Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03634/2016

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 January 2018	**On 28 March 2018**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

SK
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Seehra
For the Respondent: Ms Ahmad

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka born in 1982. She appeals against the decision of the respondent made on 1 April 2016 to refuse her claim for asylum.

2. Her immigration history in brief is that she was granted periods of leave as a student between February 2012 and October 2015. She returned to Sri Lanka between June and July 2014. Her student leave was curtailed to

expire in July 2015 because her college said she had not registered for classes during the previous semester and it had withdrawn its sponsorship. She claimed asylum on 6 October 2015.

3. The basis of her claim is that she fears persecution by the authorities because of suspected involvement with the LTTE. She worked as a clerk at the High Court in Ampara from 2008 to 2011. In November 2008 her landlady in Ampara where she lodged with two Tamils asked her to obtain a court order which was required by her lawyer. She did so. She was arrested at work and detained for two days. The police told her they had information that she was connected with the LTTE, in particular that she was involved in her landlady's activities with the LTTE, such as fundraising. She admitted getting the court order.

4. On release she continued working at the court until she left Sri Lanka. She had no problems from the authorities.

5. However, on return to Sri Lanka in June 2014 she was detained at the airport and taken to the CID office in Colombo, where she was held for five days and was then taken to Welikada jail where she was held until her parents paid bail. She was told she was being detained because she left Sri Lanka while they were still investigating her. She was beaten once and accused of having helped the LTTE. On release she was required to report weekly to a police station. She did so once. Her parents paid an agent to get her through the airport. The police went to her parents' house a week later looking for her. They had returned twice, most recently in August 2015.

6. The respondent did not believe the account. In summary, it had not been explained why her landlady would have asked her to get a document instead of getting it through a lawyer; why she would have been allowed to continue working at the court if she was suspected of LTTE involvement and why she would have been untroubled by the authorities for three years after release. Also being able to leave Sri Lanka in 2011 and 2014.

7. She appealed.

First tier hearing

8. Following a hearing at Harmondsworth on 3 August 2017 Judge of the First-Tier NJ Bennet dismissed the appeal.

9. His reasons, in summary, were that there was no satisfactory explanation why a lawyer would not have got the court order rather than a clerk; nor why she would have been able to continue working for the court if she was suspected of helping the LTTE. Also, the explanation of why she got the court order was contradictory. Her claim of interpreter error was not accepted.

10. Next, the judge found difficulties with the documents relating to proceedings in the Magistrates Court which appeared to indicate that the CID were satisfied about the investigation and had no intention of detaining the appellant but nonetheless went on to ask for the appellant to be remanded until the conclusion of the case. Such in the judge's view made no sense. Equally it made no sense for the Magistrate to cancel the detention order but to remand the appellant.

11. Further, the Magistrate's record about bail was inconsistent. Contrary to the appellant's evidence the record does not indicate that the parents were involved in the grant.

12. In further criticisms the judge noted a Ralon document verification report which indicated that the CID had stated that the warrant was a forgery. He rejected as speculation that the CID might have engaged in a ploy to secure the appellant's removal by wrongly stating that the warrant is false.

13. Finally, the judge found against the appellant that she was able to leave Sri Lanka on her own identity scarcely a month after she claimed to have been arrested at the airport and her delay in claiming asylum.

Error of law hearing

14. She sought permission to appeal which was granted on 16 November 2017.

15. At the error of law hearing before me Miss Seehra made four main points. First, that the judge's findings criticising the procedure disclosed in the Magistrate's Court documents and thus the documents themselves was contrary to the background material.

16. Second, the criticism that various answers at interview were contradictory and that he did not accept that the interpreter was to blame did not take account of a letter correcting the anomalies sent to the respondent soon after the interview. In similar vein contrary to the assertion (at [41]) that the appellant had not explained why she rather than a lawyer had been asked to obtain the court document she did give an explanation in her witness statement.

17. Third, the judge failed to engage adequately with the appellant's challenge to the method of verification made by Ralon. He failed to make any findings in relation to the potential risk the appellant has been exposed to by the respondent approaching the very people the appellant fears will mistreat her on return.

18. Further, the judge failed to make any findings on the appellant's husband's evidence which corroborated crucial aspects of her historical claim.

