



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

Appeal Number: AA/02017/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 20 November 2014**

**Determination
Promulgated
On 23 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

**MR MANATHUNGA DUSHANTH NISHANGA DE SILVA
(NO ANONYMITY DIRECTION)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani, Counsel instructed by Kesa & Co
Solicitors

For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka and his date of birth is 30 March 1976. He entered the UK on 2 December 2008 and claimed asylum on 20 February 2014. His application was refused by the Secretary of State in a decision of 28 March 2014. The appellant appealed against the decision to remove him which accompanied the decision to refuse to grant him asylum. He was detained and his appeal was processed in the fast track system.

2. The appellant's appeal against the decision of the Secretary of State was dismissed by Judge of the First-tier Tribunal Kimnell in a decision promulgated on 8 April 2014 following a hearing at Hatton Cross on 7 April 2014. Permission to appeal was refused by the First-tier Tribunal and then by the Upper Tribunal. The appellant made an application for permission to apply for judicial review and this was granted by Mrs Justice Laing. Following this, there was a consent order whereby the Upper Tribunal quashed the decision of the Upper Tribunal to refuse to grant the application for permission to appeal and agreed to grant permission. In accordance with that order permission was granted by Vice President T M G Ockleton on 9 July 2014. Thus the matter came before me.

The Hearing Before the First-tier Tribunal

3. The appellant was in the Sri Lankan Air Force between 1995 and 2007. After he left the Air Force he worked for Mr Nanayakrara. The work that they were involved in was apprehending LTTE suspects. In 1992 the appellant's father was murdered. This was as a result of his father's involvement in politics. The appellant believes that his father was murdered by Felix Perrera's bodyguard, Manil. Felix Perrera was a member of a political party. As a result of this the appellant's brother paid a gang to kill Manil and another man called Gamani. The gang killed Gamani and in 2002 the appellant was arrested for his murder. The appellant was detained for two days at a police station. He was then taken to a shed belonging to Felix Perrera and tortured over a period of four days. Mr Nanayakrara's intervened and secured his release. The appellant fled Sri Lanka in 2008. His evidence is that he is at risk on return to Sri Lanka. He fears Manil who is now an MP. He also fears Mr Nanayakrara.
4. The appellant was detained and unrepresented when he appeared before the First-tier Tribunal. Whilst in detention he was seen by a GP and a medical report was produced pursuant to Rule 35 of the Detention Centre Rules 2001. The report indicates that the GP who assessed the appellant had concerns that he may have been the victim of torture. The appellant told the GP that he had been beaten by bodyguards and that his ordeal lasted six days. During this time he was tied up with rope and beaten. The doctor noted that there were no concerns relating to the appellant's mental health but that the "scars are consistent with the account of events given by the detainee." There is a body map showing the scars. At the hearing the appellant produced a letter from the (Helen Bamber Foundation) HBF
5. The Judge recorded the following at [24] of the determination:

"24. ...A letter from the Helen Bamber Foundation was also submitted indicating that the appellant had been accepted for initial assessment on 9 September 2014 and only then would the Foundation be in a position to say whether or not they would prepare a medical report. Though the appellant did not specifically make one, I considered whether the letter from the Foundation ought to be treated as an

application to adjourn proceedings, but I decided not to adjourn because whether or not a report would be available remained speculative, depending on the outcome of the appointment on 9 September. There is a brief report and a body map in the respondent's bundle identifying physical scars the appellant has. Given the delay of six months before the Foundation were even in a position to say whether or not they would be prepared to provide a report, the adjournment would have to be for a period of something like eight or nine months which was wholly unrealistic. The appellant was therefore invited to put his case.

6. The Judge went on to dismiss the appellant's appeal finding that his evidence was lacking in credibility and highlighting a number of discrepancies. At [57] Judge Kimnell stated as follows:

57. I accept that the appellant has the scars shown on the body map included in the respondent's bundle. The nature of the scars cannot be ascertained from the report, but given the fact that the appellant was an engineer who served in the Sri Lankan Air Force fighting the LTTE in villages round Trincomalee, and participating in the arrest of LTTE members, it will be surprising if he did not have some scars. The report does not give an opinion as to how they were likely to have been inflicted."

The Decision of Mrs Justice Laing

7. The decision of the High Court at [4] – [7] reads as follows:

"4. The FTT refers to the Rule 35 report in paragraph 88 of the determination where it relies on the narrative given to the doctor who made the Rule 35 report as evidence of inconsistency in the claimant's account, in paragraph 24, where it says that the report gives a map of the claimant's scars, and in paragraph 57 where they say that the report does not give an opinion as to how the scars were likely to have been inflicted. The FTT does not seem to have appreciated that the Rule 35 report went somewhat further than this. Had the FTT appreciated this, they might have taken a different view about adjourning the hearing for a report from the Helen Bamber Foundation ("the HBF"), at least to the extent of exploring whether the date of the appointment offered could be moved.

