



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

Number: AA043492015
AA039662015

THE IMMIGRATION ACTS

**Heard at: Manchester
On 28th April 2016**

**Decision Promulgated
On 27th May 2016**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**DAV
MRV
(anonymity direction made)**

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Garrod, Counsel instructed by Marsh and Partners Sols
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The First Appellant is a male national of Sri Lanka born in 1984. The Second Appellant is his wife, born in 1987. They have permission¹ to appeal against a determination of the First-tier Tribunal (Judge Ransley) to dismiss their linked appeals against decisions to remove

¹ Permission granted on the 29th September 2015 by First-tier Tribunal Judge Wellesley-Cole

them from the United Kingdom under s10 of the Immigration and Asylum Act 1999. Those decisions followed the Respondent's rejection of their asylum and human rights claims.

Background to Appeal

2. The First Appellant claimed asylum on the 19th September 2013. He told interviewing officers that he had arrived in the UK that day, hiding in a car. His claim was that he has a well founded fear of persecution in Sri Lanka for reasons of his political opinion. He claims that he was twice arrested for suspected involvement with the LTTE. The first time was in 2006. After he was released he went to live in an area controlled by the Tigers. The second detention was in 2013 when he was arrested after being identified by a captured LTTE operative as being involved with the organisation. CID came and questioned him and quickly released him. A week later they came to his home at night and took him in for interrogation. He was subject to serious harm over a number of days. He managed to escape. He found out that in his absence the Army had come to his home and his wife had been raped by four soldiers. The couple soon left Sri Lanka with the assistance of an agent.
3. The Respondent did not accept any of this account, bar the assertion that the Appellants are Sri Lankan Tamils. The Respondent found the account to contain numerous discrepancies such that it could not be accepted, even to the lower standard of proof. Further the First Applicant's claims about the behaviour of the Sri Lankan security services were found to be inconsistent with the findings made about the country situation in GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC). The focus of the government was no longer on pursuing any Tamil with links to the LTTE. The focus for their concern was now Tamils in the diaspora who were actively seeking the destabilisation of Sri Lanka. Their investigations were intelligence led and there was nothing to suggest that the First Appellant would have been of interest to them in 2013. Finally, the Respondent invoked s8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, since it was believed that the Appellants must have passed through at least one safe country before reaching the UK.
4. So it was that when the linked appeals came before the First-tier Tribunal the central matter in issue was credibility.

The Determination

5. The First-tier Tribunal heard oral evidence from both Appellants. Having done so they were found not to have discharged the burden of proof. The determination sets out a number of reasons why the witnesses were disbelieved: the First Appellant had given internally inconsistent evidence and the two witnesses had contradicted each

other.

6. Photographs relied upon, purporting to show scars on the First Appellant's back, were given little weight since they were not accompanied by a medical report and it could not be ascertained whose back it was; further he had made no mention of having any scars when he attended the asylum interview in November 2013.
7. The Second Appellant relied on a report prepared by Consultant Psychiatrist Dr Robin Lawrence. Dr Lawrence concluded that the Second Appellant was suffering from PTSD and severe depression and he attributed that to her having been raped in Sri Lanka. The First-tier Tribunal found it to be unsatisfactory that Dr Lawrence had not set out how he had come to give the Appellant the 'scores' he did on the Beck Depression Inventory. The diagnostic interviews had been conducted through a Tamil interpreter who was described as a "third party informant": this lady was variously described as a friend from the Second Appellant's village and someone whom the family had met in Crewe. The Tribunal draws adverse inferences from the fact that the consultation took place without a qualified independent interpreter, and from the fact that the witnesses had given inconsistent accounts of who this woman was. Further the report itself describes the answers given by the Second Appellant as "vague" but does not set out what she said or whether that vagueness was taken into account when assessing her account given and the claimed sequelae. Finally Dr Lawrence made no attempt to consider whether there might be other causes for the PTSD that he had found the Second Appellant to have. In respect of this matter the determination records the HOPO's submission that the witness had become very upset and tearful when talking about the children she had left behind in Sri Lanka: it was possible that she was depressed because of this separation and the failure of Dr Lawrence to consider such matters undermined his diagnosis.

