



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

Appeal Number: AA/01864/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 28 January 2015**

**Decision & Reasons
Promulgated
On 02 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**BT (SRI LANKA)
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Jegarajah, Counsel instructed by H K Solicitors

For the Respondent: Ms L Kenny, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing his appeal against a decision by the Secretary of State to refuse to recognise him as a refugee, or as otherwise requiring international or human rights protection. The First-tier Tribunal made an anonymity direction, and I am satisfied that the appellant should be accorded anonymity for these proceedings in the Upper Tribunal.
2. The appellant is a national of Sri Lanka, whose date of birth is 15 November 1977. He arrived in the United Kingdom on 6th January 2009

with a student visa valid until 31st October 2010. He extended his student visa until 31 December 2013, but on 26 March 2012 the decision was made to curtail his leave because the licence of the teaching institution at which he was studying was revoked. However this decision to curtail his leave was not served on the appellant, and so as far as he was concerned he had extant leave until 31 December 2013. On 11 December 2013 he made an appointment to claim asylum, and he did so on 10 January 2014.

3. The appellant's case was that he had joined the LTTE in the year 2000. For about four months he underwent training at a camp in Mullaittivu. He was taught how to handle an AK47 and to throw grenades, but was not involved in armed combat. He was then sent to an administrative unit for about four months, where he arranged transport facilities, food and clothing for LTTE cadets, and registered new LTTE members.
4. The appellant then went to Jaffna University in or about October 2000. While attending university, he was involved in activities promoting the aims and objectives of the LTTE. He completed his university course in 2005. The LTTE found the appellant a job with the World Food Programme in Kilinochchi. He was meant to inform the LTTE about Tamils who worked with the army. The appellant held this job until about August 2006.
5. From March to December 2007 the appellant worked with the ICRC in Jaffna. Whilst working there, he informed the LTTE about what security there was on the Jaffna road, and told them whether or not it was safe for them to travel.
6. From December 2007 the appellant worked for an architect in Colombo. While in Colombo, he assisted the LTTE by arranging accommodation, and also by supporting member families with money which the LTTE deposited into his bank account. In 2008 the appellant was arrested in Colombo by the police during a roundup. He was beaten ten to fifteen times with batons, rifle butts, sticks and wires and was released the following day after his fingerprints had been taken. During his detention the appellant did not admit to being a member of the LTTE. The appellant left Sri Lanka for the UK without any problems on 5 January 2009.
7. In 2012 the appellant's mother informed the appellant that his brother B had been arrested in January 2012 as a result of the appellant's LTTE involvement. During a search of the family home, the army had found the appellant's national identity card. The appellant also spoke to his brother, who told him that he had been detained for two weeks after being brutally tortured by the army. He was shown the appellant's LTTE membership photograph during his questioning. His brother B was released on condition that he reported every month to Elavali Police Station. The appellant had taken an overdose in November 2013 because he was so upset about his brother and his own future. He suffered from depression.
8. While living in the UK, the appellant had participated in UN peace demonstrations about twice or three times a year. He was a member of the British Tamil Forum which was banned by the Sri Lankan Government, and he had assisted the British Tamil Forum since May 2009. He had also

been involved with the Transnational Government of Tamil Eelam and was a member of Tamil Youth Cultural Affairs.

9. The appellant's screening interview took place on 10 January 2014 and his substantive asylum interview took place on 20 January 2014. On 6 March 2014 the respondent gave her reasons for refusing to grant him asylum, and to remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. She also certified the claim as clearly unfounded under Section 94(2) of the Nationality, Immigration and Asylum Act 2002.

The Hearing Before, and the Decision of, the First-tier Tribunal

10. The appellant's appeal came before Judge Eban sitting at Richmond in the First-tier Tribunal on 11 July 2014. The appellant was represented by Mrs Poynor of Counsel, and the respondent was represented by Mr Vaghela, Home Office Presenting Officer.
11. In her subsequent determination, Judge Eban began by setting out the respective cases of the appellant and the respondent. She then addressed the medical evidence relied on by the appellant, which consisted of a psychiatric report from Dr Morrison dated 8 May 2014 and a scarring report by Mr Martin dated 6 December 2014. At paragraph 15, she considered the background evidence in the Sri Lanka OGN issued August 2009 as to what was happening in 2008 when the appellant said he was detained.
12. The judge's findings of credibility and fact begin at paragraph 16. At paragraph 20 she said:

I have considered the evidence as a whole. This includes an assessment of the claimant's account of events set against the relevant background in the light of the appellant's individual position and personal circumstances as well as the medical evidence. I have considered all the respondent's criticisms of the appellant's evidence which are said to go to the appellant's credibility.

