Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/01639/2017**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 16 March 2018 **On 20 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SURESH SINGARAJAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Martin (counsel) instructed by Nag Law, solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Swaniker promulgated on 6 November 2017, which dismissed the Appellant's appeal against the respondent's rejection of his protection claim.

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Background

3. The Appellant was born on 28 November 1970 and is a national of Sri Lanka. On 30 January 2017 the Secretary of State refused the Appellant's protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Swaniker ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 14 December 2017 Judge Page granted permission to appeal, stating

> This application has raised arguable grounds of appeal that go beyond disagreement with the Judge's findings of fact. It is argued that the Judge has acted irrationally in her credibility findings by relying on one inconsistency in the appellant's evidence as her reason for discounting the appellants evidence in its entirety. At paragraph 26 of the decision the Judge has said: "*I do not accept counsel's argument that there was no inconsistency between the appellant's two accounts of how he came into contact with the man who helped with his escape from his claimed airport detention*". Counsel for the appellant, who has made this application for permission to appeal, has revisited this argument in her application for permission to appeal. Counsel for the appellant, in this application, has said that the appellant was cross examined extensively for a period of approximately 3 hours and gave evidence that was "*entirely consistent throughout*" save the one contested inconsistency. The grounds of appeal argue that significant weight was placed by the Judge upon the plausibility of the appellant's account of his escape from the airport. It is arguable that if there was no inconsistency between the appellant's two accounts of how he came into contact with the man who helped with his escape from airport detention that the Judge's finding that there was a material inconsistency is an arguable error. Permission to appeal is granted on all grounds.

The hearing

6. (a) Mr Martin, for the appellant, moved the grounds of appeal. He reminded me that the appellant's earlier appeal against refusal of a claim for asylum was dealt with in a determination promulgated in July 2006. He took me through the terms of that earlier determination and told me that although the appellant's asylum claim was rejected then, the 2006 decision upheld the respondent's reasons for refusal letter which did not take issue with the appellants claimed membership of EPRLF. In line with Devaseelan, Mr Martin told me that the Judge should have taken that as a starting point.

(b) Mr Martin took me to the Judge's findings from [24] of the decision onwards. He told me that the Judge's error is that she has focused solely on the appellant's return to Sri Lanka in 2007 and not considered his wider account. He told me that at [24] & [25] the Judge's findings are flawed because they are based on plausibility.

(c) Mr Martin moved onto [26] to [29] of the decision and told me that the Judge incorrectly and unfairly found that there are inconsistencies in the appellant's evidence. He told me that consideration of the appellant's mother's evidence did not take account of her age and her poor memory. He told me that the Judge's findings are inadequately reasoned and that the analysis of the appellant's mother's evidence is lacking. He told me that overall the Judge's analysis of the evidence was inadequate and that the Judge places too much reliance on credibility findings made in 2006, and on unsustainable findings that there is an inconsistency where (he argued) no inconsistency has occurred. He told me that the Judge's overall credibility assessment was inadequate.

(d) Mr Martin urged me to find that the Judge's decision is tainted by material errors of law. He asked me to allow the appeal and to set the Judge's decision aside.

7. (a) For the respondent, Mr Clarke told me that the Judge's decision does not contain any errors, material or otherwise. He reminded me that there are two grounds of appeal. The first ground of appeal is in irrationality argument. He reminded me that there is a high threshold for irrationality. He told me that I must be satisfied that no other Judge or tribunal would have come to the same conclusions.

(b) Mr Clarke took me to [24] where he told me that the Judge properly applied the Devaseelan principles. He reminded me that the 2006 decision found that the appellant's conduct is not that of a genuine asylum seeker. He told me that the Judge's credibility findings are not restricted to [26] to [30] of the decision. He took me through some of the evidence before the First-tier Tribunal and argued that, in the light of that evidence, the Judge's findings are sustainable. He told me that the appellant has made prior inconsistent statements and that his mother's evidence is in direct conflict to the evidence of the appellant. He told me that in the face of that evidence the Judge was bound to come to the conclusions that she came to.

(c) Mr Clarke turned to the second ground of appeal, which argues that the Judge made adverse inferences drawn from plausibility only. He took me to [25] of the decision and told me that the Judge's findings are not drawn exclusively from her view of plausibility. He told me that the Judge's finding that one aspect of the appellant's account is inherently implausible is only one small part of the overall credibility assessment.

(d) Mr Clarke urged me to dismiss the appeal and allow the decision to stand.

Analysis

8. The first ground of appeal is summarised at paragraph 9 of the grounds of appeal and is clearly an argument about rationality. It is said for the appellant that the Judge acted irrationally when making her credibility findings and provided in sufficient reasons for her findings.

9. In Dasgupta (error of law – proportionality – correct approach) [2016] UKUT 00028 the Tribunal held that in error of law appeals relating to findings of fact, the Upper Tribunal should apply the principles in Edwards v Bairstow [1956] AC 14. In Edwards v Bairstow [1956] AC 14 Viscount Simonds said " *For it is universally conceded that, although it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained.*" Elsewhere the House of Lords referred to " perversity", defining this as a case in which " ..... *the facts found are such that no person acting judicially and properly instructed as to the relevant law could come to the determination under appeal*." In R and Others v SSHD (2005) EWCA civ 982 Lord Justice Brooke noted that perversity represented a very high hurdle. It embraced decisions which were irrational or unreasonable in the Wednesbury sense.

10. At 23 the Judge reminds herself of the Devaseelan principles. At [24] the Judge applies those principles and explains why the 2006 findings cannot be preserved.

11. At [27] the Judge starts an analysis of the evidence presented to her. The Judge explains why she finds one aspect of the appellant's account inherently implausible, but that finding is not determinative of the appellant's appeal. The Judge goes on to consider each aspect of the appellant's account and gives clear reasons, between [25] and [33] for finding that the appellant is neither a credible nor a reliable witness.