19. Ms Ahmad's response was that looked at in the round the judge had given adequate reasons justifying his findings.

Consideration

20. In considering this matter it is clear that the judge has made a careful effort to analyse the claim and some of his findings are ones in themselves which were clearly open to him on the evidence. However, I consider that there are a number of difficulties.

21. First, a core criticism by the judge is of the procedure stated in the Magistrate's Court documents (at [45]) where he concludes:-

> *"… it makes no sense for the CID to be satisfied about the investigation and to have no intention of detaining the appellant further but to go on to ask for the appellant to be remanded until the conclusion of the case. Equally, it makes no sense for the Magistrate to cancel the detention order but to remand the appellant …"*

22. However, background material that was before the judge indicates that such a conclusion may be incorrect.

23. The Amnesty International Report, Locked Away: Sri Lanka's Security Detainees (March 2012) provides extensive information about the powers to detain pursuant to a detention order issued under the Prevention of Terrorism Act, versus remand by a magistrate. The two are clearly distinct procedures (emphasis added):

> *Page 10-11:*
>
> *At the end of August 2011 Sri Lanka finally lifted the State of Emergency, but on 29 August (just 24 hours before the emergency lapsed), the* ***President introduced new regulations under the Prevention of Terrorism Act, which extended the detention of persons detained under the Emergency Regulations for 30 days pending issuance of detention orders under the PTA or remand by a magistrate****. The Sri Lankan government vowed that as of 1 September 2011 any person arrested or detained would be handled under the Code of Criminal Procedure Act or the PTA:*
>
> *According to new regulations made under Section 27 of the PTA for the treatment of detainees and surrendees consequent to the Lapsing of the Emergency Regulations:*
>
> ***1. Detainees under the lapsed regulations shall be produced forthwith before a Magistrate who will bring the suspect under the Code of Criminal Procedure Act.***
>
> 2. *If this production does not take place within 30 days from 30th August 2011 and the Magistrate does not take steps to remand him on material available the detainee shall be released.*
>
> ***3. If a detention order either under Part II [the PTA Section on "Investigation"] or Part III [the PTA Section on***

"Detention and Restriction Orders"] has been issued in respect of the detainee before the expiry of 30 days, the detainee shall not be released subject to the availability of the right of bail in given circumstances.

4. Those who were remanded by the magistrate under the provisions of the lapsed regulations will be deemed to have been remanded under the Prevention of Terrorism Act.

Page 13-14:

Under Section 9(1) of the PTA, people can be arrested without charge and detained for up to 18 months under a detention order issued by the Minister of Defence while police investigate the possibility of their involvement in illegal activity. After release, the Defence Minister can issue additional orders restricting an individual's freedom of movement, association and expression (such as restricting travel or place of residence, prohibiting his or her involvement in organisations or preventing the individual from addressing public meetings). These orders cannot be challenged in court. Section 10 of the PTA states specifically that "an order made under section 9 shall be final and shall not be called in question in any court or tribunal by way of writ or otherwise."

People arrested for investigation under the PTA by the police without a detention order from the Ministry of Defence must be brought before a magistrate within 72 hours, ***but the law does not give the Magistrate the power to question the lawfulness of the detention and it requires the magistrate to order the person to be detained under remand "until the conclusion of the trial": the law does not stipulate that the individual be charged with an offence first.*** *People have thus been held for years without charge or trial under this act, as they wait for detaining authorities to frame a case against them that often never materialises. And given Sri Lanka's inefficient justice system, even individuals who are charged under the PTA have remained in detention for extremely prolonged periods – as long as 15 years – without being convicted.*

Page 49:

Provided however, if no Detention Order in terms of Part III of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 is issued prior to the expiration of the period of thirty days in respect of such person, such person shall forthwith be released from custody by the person in whose custody he is held, ***unless such person has been produced before a Magistrate and remanded under the provisions of Part II of the said Act, or any other law for the time being in force.***

24. The evidence indicates that detention pursuant to a Detention Order and detention on remand by order of a magistrate are two distinct procedures and that the appellant's documents are consistent with the procedures

described, namely detention pursuant to a Detention Order issued under the PTA followed by an order from the magistrate when that Detention Order is cancelled, that she be detained on remand until the conclusion of her case.