Error of Law

8. The ground of appeal, and supporting skeleton, are long, detailed and repetitive. The Appellants' case can however be summarised as follows. The Tribunal erred in its approach i) to the claim of the Second Appellant, ii) to the medical evidence relating to her, and iii) in its conclusions on the credibility of the First Appellant. The three are inextricably linked. If a material error can be established in respect of any one of these areas of concern, then the entire determination must be set aside, since the credibility findings on both Appellants inevitably overlap. The only reason ever given by the Respondent for disbelieving that the Second Appellant had been raped was that her husband had not proved his case; conversely if it had been accepted, on the lower standard of proof, that she *had* been raped, this would necessitate a review of the First Appellant's evidence.

9. Mr McVeety agreed with this proposition. He accepted that a fundamental error, if established, would infect the other findings and the entire decision would need to be remade. He did not however accept that the Tribunal had erred in any of the ways alleged and mounted a rigorous defence of the determination, particularly in the approach to the medical report.
10. Due to the complexity of the grounds I reserved my decision following the error of law hearing. For the reasons set out in detail below I find there to be no merit in grounds ii) or iii). The medical report was unreliable, and the Tribunal gave perfectly good reasons for rejecting the evidence of the First Appellant. Given the cogent and sustainable manner in which the Tribunal dealt with that evidence it is with regret that I have concluded that the decision as a whole must be set aside. The error in approach is established in respect of the Second Appellant's evidence. I set out my reasons on the unmeritorious grounds first.

The First Appellant

11. The Tribunal did not believe the First Appellant. The grounds make various complaints about this conclusion, including that the Judge took an "incorrect approach", that she speculated, and that she failed to view the evidence from the perspective of the actors involved, rather than her own, contrary to established principles of asylum law.
12. At paragraph 38-39 the Tribunal appears to draw adverse inference from the fact that the Second Appellant had made a handwritten amendment to her witness statement. The typed version said that her husband had been arrested on "three" occasions. This would have been inconsistent with his evidence that he was detained twice. Before the hearing the word "three" was crossed out and replaced with the word "two". Before me Mr McVeety conceded that this was not a permissible approach. The Second Appellant's evidence before the Tribunal said that her husband had been arrested twice, and this was all that mattered. The fact that there had been an error in the earlier draft was an immaterial matter which should not have been taken into account. That was not however the only difficulty found with the First Appellant's testimony.
13. The determination identifies a number of inconsistencies in the First Appellant's evidence: about the extent of his involvement with, and ideological support for, the LTTE; in respect of his 2006 detention where he was detained and with whom; in respect of his 2013 detention why the authorities would first have questioned him and then let him go if they were acting upon information that he was an LTTE member. The grounds take issue with these findings on the basis that the learned Judge has failed to consider whether or not these defects could have been caused by the First Appellant's claimed memory loss. This ground has absolutely no merit. The Judge

expressly considers the claim that he suffers from memory loss. She rejects it on the grounds that he managed to answer 176 questions at his asylum interview without any apparent difficulty. Secondly, as she rightly noted, there was no medical evidence at all. These were perfectly good reasons to reject the claim that the First Appellant was suffering from memory loss. I would add that there appears to be little correlation between the claimed memory loss and the answers given: presumably the witness would not have forgotten his ideological commitment to the LTTE. If the First Appellant could not remember something he would have said so, rather than just saying something that was not correct.