12. At [27], [28] and [29] the Judge explains why she finds that the appellant's mother, who was led as a witness to support the appellants evidence, not only fails to support his evidence but undermines his evidence. Between [25] and [33] the Judge explains fully why she finds that the appellant is neither a credible nor reliable witness.

13. The Judge's findings of fact are manifestly drawn from the evidence presented before her. The conclusions that she reaches are well within the range of reasonable conclusion s available to the Judge - and on any construction cannot be described as either irrational or perverse. They are findings which the appellant does not like, but they are evidence-based findings which were open to the Judge. The Judge sets out adequate reasons so that the objective reader is left in no doubt about how the Judge reached her conclusions.

14. At paragraph 49 of MA (Somalia) [2010] UKSC 49, it was said that "*Where a tribunal has referred to considering all the evidence, a reviewing body should be very slow to conclude that that tribunal overlooked some factor, simply because the factor is not explicitly referred to in the determination concerned*". McCombe LJ in VW(Sri Lanka) C5/2012/3037 said "*Regrettably, there is an increasing tendency in immigration cases, when a First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully. In my judgment,*

with respect, that is no basis on which to sustain a proper challenge to a judge's finding of fact"

15. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

16. It was noted in MD (Turkey) v SSHD [2017] EWCA Civ 1958 that adequacy meant no more nor less than that. It was not a counsel of perfection. Still less should it provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits. The purpose of the duty to give reasons, is in part, to enable the losing party to know why she has lost and it is also to enable an appellate court or tribunal to see what the reasons for the decision are so that they can be examined in case there has been an error of approach.

17. There is no merit in the first ground of appeal. What is argued for the appellant does not approached the threshold of irrationality. The Judge gives adequate reasons for her findings. The fact that the appellant was cross examined for almost 3 hours is entirely irrelevant. It is the quality of the evidence which counts, not the quantity of the evidence. The Judge explains that she considered each strand of the appellants evidence and explains why she found that the appellant gave inconsistent evidence. The appellant's mother was led as a witness to support the appellant. The Judge explains why the appellant's mother's evidenced damaged the appellant's overall account rather than providing support for it.

18. What the Judge has done is carefully analyse the lengthy, detailed evidence from different sources and use that analysis to draw conclusions. That is precisely what the Judge should do. The Judge cannot be criticised for doing what she should do. Despite the efforts of counsel for the appellant, there is no valid criticism of the Judge's fact-finding exercise. At [32] of the decision the Judge takes correct guidance in law.

19. The second ground of appeal challenges the Judge's reliance on plausibility. It is only at [25] of the decision that the Judge finds part of the appellant's account

to be inherently implausible.

20. The finding of inherent plausibility at [25] is made by reference to background materials about the Sri Lankan authorities' desire to prevent a resurgence of LTTE

activity. It forms one small part of the overall assessment carried out between [25] and [33] of the decision.

21. In MM (DRC) 2005 UKIAT 00019 the Tribunal said that the assessment of credibility may involve an assessment of the plausibility, or apparent reasonableness or truthfulness of what was being said. This could involve a judgement on the likelihood of something having happened, based on evidence or inferences. Background evidence could assist with that process, revealing the likelihood of what was said having occurred. Background evidence could reveal that adverse inferences which were apparently reasonable when based on an understanding of life in this country, were less reasonable when the circumstances of life in the country of origin were exposed. Plausibility was an aspect in the process of arriving at a decision, which might vary from case to case, and not a separate stage in it. A story could be implausible yet credible, or plausible yet properly not believed. Plausibility is not a term of art. It is simply that the inherent likelihood or apparent reasonableness of a claim is an aspect of its credibility and an aspect which may well be related to background material which may assist when judging it. The Tribunal went on to say that "*the more improbable the story, the more cogent the evidence necessary to support it, even to the lower standard of proof*." In relation to the contention that there was an alternative satisfactory explanation for matters found to be implausible by the Adjudicator, the Tribunal said that it was for the claimant to put forward all relevant evidence and to recognise and explain any inconsistencies and improbabilities and a conclusion was not necessarily erroneous because it did not contemplate possibilities that were not raised for the Adjudicator's consideration. In Gulnaz Esen v SSHD 2006 CSIH 23 the Court of Session said that Adjudicators are entitled to draw inferences of implausibility when assessing credibility and to draw on their common sense and ability to identify what was or was not plausible, as long as it was based on hard evidence.

22. In this case the Judge's starting point was a finding in 2006 that there was no risk to the appellant on return to Sri Lanka. The Judge correctly focused on events since 2006 and after carefully analysing the evidence finds that the appellant does not give an honest account of what has happened to him since February 2007. The correct focus is taken to this appeal in the first two sentences of [25] of the decision; thereafter the Judge carries out a detailed analysis of the evidence before reaching conclusions. Those conclusions do not rely exclusively on the plausibility assessment in the middle of [25] of the decision. That is one small part of the overall assessment. The Judge's decision does not rest on a finding of plausibility.

23. There is nothing wrong with the Judge's fact-finding exercise. In reality the appellant's appeal amounts to little more than a disagreement with the way the Judge has applied the facts as she found them to be. The respondent might not like the conclusion that the Judge has come to, but that conclusion is the result of the correctly applied legal equation. The correct test in law has been applied. The decision does not contain a material error of law.

24. The Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed.

25. No errors of law have been established. The Judge's decision stands.

DECISION

26. The appeal is dismissed. The decision of the First-tier Tribunal, promulgated on 06 November 2017, stands.

Signed Paul Doyle Date 19 March 2018

Deputy Upper Tribunal Judge Doyle