



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/12508/2019 (V)

THE IMMIGRATION ACTS

**Heard at Field House
On 15 July 2020**

**Decision & Reasons Promulgated
On 30 July 2020**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

**KS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Bayati, Counsel, instructed by S Satha & Co Solicitors

For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sri Lanka. His date of birth is 15 April 1984.
2. The Appellant came to the United Kingdom unlawfully in 2013. He made an application for asylum which was refused. His subsequent appeal in 2016 was dismissed on asylum grounds and allowed on Article 3 health grounds. The judge found that the Appellant was not credible and rejected his account about what happened in Sri Lanka. Following his appeal, the Appellant was granted discretionary leave until 17 September 2018. On 30

August 2018, he made an application for leave to remain under Article 8. The Respondent was of the view that he was no longer at risk in the absence of medical evidence to the contrary and refused his application.

3. The Appellant appealed. His appeal was dismissed by Judge of the First-tier Tribunal C. Bennett in an extensive decision comprising 50 pages. The Appellant was granted permission by Judge of the Upper Tribunal O'Callaghan on 26 February 2020. The matter came before me to decide whether the judge made an error of law.
4. Judge Bennett proceeded on the basis that the appeal was on Article 8 and Article 3 health grounds. The judge recorded that Counsel for the Appellant was not seeking to rely on the Refugee Convention in respect of *sur place* activities. The thrust of the grounds is that the judge misunderstood Counsel, Mr Paramjorthy, who did not say that the Appellant was not relying on the Refugee Convention.
5. Mr Paramjorthy has provided two witnesses of 9 October 2019 and 16 June 2020. He says that he did indicate at any time that he was not relying on the Refugee Convention. The judge wrongly recorded this to be the case. The Appellant was not seeking to interfere with the findings of the first judge in respect of his claim arising from events in Sri Lanka. It is suggested that there must have been a misunderstanding. As the Appellant's skeleton argument before the First-tier Tribunal discloses he was relying on the Refugee Convention in respect of *sur place* activities. Mr Paramjorthy gave evidence at the hearing before me. He adopted his witness statements. He has been a practising barrister for over 20 years in this jurisdiction. He said that he would not concede a case after hearing the evidence as recorded by the judge without good reason and without taking instructions from his client. He said that the judge identified medical grounds as a new matter. This confused the representatives. He said that he then identified the *sur place* activities as a new matter. The Home Office Presenting Officer took instructions at the hearing and indicated that the Secretary of State consented to the appeal to be determined on the evidence advanced by the Appellant.
6. The Respondent disclosed the Home Office Presenting Officer's note prepared on 16 September 2019, three days after the hearing. She said that Counsel for the Appellant conceded that there was no asylum claim and that the appeal was based on medical grounds. She said that the judge had raised whether the medical evidence amounted to a new matter. She recorded that both she and the Appellant's representative were confused by this. However, she spoke to a Senior Case Worker who instructed her to consent to Article 3 in terms of the medical evidence.

Conclusions

7. It is clear to me that the appeal before the First-tier Tribunal proceeded on the basis of a misunderstanding arising from confusion at the hearing. The judge identified a new matter as Article 3 health grounds. This caused confusion because it clearly is not a new matter (see section 85 (5) of the Nationality, Immigration and Asylum Act 2002). Both representatives were aware that it was not a new matter because they both describe confusion. Consent was not needed for the Appellant to rely on health grounds. Nevertheless, it seems that neither party explained this to the judge. Ms Ali, the Home Office Presenting Officer, sought consent from a Senior Case Worker about a matter which was not a new matter and for which consent was not needed. Mr Paramjorthy believed that the Home Office Presenting Officer sought consent to the Appellant relying on *sur place* activities (this is by any account a new matter) whereas this was not the case. Without consent the Tribunal has no jurisdiction to determine the appeal on refugee grounds. Counsel's skeleton argument indicates that the Appellant relied on *sur place* activities and the Refugee Convention. Mr Paramjorthy proceeded on the basis that the Secretary of State consented to the Appellant relying on the Refugee Convention in respect of *sur place* activity. However, the Respondent had not consented to this.
8. I conclude that there has been a genuine misunderstanding which gives rise to a procedural irregularity depriving the Appellant of a fair hearing. Confusion may have arisen because a ground of appeal was wrongly categorised by the judge as a new matter. Furthermore, Counsel indicated that he was not seeking to interfere with the decision of the first judge in respect of her findings relating to the Refugee Convention. Whilst I take on board Mr Bate's submission about the contemporaneous note of the Home Office Presenting Officer which would support its reliability, it is not a matter of me preferring one person's account over that of another. I have no doubt that the parties acted in good faith and have given accounts which they believe to be accurate.
9. There is a further complaint made in the grounds of appeal to the medical evidence. In the light of there being a procedural irregularity as identified, fairness demands that the decision is set aside in its entirety.
10. I make the following observations. There is no dispute that the *sur place* activities constituted a new matter. It was incumbent on the Appellant's solicitors to properly raise the new matter prior to the hearing and to seek the consent of the Secretary of State. It was not satisfactory to leave the issue until the day of the hearing. When I raised this with Ms Bayati, her response was unimpressive. She said that when she sought consent in the past, the Secretary of State failed to respond. This does not obviate a representative's obligations to cooperate with the Tribunal enshrined in the overriding objective at Rule 2 of the Tribunal Procedure (First-tier Tribunal) Rules 2014. Moreover, it is of concern that Mr Paramjorthy could not locate his notes from the hearing. While Mr Paramjorthy conceded at the hearing before the First-tier Tribunal that *sur place* activities was a new matter, this should have been raised in his skeleton argument.

11. The decision of First-tier Tribunal Judge Bennett dismissing the appeal is set aside. The matter is remitted to the First-tier Tribunal for a re-hearing. The scope of the hearing before the First-tier Tribunal depends on whether the Appellant has by them the consent of the Secretary of State to rely on *sur place* activities.

Notice of Decision

The Appellant's appeal is allowed. The decision of the judge to dismiss the appeal is set aside. The matter is remitted to the First-tier Tribunal for a re-hearing.

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 his 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.

Signed Joanna McWilliam

Date 20 July 2020

Upper Tribunal Judge McWilliam