14. The grounds take issue with the determination's reference to the First Appellant's evidence being "evasive". It is submitted that any appearance of evasion resulted from the poor quality of the cross examination rather than the evidence given. I do not understand this ground. Where the evidence is thus described, examples are given: see for instance at paragraph 41. The Tribunal was entitled to describe evidence as evasive if the witness did not give a straight answer to a question put. The Judge was entitled to draw adverse inferences from that.
15. An explanation offered for the inconsistencies in the evidence about the couple's ideological support for the LTTE was that when they were under the control of an agent they were advised by someone not to say that they were in the LTTE otherwise they would be sent back to Sri Lanka. One of the reasons that Judge Ransley gives for rejecting that evidence was that she did not accept that the First Appellant would do as he was advised by a complete stranger. The grounds rely on the *Kasolo* principle to submit that the Judge is here supplanting what another – a vulnerable migrant under the control of an agent – might do with her own view of what conduct would be reasonable. There is no merit in this ground. The grounds have omitted to set out the entirety of the reasoning:

"I do not believe that the husband's denial at the screening interview and the asylum interview that he was a member/supporter of the LTTE was due to his reliance on the advice of a 'Tamil lady' as alleged. I say so because the core of the Appellants' asylum claim is that the husband had carried out activities as an active supporter of the LTTE..."

It was in this context that the Tribunal made the comments that it did about the unknown lady. That was a rational finding that was open to the Tribunal on the evidence before it.

16. I conclude that the findings on the First Appellant, taken in isolation, were all open to the Tribunal on the evidence before it.

The Medical Evidence

17. As I note above, the First-tier Tribunal was not impressed with the psychiatric report prepared by Dr Lawrence on the Second Appellant. The Appellants now take issue with her findings on a number of fronts.
18. I deal first with the points made about the interpreter. The determination notes that discrepant explanations were given as to who this woman actually was. The First Appellant said that she was unknown to the family before they came to the UK and they had seen her for the first time in Crewe. The Second Appellant had said that because she and her husband knew no-one in the UK her mother had sent her this lady's number. She was from her village in Sri Lanka. The Tribunal describes these accounts as irreconcilable. The grounds take issue with that and submit that the two statements are, properly read, perfectly consistent. It is possible that the First Appellant was not aware that his wife was from the same village as the lady who acted as interpreter, or that it was his mother-in-law who had put them in touch. I find this ground to be entirely without merit. The two accounts *are* completely different, and it is unlikely in the extreme that the First Appellant would not have been aware if his wife had some connection with this woman. This was a finding that was open to the First-tier Tribunal on the evidence that was given.
19. What is undoubtedly far more significant is the uncontested fact that this woman was not a qualified interpreter. Whilst it may be that community interpreters are not held to the same standard of qualification as those who work for the courts service, the clinician, and Tribunal, must be satisfied as to the interpreter's competence, and objectivity. It is not possible in this case to be satisfied as to either. Dr Lawrence describes this woman's involvement in his consultation with the Second Appellant as follows:

"A friend from her village in Sri Lanka who has lived in the UK for 10 years came and acted as an interpreter and a third party informant. This woman was intelligent, her English was very good and I found her to be a credible and reliable witness"
20. This is an extremely troubling turn of phrase. An interpreter is not there to act as a "third party informant", nor to act as a "witness". The doctor was not called upon to evaluate the credibility of any party, much less the interpreter. In these circumstances the Tribunal was not only entitled to express concerns about the independence of the interpreter; it would have been an error of law if it had failed to do so. The fact that a third party of uncertain identity or connection to the Appellants was described by Dr Lawrence as an "informant" and a "witness" is sufficient in itself to cast doubt on the conclusions of the entire report. In the absence of evidence that Dr Lawrence speaks Tamil, it was not possible for him to discern what evidence came from the Second Appellant, and what might have been added,

omitted or embellished by the 'interpreter'. The Tribunal would have been entitled to decline to place any weight at all on the report for that reason.