After identifying those aspects of the account which she accepted, the judge said she had concerns about whether other aspects of the appellant's account of what occurred to him were reliable for the following cumulative reasons which were set out in no particularly order, and some of which were overlapping. The judge then proceeded in numbered subparagraphs running from subparagraph 1 to subparagraph 15, and ranging over four closely typed A4 pages, to set out her reasons for reaching an adverse finding on the credibility of the core of the appellant's claim.

13. She summarised her findings at paragraph 21, page 14. She accepted the appellant was detained during a general roundup in Colombo in 2008. He was fingerprinted and released within 24 hours. He had scarring on his back from being beaten. But she did not consider there was a reasonable likelihood that the scarring was the result of beatings while the appellant was in detention in 2008. He had left Sri Lanka on his own passport in January 2009. He had attended peaceful Tamil demonstrations in the UK.

He was not an organiser of these demonstrations or a fundraiser. He was not involved in separatist activities. There was not a reasonable likelihood that his brother B was detained by the Sri Lankan authorities as described by the appellant.

14. The judge addressed the issue of risk on return at paragraphs 22 following. He had had a low level involvement with the LTTE, and there was no evidence that his family members are or had been associated with Tamil separatism; and he had not had a significant role in diaspora activities designed to destabilise the unitary Sri Lankan state and to revive the internal armed conflict. He found the appellant was not someone for whom there was a real risk of being stopped and questioned at the airport or thereafter in the community.

The Application for Permission to Appeal to the Upper Tribunal

15. Extensive grounds of appeal to the Upper Tribunal were settled by Ms Jegarajah of Counsel.
16. Ground (i) was that the judge had erred in failing to follow the Joint Presidential Guidance Note No. 2 of 2010 regarding child, vulnerable adult and sensitive witnesses. In breach of the guidance, the judge was required to classify the appellant as a vulnerable person and to decide credibility in that context.
17. Ground (ii) was that the judge had exhibited a disposition to disbelieve at paragraph 20(2) of the determination.
18. Ground (iii) was the judge had misinterpreted the background material relative to ill-treatment in detention in Sri Lanka.
19. Ground (iv) was that it was irrational for the judge to place weight on the fact that the appellant had not reported his alleged assault to anyone.
20. Ground (v) was that in relying on the absence of contemporaneous medical evidence of treatment for these scars, the judge was applying a standard of proof in excess of what was required.
21. Ground (vi) was that the judge had failed to give proper weight to the appellant's attendance at demonstrations in the UK and to consider this in the light of relevant country guidance.
22. Ground (vii) was that the judge had failed to make any findings on whether the appellant would face risk on return as a former member of an NGO.
23. Ground (viii) was that the judge had failed to make a specific finding on the potential risk arising from mere membership of two proscribed organisations.
24. Ground (x) was that the judge had failed to take into account corroborating documents with respect to the appellant's brother R, who had been arrested by security forces on 18th April 2014. The appellant's mother told a member of the Provincial Council that R was badly tortured and was questioned not only about his own participation in LTTE activities, but also about the appellant's participation in LTTE activities.

25. I have left out ground (ix) as it does not identify a separate alleged error of law, but appears to be a gloss on ground (viii).

The Initial Refusal of Permission

26. On 7 August 2014 Designated Judge Baird refused permission to appeal for the following reasons:

The determination in this case is comprehensive and clearly well-considered. The medical evidence before the judge does not in my view indicate that the appellant was a vulnerable person and I can see no record of any submission to that effect having been made at the start of the hearing. Ground (ii) has no merit. This issue was dealt with adequately. There may be some merit in grounds (iii), (iv) and (v) but even if there is, these points are not, looking at the determination as a whole, material to the outcome of the appeal. Contrary to what is said in the grounds the judge did consider at length the appellant's attendance at demonstrations in the UK, his membership of the two organisations and his account of his brother's difficulties. She applied the correct country guidance. I can see no mention in the appellant's statement, the refusal letter or the appellant's skeleton argument of membership of an NGO and so see no merit in ground (vii).

