



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/11972/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 30 August 2018

Decision & Reasons Promulgated  
On 13 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR SUBESKUMAR YOGALINGAM  
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms R Chapman, Counsel  
For the Respondent: Mr E Tufan, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellant**

1. The Appellant is a citizen of Sri Lanka of Tamil ethnicity who was born on 23 July 1985. He appeals against a decision of Judge of the First-tier Tribunal Craft sitting at Hatton Cross on 18 December 2017 in which the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 7 November 2017. That decision was to refuse to grant the Appellant international protection.

2. The Appellant entered the United Kingdom on 24 June 2010 with a valid student visa. On 13 July 2012 he applied to have this extended but was advised by the Respondent on 30 April 2013 that the licence of his college had been revoked. He was given further to time to submit another application. That application was refused on 8 July 2013 as the Appellant failed to meet the criteria and his appeal was dismissed. An onward appeal to the Upper Tribunal against that dismissal was compromised with the Respondent considering a further application for leave as a student. That application in turn was also refused and an onward appeal against that refusal was dismissed on 30 July 2014.
3. On 22 January 2015 the Appellant was encountered by enforcement officers whilst he was working illegally. He was advised that directions for his removal to Sri Lanka had been set for 29 January 2015. Five days before those directions were to be enforced and four years after he entered the United Kingdom the Appellant claimed asylum.

### **The Appellant's Case**

4. The Appellant claimed that he had been a member of the separatist organisation the LTTE and was arrested and tortured by the Sri Lankan army on two occasions, 11 April 2008 and November 2009. He had been taken to an LTTE training camp in or about 2001 and while working for the LTTE he had spied on one individual and been involved in the death of another. It was common ground that the Appellant had had an operation to his head but the reason why that operation was necessary was disputed between the Appellant and the Respondent. The Appellant said that it was because he had been struck whilst in detention. Since arriving in the United Kingdom he had been involved in sur place activities for an organisation called the British Tamil Forum (BTF) and the LTTE.

### **The Decision at First Instance**

5. The Judge found that the Appellant's credibility was central to determining the appeal. There were a number of significant inconsistencies and concerns in the Appellant's account of events. The Judge noted that the existence of these inconsistencies was acknowledged in the skeleton argument prepared by the Appellant's own counsel. At [52] of the determination the Judge listed some of these difficulties:
  - The Appellant had only referred to one incident of detention and torture in his screening interview not two.
  - The training camp to which he said he had been taken by the LTTE had been destroyed by the relevant date and his description of his training in Sri Lanka did not match the available objective evidence;
  - The description of the Appellant's spying activities in Colombo was implausible;

- The delay in making a claim for asylum after arrival in the United Kingdom was significant;
  - There was an absence of relevant medical evidence covering the period from 2010 to 2014;
  - The Appellant was not a prominent or leading figure in the LTTE.
6. The Appellant had been able to answer questions fully without difficulties in oral evidence. The account of the spying activities, that the Appellant had done so wearing his school uniform, was implausible when set against the fact that the person being spied upon lived and worked in a heavily fortified army camp. Although the Appellant's claimed second arrest had been for a far longer period than the first the Appellant had suffered no scarring or other injuries from it. The Appellant had been able to obtain a passport and then a student visa and leave Sri Lanka on a normal flight.
  7. Although the Appellant claimed that his attendance at demonstrations organised by the BTF had brought on flashbacks and bad memories the GP records show the Appellant had only attended on his GP for diarrhoea. It was only in 2014 that the Appellant said he had been beaten by a stick in Sri Lanka which led to the operation to his head and only in 2015 that he said he had been struck whilst detained by the army. During that period the Appellant was said to have been meeting with members and supporters of the BTF who would have been aware of the availability and potential benefits of an application for asylum, yet the Appellant had not applied.
  8. Nevertheless, the Judge accepted at [55] that the Appellant was a vulnerable witness and that vulnerability created potential difficulties for the Appellant in gaining access to justice. The medical evidence could not provide certainty as to the cause of the Appellant's serious head injury, but the injuries were consistent with part of the Appellant's version of events. At [56] the Judge analysed correspondence from the Appellant's mother and the family lawyer noting a discrepancy between the Appellant's mother who said that the police were continuing to attend at her home looking for the Appellant and the advocate's correspondence which said he, the advocate, told the Sri Lankan authorities that the Appellant had now left the country. The Appellant was on a stop list should he return. There was nothing to indicate that any form of arrest warrant had been issued against the Appellant and he was not on a watch list.
  9. The Judge self-directed on the country guidance contained in the case of GJ [2013] UKUT 319. He found that the Appellant's core evidence was not consistent. The Appellant had made no mention of assault or medical difficulties in the various applications he had made to the Respondent prior to his asylum application. It was only after January 2015 that medical evidence had been sought. The Appellant currently held no permanent position in either the LTTE or another separatist organisation the TGTE and had no confirmation of membership thereof until 2015 and 2014 respectively. There was no reasonable degree of likelihood that the