5. I have two independent linked concerns therefore about the decision of the First-tier Tribunal. First, it is based on a misunderstanding of the nature of the Rule 35 report, and second, had the FTT properly understood what the report showed, it might have adopted a different approach to the adjournment which it rightly appreciated the production of the HBF report required it to consider granting.

6. I do not say that the FTT would necessary have reached a different conclusion on the appeal, as there were apparent inconsistencies in the claimant's account, but a correct understanding of the effect of the Rule 35 report was an essential precondition to a fair assessment of

the claimant's asylum claim, and the essential context for the proper assessment of those apparent inconsistencies.

7. I therefore conclude that it is at least arguable that the limb two of the cart test is met. There is a strongly arguable case that the FTT erred in law, and there is a compelling reason for the grant of permission, because the claimant did not have a fair assessment of his asylum claim."

Conclusions

8. I have taken a careful note of the view expressed by Mrs Justice Laing. However, the issue for me is whether or not there is a material error of law.
9. Rules 28 and 30 of the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 are relevant to the adjournment issue. The Judge did not refer to these specifically. The Judge should have considered whether or not the appeal could be justly determined without an adjournment (Rule 28) and whether there were exceptional circumstances which meant that the appeal could not be justly determined in the fast track procedure (Rule 30), whilst at all times giving effect to the overriding objective contained (Rule 4 of the Principal Procedure Rules). The Judge was obliged to consider the above and that he did not do so is an error of law. However, I do not find that the error is material.
10. There were significant credibility issues raised by the respondent and the Judge found serious discrepancies and inconsistencies in the appellant's evidence and wholly rejected it. He did so for a number of reasons (although it was accepted that the appellant has scars). The Judge noted that there was no evidence about Felix Pererra or the death of his body guard or of a commanding officer called Nanayakrara. The Judge found that there was "no evidence substantiating anything the appellant says or supporting it in a broader sense" (see [54]). The Judge found that the serious discrepancies in the appellant's account were not just matters of varying dates or locations but they went to the substance of his claim.
11. The Judge noted at [58] that the appellant stated in his screening interview that the government killed his brother and that it was the government who had previously arrested the appellant; however, this was at odds with the account that he gave in his substantive interview which was "wholly different" where he had stated that he was not afraid of the government, but that he feared Felix Pereira and Nanayakrara. In his asylum interview the appellant stated that his father was murdered in 1992 but in his screening interview he said that his father and he were arrested in 2002/03. The appellant's oral evidence was that only he arrested because his father was already deceased by then. The Judge noted that the appellant's explanation for the inconsistencies, namely that the interpreter was to blame was "weak". The appellant in his screening

interview was asked why he could not return to Sri Lanka and he made no mention of Felix Pereira or a commanding officer Nanayakrara.

12. The appellant stated in his screening interview that the government killed his brother but in the substantive interview he stated that his brother was not dead. The Judge noted that the appellant's evidence within the screening interview was inconsistent. He stated that he was involved in the contract killing arranged by his brother and then he stated that he had no connection with it. The Judge took into account that the appellant did not claim asylum until he had been here for six years and that he had remained in Sri Lanka for six years after his release from custody during which time he had married and had a child. He had not on his account encountered any problems during that time. The Judge concluded by finding that not only was the appellant's evidence inconsistent, but it was contradictory and furthermore that there was no explanation for the dramatic inconsistencies and contradictions in his account. In my view these findings are reasoned and were entirely open to the Judge.
13. The Judge was aware of the Rule 35 report and acknowledged that the appellant has scarring, but he did not refer to the opinion of the GP that the scars were consistent with the appellant's account. However, there is in my view no reason to conclude he was not aware this or that he had not taken it into account. The Judge's findings at [57] are not inconsistent with this. The Rule 35 report is brief and uses the language of the Istanbul Protocol in concluding that the scars are "consistent" with the appellant's account. "Consistent" in the context of the Istanbul Protocol does not preclude the possibility of injuries having been caused by other means. In any event, the issue for me is materiality. It is inconceivable that had the Judge accepted the report at its highest he would have reached a different conclusion in the light of the evidence as a whole. The evidential weight of the opinion of the GP is reduced by the appellant's problematic evidence. There are extensive and unassailable adverse credibility findings made by the Judge.
14. Mr Bandegani indicated to me that the appellant had now been assessed by the HBF and a report is expected to be produced shortly. There was no indication of what the report may say nor whether it is expected to corroborate the appellant's evidence of torture. No unfairness has been caused to the appellant.
15. For all of the above reasons the error of the Judge is not material. The decision to dismiss the appellant's claim for asylum is lawful and sustainable and the decision and is maintained.

Signed Joanna McWilliam

Date **20 November 2014**

Deputy Upper Tribunal Judge McWilliam