The Renewed Application for Permission to Appeal

27. Ms Jegarajah settled a renewed application for permission to appeal to the Upper Tribunal. The ICRC was a well-known international NGO. The medical evidence as a matter of law rendered the appellant a vulnerable person. Vulnerable adult had the same meaning as in the Safeguarding Vulnerable Groups Act 2006. Section 59 of the Safeguarding Vulnerable Groups Act defined a vulnerable adult as follows:

A person is a vulnerable adult if he has attained the age of 18 and ... some individuals are vulnerable because of what has happened to them e.g. they are victims of trafficking or of sustained serious harm or torture or are suffering from PTSD.

28. Given that the consultant psychiatrist had made a clinical finding that the appellant was suffering from a major depressive episode and was at an increased risk of suicide, the appellant was a vulnerable witness. Even if the submission relating to the vulnerable witness guidance was not made at the hearing, there was a clear expectation that Judge Eban would apply the Presidential Guidance without it being identified and relied on.

The Eventual Grant of Permission to Appeal

29. On 8 December 2014 Upper Tribunal Judge Eshun said she found it appropriate to grant permission "in light of the argument as to whether [the judge] should have considered that the appellant was a vulnerable person for the purpose of these proceedings".

The Rule 24 Response

30. On 24 December 2014 Mr Tufan of the Specialist Appeals Team settled a Rule 24 response on behalf of the Secretary of State opposing the appeal. He relied on Judge Baird's refusal of permission. There was no evidence to suggest the appellant was a vulnerable person, and the medical evidence

did not specifically suggest as such. In her comprehensive determination Judge Eban considered the evidence and made reasoned findings. The judge had applied the ratio of the country guidance case of **GJ** and there were no material errors of law in her determination.

The Hearing in the Upper Tribunal

31. At the hearing before me, Ms Jegarajah abandoned grounds (ii) and (iii). She also abandoned part of ground (x), which was the criticism contained in paragraph 37 of the grounds. She indicated that she wished to pursue the remaining grounds.
32. Ms Kenny submitted that the appellant only had permission to pursue ground (i). But, being mindful of the case of **Ferrer**, I declined to treat the other grounds as being inadmissible.

Discussion

33. I am not persuaded that the judge should have treated the appellant as a vulnerable adult witness, or that she erred in law in not including in her determination a discussion as to the applicability of the Joint Presidential Guidance Note of 2010.
34. The definition of a vulnerable adult given in the renewed application for permission appears to be an amalgam of definitions taken from different sources. More pertinent is the definition given in paragraph 20 of the guidance itself:

This guidance applies to children and young persons under the age of 18, who appear to be under the age of 18 or claim to be under the age of 18, individuals who suffer from a mental disorder within the meaning of the Mental Health Act 1983 or who have any significant impairment of intelligence or social function such as to inhibit understanding and participation in proceedings or learning disability or as defined in the Safeguarding Vulnerable Groups Act 2006 or who are vulnerable because of external factors.

35. The premise of Ms Jegarajah's main error of law challenge is that a person who suffers from depression is *ipso facto* a vulnerable witness. This is wholly fallacious. Dr Morrison diagnosed the appellant as suffering from a major depressive episode which was moderate in severity. He found that the appellant's depression appeared to be in response to recent stressful life events, rather than any ill-treatment which he had personally suffered in the past. He did not meet the criteria for post-traumatic stress disorder. Furthermore, based on his interview with the appellant, he was of the opinion that the appellant was able to comprehend court proceedings, give evidence and give proper instructions to his legal representatives. Dr Morrison further observed that the intensity of the appellant's depression had eased "with a combination of antidepressant treatment and counselling". He was not currently suicidal. But as he was still suffering from a depressive disorder, he was at an increased *statistical* risk of suicide. Dr Morrison did not opine that the appellant was suffering from a mental disorder within the meaning of the Mental Health Act 1983 or that he had any significant impairment in intelligence or social function.