21. As it happens, other reasons were given. They are twofold. First the Tribunal finds it to be "material and unsatisfactory" that the doctor has not explained how he reached the scores he did on, for instance, the Beck Inventory. Secondly it is noted that the doctor has not considered that there are other possible causes for the symptoms of depression and PTSD. In respect of both reliance is placed on R (on the application of Minani) v IAT [2004] EWHC 582 (Admin). It is submitted that the First-tier Tribunal has doubted the competence of the examining physician without good reason.
22. The point in Minani was that the court had there rejected the diagnosis of a doctor because it was simply based on what that doctor had been told. The High Court held that the opinions of doctors had to be read in light of their professional qualifications. It could be assumed that the clinician made a holistic assessment and that he did not simply believe as he was told. Medical reports cannot rationally be rejected on that ground alone. In this case the Tribunal has, as summarised above, give three reasons for declining to place weight on the report. In my view the point about the interpreter would in itself have been sufficient. Whilst the report does make reference to the diagnostic criteria in respect of, for instance, PTSD, it does not expressly connect the Appellant's self reporting to those objective measures. Given the concern already expressed about interpreter, it was important that the Tribunal was able to understand where the doctor's conclusions came from. The information that the Appellant scored 75 on the "Impact of Events Scale" was, without more, meaningless to the Tribunal.
23. The final point concerned the possible other causes for the Second Appellant's distress. The Tribunal and HOPO had observed at hearing that she began to "sob" when talking about her children. The report of Dr Lawrence addresses other possible causes thus:

"I have considered if any other trauma than the trauma that [the Second Appellant] describes is a possible cause and I think that this is unlikely. I have concluded that it is more likely that she is traumatised by the events she describes for the following reasons:

 - i) Her descriptions of the trauma, and the way the trauma is described are both consistent with the trauma being the cause of her Post Traumatic Stress Disorder
 - ii) She has a physiological response to any reminder of the trauma (the memory of being raped)
 - iii) She does have Post Traumatic Stress Disorder and

if the trauma she describes were not its cause we would have to postulate, and discover, another cause”

24. It is apparent from this extract that the doctor has not expressly considered whether dislocation from her homeland, house and young children might have caused the Appellant any distress. The comments made at paragraph 54 of the determination were therefore perfectly justified.
25. Whilst it may be that the Second Appellant is suffering from depression and/or PTSD, I conclude that the First-tier Tribunal was quite right not to have placed weight on this medical report.

The Second Appellant's Evidence

26. On the 10th October 2013 the Second Appellant claimed asylum. She was interviewed that day and in that short 'screening' interview asserted that she was suffering from headaches and skin itching because she had been raped in Sri Lanka. She said that on the night of 25th August 2013 she had been raped by four men and had been thrown unconscious into a forest. The Second Appellant was subsequently interviewed again, a year to the day, on the 10th October 2014. She described how on the night in question soldiers had come and knocked on the door. Her mother-in-law had answered. They came in and asked where her husband was. That was how she had come to understand that he had escaped from custody. The soldiers searched the house. The Second Appellant told them that she did not know where he was. One of them held her by her hair. Both women were screaming. One of the soldiers pointed his gun at the Second Appellant's mother-in-law and said "if you shout, we will shoot you". They covered the Second Appellant's mouth and dragged her outside to a waiting 'Hi-Ace' vehicle. The house was in a jungle area and they drove for about 2 miles. They took her out and dragged her into a dilapidated building. When they asked her where her husband was she told them "I don't know - you took him". They said that he had escaped and that she must know where he is. The interviewing officer records the evidence that followed [Q69]:

“Tell us where you have sent him. I told them, he did not come home and I do not know where he is. Then the 4 of them did what they wanted to do and raped me and left me there (Applicant starts crying). They took turns and held my hands, they pointed the gun at my forehead and my mouth. They put their penis in my mouth”

27. The record shows that the interviewing officer at this point offered the Second Appellant a break, which she took. When the interview resumed the officer checked if she was ok to continue, and she said that she was. The officer recommenced the interview by reassuring her that she would not be asked to give any more details about the

rape. The Appellant added that she had been hit on her ear and had fallen unconscious. She had woken in the morning to find herself alone in the jungle:

“It was dawn. I covered myself with torn clothes and sat there. This man was taking the cattle for grassing. When he came towards me, I started to scream. He is from a neighbour village. He told me ‘what happened to you, tell me?’

