



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04162/2017

THE IMMIGRATION ACTS

Heard at Field House
On 30 July 2018

Decision and Reason Promulgated
On 13 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

KB
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Paramjorthy (for A and P Solicitors)

For the Respondent: Ms A Everett (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of KB, a citizen of Sri Lanka, born 7 February 1979, against the decision of the First-tier Tribunal of 1 February 2018, itself dismissing his appeal against the refusal of international protection of 9 March 2017.
2. The immigration history supplied by the Respondent is that the Appellant was granted entry clearance as a student and entered the UK on 4 October 2007 to pursue a Master's

degree in structural design, with leave until 30 April 2009. He returned to Sri Lanka on 13 April 2008. He returned to the UK on 21 June 2010 as a post study worker on 3 March 2010 with leave until 3 March 2012, and was joined by his wife and children on 21 January 2012. He claimed asylum 1 March 2012.

3. That asylum application was refused and an appeal against the decision was dismissed on 6 July 2012 by the First-tier Tribunal. Judge Pygott found that the Appellant's asylum claim lacked credibility. However, due to a technical failure with the method of setting removal directions, the Upper Tribunal found that the original immigration decision had not been in accordance with the law albeit that there was no legal error in the First-tier Tribunal's reasoning on the substance of the decision on international protection grounds. For reasons unknown, the Secretary of State subsequently generated a further decision refusing the Appellant's international protection application, and it is the appeal against that decision which gives rise to the present proceedings.
4. The Appellant is from Jaffna, and last lived in Colombo before coming to the UK. He supported the LTTE's goals though was never a member. He had three older sisters and a younger brother. His elder sister had been in the LTTE police force; she and her children presently lived with the Appellant's mother, though her husband who had been in a LTTE fighter was in military custody. Another sister was also in the LTTE, whilst her third sister lived with the Appellant's mother. In November 2004 campus security staff at his university searched his room and found LTTE related material. He was photographed, fingerprinted and questioned, and then released, it not being thought he had done anything wrong. He was not contacted in relation to this issue again.
5. Between 2003 and 2005 the Appellant helped a LTTE fighter, THO, who he had previously studied with. At THO's instance he also helped LTTE members to find accommodation. He was aware that THO had been arrested at some time towards the end of the conflict, though he had lost contact with him in mid-2009. The Appellant worked for the United Nations Office for Project Services in 2006 as a site engineer helping with re-construction following the tsunami. In January 2017 the Appellant flew to Colombo with UN staff as the construction work had stopped temporarily because two employees were unlawfully killed and some routes to the workplace were shut down. He left the UN in March 2007 and searched for work in Colombo whilst seeking to secure a visa for the UK.
6. In October 2011 THO went to the Appellant's mother's house with some other men asking where he was. THO asked the Appellant's mother to tell him if the Appellant returned to the UK. She informed the Appellant of this visit, and he in turn warned his wife who was then staying in Colombo. He was unaware of the reason for the visit. In December 2011 THO attended the Appellant's wife's sister's house asking after him once again, and again requesting notification should the Appellant return to Sri Lanka. Concerned for his wife's well-being in the light of this development, the Appellant now expedited her outstanding visa application to join him in the UK. Persons unknown visited his wife's sister again after his arrival in the UK. He claimed asylum because he

feared that his involvement with the LTTE would cause problems with the Sri Lankan government.

7. That was essentially the claim as put to the First-tier Tribunal in 2012. Judge Pygott found that the historical facts put forward were fabricated. There was no credible reason why the authorities would express an interest in the Appellant when he had previously travelled to and from Sri Lanka on his own documents without incident. It was not credible that THO would have helped the authorities search for the Appellant. He had been remarkably vague about THO's own problems with the authorities and his evidence shifted in the re-telling, variously stating that THO was a fighter and a high profile intelligence operative. His evidence as to the details of the men accompanying THO when visiting his relatives was inconsistent with the evidence in his mother's affidavit; the sister-in-law's evidence of the actual visit of THO and the identity of the men with him was vague. Overall the Appellant's evidence lacked credibility and he could not be at any risk of persecution simply based on his sisters' or their husbands' historic involvement with the LTTE.

The proceedings in the First-tier Tribunal in the context of the present appeal

8. The Appellant's wife gave evidence. She said that she did not know why the authorities would still be looking for him, but nevertheless they had visited her. She had returned to Sri Lanka in 2010 and 2012. The Appellant's sister SN gave evidence and said she had attended their sister-in-law's funeral in February 2017. The authorities showed up and questioned her about the Appellant. The Appellant's brother-in-law provided a witness statement confirming that the authorities had attended his sister's funeral enquiring after the Appellant.
9. Notably the Appellant's brother-in-law did not give live evidence. The only live witnesses were the Appellant, his sister and sister-in-law. Nevertheless, the First-tier Tribunal set out evidence from one "Mr [S]", described as the Appellant's brother-in-law, who was said to have stated that he assisted the Appellant and his family in the UK, and had known the Appellant since becoming his brother-in-law. He occasionally holidayed in Sri Lanka.
10. The First-tier Tribunal treated the findings of Judge Pygott as the starting point for her own findings, noting that the evidence of the visit by the security forces to the funeral represented a further possible development in the background facts. The First-tier Tribunal concluded that the Appellant would not face any risk in Sri Lanka given he had returned there in 2008 and twice in 2010 without incident, using his own passport. It was not credible that a person of his profile would remain of interest in 2017 following an arrest in 2004, particularly given that he had been released without problems at the time. It was not credible that the security forces would subsequently visit a family funeral. Applying the Country Guidelines, he did not fall within any recognised risk category.