36. Paragraph 14 of the guidance cited by Ms Jegarajah in ground (i) provides *inter alia* as follows: “Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.”
37. A notable feature of this case is that the judge does not appear to have based her adverse credibility findings on any asserted discrepancy in the appellant’s oral evidence. Insofar as the judge’s reasoning relies on inconsistencies, they are not internal ones (such as a discrepancy between what the appellant said in his oral evidence against what he said in interview) but upon external inconsistencies between his narrative and the background material.
38. It is apparent from the judge’s self-direction at paragraph 20 that she took full account of the fact that the appellant was suffering from depression in her overall assessment of the credibility of the core claim. As the appellant was legally represented and was not put forward as a vulnerable witness, the judge did not have a duty to consider whether the Joint Presidential Guidance applied, still less to follow the guidance to the letter, such as formally recording whether in her view the appellant was a vulnerable witness or not. Under paragraph 5 of the guidance the primary responsibility lay with the appellant’s legal representatives to put the appellant forward as a vulnerable witness.
39. It is convenient to address ground (v) next, as it also relates to the judge’s approach to the medical evidence. The judge observed in subparagraph (6) of paragraph 20 that there was no contemporaneous medical evidence of treatment for the scars, and she found that this lack of independent corroborating evidence led her to doubt even to the lower standard that the appellant’s scars stemmed from a beating in December 2008. Ms Jegarajah submits that this was not a finding which was open to the judge, as there was independent medical evidence from Mr Martin as to the likely cause of the appellant’s scarring.
40. But Ms Jegarajah’s challenge ignores the fact that the judge addressed Mr Martin’s report in subparagraph (4) of paragraph 20. She noted Mr Martin’s view that the scars on the appellant’s back occurred a few years ago. She contrasted this opinion with the following passage in **KV (Scarring - medical evidence) [2014] UKUT 230 (IAC)**:
- Whilst the medical literature continues to consider that scarring cannot be dated beyond 6 months from when it was inflicted, there is some medical basis for considering in relation to certain types of cases that its age can be determined up to 2 years.
41. It is clear from this passage, and from what the judge says elsewhere in her determination, that she is not disputing that Mr Martin’s report constitutes independent medical evidence as to the likely cause of the scarring observed by him on the appellant’s back, namely that it was deliberately inflicted by a third party. What the judge is driving at in subparagraph (4) of paragraph 20 is that little weight can be attached to Mr Martin’s opinion as to *when* the scarring took place, beyond the fact that it must have taken place at least two years before he undertook his

clinical examination. Since, according to **KV**, the scarring could have occurred at any time up to two years previously (for example, ten years previously), the absence of contemporaneous medical evidence of the appellant receiving treatment for fresh scars in or shortly after December 2008 was a highly relevant consideration to which the judge was entitled to attach considerable weight.

42. Although not canvassed in the grounds of appeal, Ms Jegarajah also took issue with the judge's line of reasoning in subparagraph (12) of paragraph 20. The judge referred to what Dr Morrison had recorded in his report as to why the appellant had taken an overdose of paracetamol which had led to him being admitted to Royal Free Hospital on 25 November 2013. According to what the appellant told Dr Morrison, he had found out *two days before* about his brother's B's capture. Dr Morrison observed that this appeared to be the trigger for the overdose. However, as the judge noted, the evidence adduced by the appellant was that B had been arrested on 21 January 2012. So the appellant did not take an overdose two days after he found out about his brother's capture, as recorded by Dr Morrison. This indicated to the judge that the appellant sought to mislead Dr Morrison, or there was some misunderstanding. Either way, Dr Morrison's diagnosis was based on erroneous facts.
43. Ms Jegarajah submits that this finding by the judge is erroneous in law, as Dr Morrison's diagnosis of depression was based on a clinical observation of the appellant's presentation and demeanour. But this is only partially true. His diagnosis is also based on the appellant's account of the development of his symptoms, and his account of what led to him taking an overdose. The central finding in Dr Morrison's psychiatric report is that the appellant's current depressive episode is likely to have been triggered by news of his brother's arrest and ill-treatment in detention. Since, on the appellant's own case, his brother had been arrested and ill-treated 18 months before he took an overdose, it was an entirely legitimate observation for the judge to make that Dr Morrison had made his diagnosis as to the cause of the appellant's depression on a false factual basis.
44. Ground (iv) is the only other ground which I have not considered thus far which Designated Judge Baird said might have some merit. At the beginning of subparagraph (6) of paragraph 20 the judge observed that the appellant did not report his alleged assault in detention in 2008 "to anyone". Ms Jegarajah submits that this is an irrational finding, as it was the state authorities who had perpetrated the torture, and it would be the state authorities to whom he would have to complain. But the judge did not specify that the appellant should have reported the alleged assault to the authorities. "Anyone" includes a lawyer, human rights organisation or doctor. As the judge went on to note in subparagraph (11), the alleged arrest of B on 21 January 2012 was allegedly reported to Mr Kuganeswaran, attorney at law, immediately. Given the level of ill-treatment that the appellant claimed to have suffered in detention, it was open to the judge to attach weight to the fact that the appellant had not made a contemporaneous report of his alleged ill-treatment in detention to anyone.