25. In failing to consider the documentary evidence in the context of the background material I consider that the judge erred.

26. Further, at para [42] the judge criticised the appellant for various answers recorded in the interview and her account of having had difficulties with the interpreter during the course of the interview. He states:-

> *"42. She now explains that her replies were not properly translated. I accept that difficulties and misunderstandings can occur when evidence is given through interpreters and that in this instance the interpreter acknowledged having made a mistake by translating 'she' for 'he', Q88). It is nevertheless surprising that the interpreter made exactly the same mistake twice in respect of both versions. The appellant had a reason to want to change her evidence and therefore to blame the interpreter because the respondent had identified the anomaly in her evidence in the refusal letter".*

27. In suggesting that the appellant "*had a reason to change her evidence and, therefore, to blame the interpreter because the respondent had identified the anomaly in her evidence in the refusal letter*" fails to note that the appellant had in fact corrected the anomalies prior to the respondent's decision being received. The solicitors sent a letter to the respondent on 1 April 2016 highlighting the various errors "*made by the interpreter during the course of the interview*". This was three days after the interview which was held on 29 March 2016.

28. In failing to give consideration to material evidence the judge erred.

29. I would add that I find merit in the submission that the judge failed (at [41]) to consider the explanation at paras 18 and 19 of her witness statement why her landlord had requested her to obtain the court document. If it was considered, no reasons were given for why it was rejected.

30. I also find merit in the third point. At [38] the judge stated that counsel's suggestion that the CID "*might have engaged in a Machiavellian ploy to secure the appellant's removal by wrongly stating that the warrant is false is...speculative and does not justify me in rejecting the report out of hand*." He continued (at [51]) "*Despite the limitations of the Ralon report, I am nonetheless satisfied that the warrant is probably forged..."*

31. In VT (Article 22 Procedures Directive-confidentiality) Sri Lanka [2017] UKUT 368 the Upper Tribunal found: (headnote) (iii) "*The humanitarian principles underpinning Article 22 of the Procedures Directive prohibit direct contact with the alleged actor of persecution in the country of origin in a manner that might alert them to the likelihood that a protection claim*

has been made or in a manner that might place applicants or their family members in the country of origin at risk."

32. It adds that redacting personal information and not making reference to the purpose of the enquiry might protect people who have submitted false documents because if there is no genuine record of an arrest warrant the authorities would not be able to identify the person. However, this method of enquiry "*would not protect those who have a genuine arrest warrant issued against them*" because the identity of the person will be known from the reference number [86].

33. Further, "…*it is at least possible that the authorities might have a motive to deny the existence of a warrant if they had a strong interest in arresting a person*" The fact that the authorities have confirmed a document in one case "*does not mean that weight can be given to the information provided in response to every verification request*."[90]

34. The Tribunal concluded (at [91, 92]) by stating that the current method of enquiry with the authorities risked breaching the prohibitions in Article 22 and is "*unlikely to produce reliable evidence relating to the authenticity of the document in question."* In that case the Tribunal placed "*little weight*" on the evidence from the authorities.

35. It is not clear to me whether the judge was referred to VT. However, very similar issues were raised in the skeleton argument. The judge did not engage with them. In failing to do so he erred in his approach to the verification evidence.

36. Further, I find merit in the claim that the judge failed to have regard to and make findings on the husband's evidence.

37. That he gave evidence is recorded at [28-32]. On the face of it he corroborated important aspects of the appellant's evidence including her arrest from the airport in June 2014, her production at the Magistrates Court in Colombo, her remand in Welikada Prison and her release on bail.

38. Again, in failing to have regard to material evidence the judge erred.

39. I consider that these errors must taint the other findings made by the judge such that the case must be reheard.

Notice of Decision

The decision of the First-Tier Tribunal is set aside. The nature of the case is such that it is appropriate in terms of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and of Practice Statement 7.2 to remit the case to the First-Tier Tribunal for an entirely fresh hearing before a Judge other than Judge NJ Bennet. No findings stand.

Direction Regarding Anonymity

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her 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 26 March 2018

Upper Tribunal Judge Conway