He said ‘I can’t leave you like this and go’. He was wearing a turban on his head. He tied that on his waist and gave me his sarong to cover myself.

He told me to wait there and wait at the main road. He saw the priest pass that way. He told them, the priest stood at a distance and looked at me, he didn’t come. Then he went and told my father.”

This part of the interview concludes with the Appellant explaining that she could not go to the police in case it was in the papers; if it was in the papers she would have to commit suicide, like other women from her village had done. She described her injuries after the event as scratches caused by the trees, and the “scratch marks of nails on chest”. She said that she has been affected in lots of ways, and that not a day has gone by when she has not shed tears.

28. That was the detailed evidence of the Second Appellant which was at the heart of the linked appeals. It is summarised in the determination under the heading ‘The Wife’s Evidence’[at 23]:

“The wife’s case is that in Sri Lanka she was raped by the army people who came to the marital home to look for her husband and because of this episode she suffered from PTSD”.

29. The evaluation of this evidence is confined to paragraph 67 of the determination which reads:

“... the cumulative effect of the credibility issues and inconsistencies in the evidence is that even on the lower standard of proof I conclude that the Appellants have not told the truth. I do not believe that the husband was a supporter of the LTTE in Sri Lank, or that the wife was raped by four army officers due to the husband’s activities”.

30. The grounds raise two issues about this. First, it is submitted that the finding set out above it unclear: is the evidence that she was raped rejected in its entirety, or is it the given reason for the attack that is disbelieved? Second, it is submitted that in making this finding unsupported by reasons the Tribunal has failed to address this central allegation of past persecution on its own merits. It has failed to make any findings on the evidence of the Second Appellant herself.

31. I find these grounds to be made out. This was an appellant who had

claimed asylum in her own right. She had been served with an immigration decision and had lodged her own appeal. She was entitled to a proper analysis of her evidence. Mr Garrod submitted that the Second Appellant cannot read this determination and understand why her evidence - as opposed to that of her husband or doctor - might have been rejected. I accept that this is so. There are no reasoned findings on the evidence in the asylum interviews, compelling as it is. The heading 'The Wife's Evidence' suggests that she has been treated as a dependent upon her husband's claim. If that is so, the First-tier Tribunal can be forgiven for having gained that impression: I note that the Appellants' representatives did not prepare a witness statement for the Second Appellant and simply sought to rely on the medical report which I have addressed above. Given the nature of the evidence, this was wholly unsatisfactory. It remained the case that there was detailed evidence before the Tribunal in the form of the asylum interview record. It would have been possible for the report to be rejected, but for the Appellant's own testimony to be accepted. For that reason, the determination of the Second Appellant must be remade.

Conclusions

32. Taken together the grounds and skeleton were a good deal longer than the determination they seek to challenge. For the reasons I have given, the grounds were in the main without merit. I am however satisfied that the determination in respect of the Second Appellant must be remade. Mr McVeety agreed that any findings on her evidence in a new decision must also touch upon the evidence given by her husband. It is not possible to extricate the two accounts and it may be that a different Tribunal, assessing all of the evidence in the round, may find the burden of proof to be discharged. It follows that the appeal of the First Appellant must also be revisited. Due to the nature and extent of the fact-finding required it is appropriate to remit this matter to the First-tier Tribunal.

Decisions

33. The determination of the First-tier Tribunal contains an error of law and it is set aside.
34. The decision is to be re-made in the First-tier Tribunal.
35. Having regard to the nature of the evidence I make the following direction for anonymity, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders.

"Unless and until a tribunal or court directs otherwise, the Appellants are 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 Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”.

Upper Tribunal Judge Bruce
23rd May 2016