45. Grounds (vi), (vii), (viii) and (ix) all have a common theme, which is that the judge erred in law in her assessment of risk on return. The NGO apparently referred to in ground (vii) is the ICRC. The appellant's case is that he worked with the ICRC in Jaffna between March and December 2007, not that he was a member of the ICRC, and certainly not that he continued to be a member of the ICRC. I consider that all the grounds of challenge on the issue of risk on return are no more than an expression of disagreement with findings that were reasonably open to the judge in the light of her primary findings of fact and having regard to the country guidance of **GJ and Others**. Although the appellant stated in his witness statement that his sur place activities in the UK were significant, during cross-examination he accepted he did not write, blog, give speeches on platforms, or otherwise lead opposition. He attended demonstrations and occasionally handed out leaflets: see paragraph 20(14). The evidence did not establish that the appellant had been a supporter or member of the British Tamils Forum before 2014: see paragraph 20(14). The judge rightly proceeded on the premise that, given the sophisticated intelligence available to the Sri Lankan authorities, within and without Sri Lanka, they would know what separatist activities the appellant had undertaken in Sri Lanka and what his activities had been in the United Kingdom. Notwithstanding his (recent) declared involvement in the banned British Tamils Forum, which the authorities in Sri Lanka would already presumptively know about, it was open to the judge to find that he would not be perceived as having a significant role in relation to post-conflict Tamil separatism within the diaspora, and therefore he was not someone for whom there was a real risk of being stopped and questioned at the airport or thereafter in the community.
46. The surviving part of ground (x) is a complaint that the judge failed to take into account the corroborative evidence of a member of the Provincial Council who purported to confirm what the appellant's mother had told him about the arrest on 18 April 2014 of the appellant's brother R.
47. Although not cited to me, I have had regard to **Muse & Others v Entry Clearance Officer [2012] EWCA Civ 10** on challenges to the adequacy of a judge's reasons. In **South Bucks District Council v Porter (2) [2004] UKHL 33**, cited with approval by the Court of Appeal at paragraph 33, Lord Brown said:

The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need only refer to the main issues in the dispute, not to every material consideration.

48. The judge was not bound to make a specific finding on R's alleged arrest, which was only a subsidiary aspect of the appellant's claim. Furthermore, it is tolerably clear that the judge rejected this aspect of the appellant's claim for the reasons canvassed in paragraph 10 of the decision. Mr Vaghela submitted that the alleged arrest of R was incredible. The claim was that R had been arrested when he went back to Sri Lanka to visit their sick sister, and had then fled to the UK upon his release. But there was no evidence that R was in the UK, or that he had made an asylum claim. R had not attended the hearing to support the appeal. Mr Vaghela said that prior to the hearing he had undertaken a check, and had found 50 people with the same name as the appellant's brother R. He was not able to identify whether any one of them was the appellant's brother, as he did not have R's asserted date of birth.
49. I have reviewed the judge's very detailed typed Record of Proceedings, and it appears that Ms Poynor accepted in her closing submissions that there was no evidence that R was here, or that he had claimed asylum or, if he had, his reasons for claiming asylum. She also acknowledged that R was not here to support the appellant, and there was no witness statement from him. There is no indication from the typed record that Ms Poynor nonetheless sought to persuade the judge that she should attribute some probative value to the letter from the member of the Provincial Council, in circumstances where there had been an inexplicable failure to adduce direct evidence from R.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. The appellant's appeal to the Upper Tribunal is dismissed.

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 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

Date **30 January 2015**

Deputy Upper Tribunal Judge Monson