11. Grounds of appeal contended that the First-tier Tribunal should not have applied *Devaseelan* in circumstances where the Secretary of State had reconsidered the asylum claim following the last appeal hearing. Some factual errors in the decision were identified: the elder sister in reality resided in Switzerland with her husband, the Appellant's wife had been unemployed in Colombo, the Appellant's brother-in-law was labelled as his brother, and the third witness, mis-described as the Appellant's sister, was in truth her sister-in-law. As I set out in more detail below, there was also a more significant error raised regarding the fourth witness. No credibility finding had been made whatsoever on the evidence of the Appellant's wife.
12. Although the First-tier Tribunal refused permission to appeal, the Upper Tribunal granted permission on 18 May 2018 on the basis of a lack of care and anxious scrutiny.
13. Before me Mr Paramajorthy contended that this was a fundamental flaw in the decision. The evidence of a witness who had not given evidence was taken into account and thus it was doubtful that anxious scrutiny had been applied. Ms Everett accepted that this was clearly an error of law though argued that this was not a material one: the First-tier Tribunal decision was wholly consistent with the approach in the Country Guidelines given the Appellant's limited profile.

Findings and reasons

14. I reserved my decision at the hearing and now give my findings and reasons.
15. There is one very disconcerting feature of this appeal. As the representatives before me agreed, only three witnesses gave live evidence. There was no fourth witness who provided evidence in the terms attributed to them by the First-tier Tribunal. There *was* a witness statement supplied from Mr KS, the brother-in-law of the Appellant, who gave evidence of historical facts which he stated he had personally witnessed. He stated that the funeral in question was that of his wife. On 20 February 2017 men in civilian clothes identifying themselves as CID operatives asked after members of his wife's sister's family, particularly the Appellant. He told them the relevant family members were in the UK. They apparently expected that the Appellant would have been in attendance at this family funeral.
16. The question arises as to whether or not the First-tier Tribunal's reference to a witness who did not give evidence in the terms recorded represents a fundamental flaw in its decision. Asylum appeals must be approached applying the appropriate anxious scrutiny, and as Carnwath LJ explained in *YH* [2010] EWCA Civ 116 that term "has by usage acquired special significance as underlining the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account."

17. It will be relatively rare for an error of this scale not to cast doubt on the decision in an asylum appeal. However, having considered the matter with care, I find this is one such rare occasion. This is for a number of reasons.
18. Firstly, the Appellant's claim received very thorough assessment previously on appeal. The reasoning in that earlier decision might have been thought sufficient to finally determine any international protection claim by the Appellant. Nevertheless he is of course entitled to put forward further evidence if it gives rise to the possibility of a well founded fear of persecution. However, the clarity and detail of the reasoning previously given is nevertheless impressive.
19. Secondly, the further element of the Appellant's claim in fact faces the same difficulties as does the remainder of his account. It is very difficult to see how a person of his own very reduced profile would be of current interest to the Sri Lankan authorities. Both First-tier Tribunal Judges who have determined the appeal have so concluded.
20. The headnote of *GJ (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 319 (IAC) sets out that the Sri Lankan government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. The categories of persons at real risk were:
- “(a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism.
- (b) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government.
- (c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.
- (d) A person whose name appears on a computerised "stop" list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.”
21. The Appellant's profile is very different to any of those scenarios. One must always be aware of the possibility that those Guidelines do not capture every possible eventuality, but there is simply no reason whatsoever to imagine a person with his background would be of interest to the Sri Lankan security forces on a return. He has not involved

himself with diaspora activities or journalism, or the enquiry into international crimes in Sri Lanka, and he was never a member of the LTTE; there is simply nothing that would put him at risk of falling foul of the security forces. He has previously travelled to and from the country without incident.

22. My third reason is that the evidence in the witness statement of the brother-in-law is itself barely more detailed than the previous testimony of the Appellant and other witnesses criticised for its vagueness by each incarnation of the First-tier Tribunal which considered it. And the evidence of the witness which the First-tier Tribunal apparently conjured into existence was not used to discredit the evidence of those witnesses who had made witness statements or given live evidence.
23. So in conclusion, whilst the First-tier Tribunal erred in law in making an error of fact as to the witnesses before it and the evidence that they gave, I find that that error was not a material one in the circumstances of this appeal.

Decision:

The decision of the First-tier Tribunal contains no material error of law.
The appeal is dismissed.

Anonymity Order

I make an anonymity order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure of any information or matter likely to lead members of the public to be able to identify the Appellant.



Signed:
Deputy Upper Tribunal Judge Symes

Date: 9 September 2018