



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

Appeal Number: PA/02722/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 12th July 2016**

**Decision & Reasons
Promulgated
On 25th July 2016**

Before

UPPER TRIBUNAL DEPUTY JUDGE ROBERTS

Between

**RM
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Haywood, Counsel
For the Respondent: Mr Walker, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was made by the First-tier Tribunal. As a protection claim, it is appropriate to continue that direction.

DECISION AND REASONS

1. The Appellant RM is a national of Sri Lanka who arrived in the UK on 25th November 2012 and claimed asylum upon arrival.
2. She was interviewed by the Respondent on two occasions and following those substantive interviews, the Respondent on 3rd November 2014, made a decision excluding her from refugee status under Article 1F(a) and 1F(c) of the Refugee Convention. It was accepted however that her removal to Sri Lanka would contravene Article 3 ECHR and accordingly she was granted restricted leave to remain valid until 2nd May 2015.
3. On 30th April 2015 the Appellant submitted an in time application for further leave to remain. By a decision dated 27th October 2015, the Respondent maintained her decision to exclude the Appellant from the Refugee Convention under Article 1F(a) only (conceding Article 1F(c) no longer applied), but granted a further period of restricted leave to 27th April 2016. It is against that decision that the Appellant appeals.

Appellant's Claim and Background

4. The Appellant's claim in summary is that she is an ethnic Tamil from the Trincomalee District of the eastern province of Sri Lanka. It is accepted that she assisted the LTTE from about the end of December 2002 at a time when she regarded them as the sole representative of the Tamil people. In May 2004 she formally joined the LTTE, was taken to Samboor for a month and a half's training and followed this by specialist training to become an intelligence operative.
5. After her training she returned to her village and started studying for her A levels. She provided the LTTE with information about army movements in her village and following the LTTE split from the Karuna Group, also provided intelligence about members of that group and members of the public who were giving information about the LTTE to the Sri Lankan Army or to the Karuna Group.
6. In 2007 the Sri Lankan Army gained control of the eastern province and the Appellant lost contact with the LTTE. She returned to her home village and continued studying. In 2011 she was arrested at her home by Sri Lankan Army intelligence officers and detained for ten days. She was not charged but she was interrogated in detention, tortured including being raped and sexually abused. She was eventually released from detention but was required to report weekly to the police and to inform them if she intended to leave her home area.
7. In November 2011, the Appellant claimed that her father was beaten to death so she went to live with her uncle in Trincomalee. In May 2012 she stopped reporting to the police and in July 2012 she was informed by telephone that her mother and sister had died after being burned alive when the family home was deliberately set on fire.

8. The Appellant was arrested once again by Central Intelligence Department on 3rd October 2012 and again tortured and raped. Her uncle secured her release. He arranged for her to leave Sri Lanka and she travelled to the UK arriving on 25th November 2012 and claimed asylum.

FtT Hearing

9. The Appellant's appeal came before the First-tier Tribunal on 8th and 16th March 2016. That tribunal heard evidence from the Appellant. It was common ground that in appeals such as this one the Respondent bore the burden of proving that the Appellants activities in the intelligence wing of the LTTE brought her within the exclusion clauses of the Refugee Convention. In coming to its decision the FtT made several findings and concluded that the Respondent had correctly excluded the Appellant from the Refugee Convention. In particular the FtT found that it disbelieved the Appellant when she maintained her stance that she was unaware of what happened to those people she had informed against and further she was unaware of whether or not the LTTE hearings followed due process. The FtT concluded that even if the Appellant was not a witness to war crimes, it was not credible that she was unaware that war crimes were being committed by both the LTTE and the Sri Lankan forces. The appeal was dismissed.

Permission to appeal/error of law hearing

10. The Appellant sought permission to appeal the FtT's decision. Permission was refused initially but granted on a renewed application before the Upper Tribunal. Several grounds were put forward but for the purposes of this decision, I need only highlight two of those grounds.
11. The first is that the FtT misapplied the burden of proof in its findings about the fairness or otherwise of the LTTE court system and processes. Secondly following on from that, it failed to make proper and adequate findings on whether the Appellant was aware that the LTTE courts did not afford due process. That erroneous approach tainted the findings made on credibility to the extent that the decision was unsustainable.
12. I find I am satisfied that the FtT's decision reveals such errors that the decision must be set aside. I now give my reasons for this finding.
13. It is common ground that in an Article 1F case, the Respondent bears the burden of proving that the activities complained about bring the Appellant within the exclusion clauses of the Refugee Convention and those activities have to be narrowly and restrictively construed. The judge indeed acknowledged this at [25] and again at [69]. Despite these acknowledgements, it is plain from a reading of the text, that from [65] to [68] the judge has clearly reversed the burden. In particular at [65] the judge notes:

"I find that there is little evidence that the LTTE conducted a separate legal system in areas under its control which met international minimum standards of a fair trial. There is no evidence for example that the judicial system had legally trained prosecutors or that defendants were allowed legal representation from qualified lawyers or that defendants were allowed to see the evidence against them and challenge that evidence through legal representation. Nor is there any evidence that the judges who presided over the LTTE hearings were themselves legally qualified".

As the grounds seeking permission point out, since the Respondent bears the burden of proof, it was for the Respondent to show that the court system was unfair and did not meet international minimum standards, not for the Appellant to adduce evidence that it was fair. This has led the FtT into error in its approach to the evidence before it.

14. Likewise but equally important is the question of whether the FtT has given proper reasoned findings showing the Appellant could even be said to be aware that the LTTE's court procedures did not follow due process. There are no findings that I can see, which demonstrate that the judge has properly considered this crucial point.
15. Throughout her two interviews the Appellant has consistently maintained that she did not have such awareness. Whilst it is correct, as Mr Walker pointed out, that the judge dealt with the issue of the Appellant's credibility, nevertheless from a plain reading of the decision, it has been dealt with from an incorrect standpoint. The judge appears to have imputed knowledge and awareness of the LTTE court's procedures, simply on account of the fact that the Appellant had been recruited to the intelligence division. There needs to be more than that to justify a finding of knowledge and intent. I find there is no adequate reasoning to show why the judge disbelieved the Appellant's account, consistently maintained that punishments were only imposed by the LTTE after "a formal hearing".
16. Since these issues are crucial and central to the Appellant's appeal, I find that the judge's decision cannot stand. I set it aside in its entirety.
17. Both representatives were of the view that should I find an error of law there will need to be a full rehearing. I agree since findings on the Appellants credibility or otherwise must be made. Mr Haywood submitted that any rehearing should take place in the First-tier Tribunal, on account of the fact that the Appellant would need to give evidence and it was appropriate that judicial fact-finding should take place in that Tribunal. Mr Walker however was of the view that he would prefer the matter s stay in the Upper Tribunal.
18. On reflection because the original decision has been set aside and because of the amount of judicial fact finding necessary in this appeal, I consider it appropriate in fairness to the Appellant that this appeal is

returned to the First-tier Tribunal (not Judge Beg) for a fresh rehearing. No findings of fact are preserved from the original decision.

Notice of Decision

The decision of the First-tier Tribunal is hereby set aside for error of law. This appeal is remitted to that Tribunal (not Judge Beg) for a fresh rehearing.

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 them 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.

Signed

C E Roberts

Date

21 July 2016

Upper Tribunal Deputy Judge Roberts