be informed of a removal decision to Sri Lanka.'* He also found that the Appellant was unfit to attend court hearings and give oral evidence because she *'is depressed, hopeless and very anxious, and her concentration is poor.'*
  - b. A letter from Dr Morad El-Shazly, Locum Consultant Psychiatrist at Erdington and Kingstanding CMHT dated 21 November 2023. Dr Morad El-Shazly confirmed that the Appellant was known to secondary Mental Health Services with a diagnosis of *'Severe Depressive Disorder with Psychotic symptoms and significantly suicidality'* which was being treated by a combination of anti-depressants and anti-psychotics.
  - c. The Appellant's GP records.
5. The FtTJ found that the Appellant was not at risk of persecution for a convention reason because she found that the Appellant had not established that her son was killed by the Sri Lankan authorities, the Appellant was in contact with her husband and the Appellant had not satisfied the FtTJ that the Sri Lankan authorities have maintained a continuous adverse interest in her.
6. In her consideration of the Appellant's Article 3 claim on health grounds, the FtTJ considered and raised no issues with Dr Dhumad's report although she noted (incorrectly) that the Appellant's GP records were not filed. The FtTJ accepted that following the death of her son the Appellant has been experiencing grief, that she has mental health problems and receives medication for it. The FtTJ found that the Appellant had not acted on her thoughts of suicide. The FtTJ found that the Appellant could access medical care in Sri Lanka with the assistance of her daughter and son in law or her husband in Sri Lanka. The FtTJ concluded that the Appellant's claim did not meet the high threshold under Article 3 ECHR.

7. The FtTJ found that there were not very significant obstacles to the Appellant's integration on return to Sri Lanka because the Appellant knows the culture, language, had lived in Sri Lanka for most of her life and her husband remained there and could help her integrate.
8. The FtTJ accepted that the Appellant had established a private and family life in the UK with her daughter, son-in-law and grandchildren and had sufficient ties with medical professionals and her community to engage Article 8 ECHR. The FtTJ found that the evidence did not satisfy there being exceptional circumstances in the Appellant's case and found that the decision to refuse her protection and human rights claim was proportionate.
9. The FtTJ dismissed the Appellant's appeal on all grounds.

#### The Appeal to the Upper Tribunal

10. The Appellant sought permission to appeal to the Upper Tribunal on 1 April 2024 on the following grounds:
  - (i) The FtTJ failed to engage with Dr Dhumad's report in her assessment of credibility and had therefore failed to follow the guidance in *Mibanga v Secretary of State for the Home Department* [2005] EWCA Civ 367.
  - (ii) The FtTJ failed to adequately engage with the Appellant's witness statement.
  - (iii) The FtTJ materially erred in her assessment of the Appellant's *sur place* activity.
11. In the grant of permission Designated Judge Shaerf noted that contrary to what the FtTJ had recorded in the determination, the Appellant's GP records had been filed prior to the hearing, along with the letter from Dr Morad El-Shazly. Designated Judge Shaerf concluded that it was arguable that:
  - (i) The FtTJ erred in law in her consideration of the Appellant's suicidality because the FtTJ failed to consider the suicide risk at the several points of risk between the Appellant learning that her appeal had been dismissed and subsequent to her arrival in the UK.
  - (ii) The FtTJ reached her conclusion on the credibility of the Appellant's refugee convention claim before considering the medical evidence thereby falling into the *Mibanga* trap.
12. The Respondent filed a rule 24 response on 28 June 2024 and a Skeleton Argument on 5 August 2024. The Respondent filed the HOPO's hearing minute of the First tier Tribunal hearing with the Skeleton Argument. At the hearing Mr Paramjorthy did not object to us admitting the HOPO's note of the FtT proceedings under Rule 15(2) of the Upper Tribunal Rules and we did so.
13. We had regard to all the pleadings before us and the oral submissions made by Mr Paramjorthy and Mr Melvin at the hearing.
14. We note that at the hearing, Mr Paramjorthy confirmed that he was not relying on the ground that the FtTJ materially erred in her assessment of the Appellant's *sur place* activity. He was right not to do so; the Appellant has not purported to have engaged in any *sur place* activity and the ground was included in error. We have therefore not addressed it.
15. Although it had not been relied on as a ground of appeal, we raised with the parties that at paragraphs 14 and 16 the FtTJ had found that there was a

reasonable degree of likelihood the Appellant had not been arrested and detained and had not been personally involved with or played a significant role within the LTTE. We highlighted that we had concerns that a finding there was a reasonable degree of likelihood something had not happened did not constitute a conclusion that it had not. We heard the parties' submissions on whether this demonstrated that the FtTJ had applied the wrong standard of proof. Mr Paramjorthy adopted the point. Mr Melvin submitted that it was a matter for the tribunal.

## **Discussion**

16. The Secretary of State's rule 24 notice submits that Dr Dhumad's report did not address the Appellant's credibility, or in any way go to the assessment of her credibility such that the FtTJ's analysis was in error. We disagree. The Appellant's health, as summarised by Dr Dhumad, had begun to deteriorate following the death of her son, which she claimed was in August 2022. That pre-dated the Appellant's substantive asylum interview, on 13 October 2022, and must have pre-dated the undated witness statement she prepared in response to the refusal of her asylum claim. Many of the FtTJ's findings are based on perceived inconsistencies across the accounts given by the Appellant in her substantive interview and in the written statement she had prepared for the proceedings below.
17. It is therefore clear that the FtTJ erred by falling into the classic 'Mibanga' error. There is no consideration of Dr Dhumad's report in her assessment of the Appellant's credibility or whether she would be at risk on account of her familial links to the LTTE. We find that this is material. The Appellant's diagnosis of Severe Depressive Disorder with Psychotic symptoms and the symptoms that she was experiencing as a result could be relevant to the assessment of her ability to give a consistent account and accordingly the FtTJ materially erred by failing to consider the Appellant's diagnosis and the medical evidence relied upon by the Appellant in her consideration of this aspect of the Appellant's account.
18. In addition and although it was not raised by the Appellant we find that the FtTJ did not apply the correct standard of proof. The FtTJ's finding that events had not occurred on the basis that there was a reasonable degree of likelihood that they had not is not a conclusion that they had not happened. The FtTJ's conclusion at paragraph 21 that she *'find(s) to a reasonable degree of likelihood that the Appellant is not at risk of persecution for a convention reason on return from the Sri Lankan authorities'* demonstrates that the FtTJ reversed the standard of proof and rejected the Appellant's account based on the lower standard thereby requiring the Appellant to meet a higher standard. Given the repetition of the error we find that it was not merely a misstatement, but materially impacted on her assessment of the Appellant's claim.
19. Mr Melvin submitted that the Appellant had not advanced an Article 3 suicide claim with sufficient particularity to mean that the FtTJ fell into error by failing expressly to address it. It was not a matter raised in the Appellant's grounds, but Mr Paramjorthy relied on Designated Shaerf's conclusions before us. It is not necessary for us to address this given our findings in respect of the other grounds.
20. There was very little focus on either parties' submissions regarding whether the FtTJ erred by failing to have regard to the Appellant's witness statement. It is not

necessary for us to address this given our findings in respect of the other grounds.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law.

We set aside the decision of the First-tier Tribunal and remit the case to the First-tier Tribunal to be heard by a different judge, with no findings of fact preserved.

***G.Loughran***

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**8 August 2024**