Appellant would be persecuted or harmed upon return. The Judge dismissed the appeal.

### The Onward Appeal

10. The Appellant appealed against this decision on four grounds. The first was that the Judge had failed to consider the Joint Presidential Guidance Note No 2 of 2010 (“the JPG”) when considering the Appellant’s mental state and the impact of that mental state upon the Appellant’s ability to give evidence. The Judge had had a detailed medical report from Doctor Sharif El-Leithy which outlined what difficulties there would be for the Appellant in explaining his case. In an Upper Tribunal decision JL [2013] UKUT 145 it was said that applying the JPG would have entailed the Judge asking whether any of the inconsistencies in an Appellant’s account could be explained by being a vulnerable person.
11. The second ground was that the Judge had failed to give clear reasons for rejecting the Appellant’s account of his second detention. Paragraph 10 of the grounds summarised the Judge’s reasons for rejecting a second detention arguing that the Judge had failed to note that the Appellant could leave Sri Lanka on his own documents because he was assisted by an agent.
12. The third ground argued that the Judge had failed to determine whether the Appellant’s activities in the United Kingdom placed him at risk. Although the Judge appeared to accept that the Appellant had been active with the BTF and was involved with the TGTE he had not explained why this did not place the Appellant at risk. The TGTE was still proscribed in Sri Lanka which showed that the authorities have an adverse interest in those persons who were in that organisation.
13. The fourth ground argued that the Judge had failed to take account of the risk of detention once the Appellant returns to Sri Lanka.
14. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Davidge on 2 May 2018. In a detailed and carefully worded decision she refused permission to appeal noting that although the grounds extended over seven pages they revealed no arguable error. The argument that the Judge had failed to apply the JPG overlooked [35] where the Judge had taken on board the arguments about the effects of the Appellant’s PTSD. It was counsel for the Appellant who had noted in oral submissions at the hearing that the Appellant had been clear in his oral evidence. The First-tier Judge could be confident that the Appellant was fit to give evidence and had been provided with the necessary support to do so [36] to [39]. The Appellant had the opportunity of going through matters slowly for the purposes of a recent medical examination and preparing a statement when explaining matters to his advisers in detail.
15. The Judge was entitled to take into account that the Appellant presented with a number of significant inconsistencies and concerns including a failure to claim

asylum promptly. The Judge was not required to reason every point especially those which in the context of the factual findings brought the case home. The fourth ground overstated the case by asserting that the arrest and detention in 2008 required specific reasoning.

16. Following the refusal to grant permission the Appellant renewed his application for permission to appeal to the Upper Tribunal on broadly the same grounds as before. The application for permission came on the papers before Upper Tribunal Judge Perkins on 9 July 2018. In granting permission to appeal he wrote that grounds three and four (that the Tribunal had not considered properly risk on return) could be argued. However, he was more concerned that proper regard may not have been shown for the Appellant's vulnerability. He then went on to say: "I am far from saying that the case is made out but the arguments are important and I am satisfied merit attention". He gave permission on each ground.

### **The Hearing Before Me**

17. In consequence of the grant of permission the matter came before me to determine in the first place whether there was a material error of law in the determination. If I found there was then the appeal would need to be reheard. If there was not, then the decision of the First-tier Tribunal would stand.
18. In oral submissions counsel (who had not appeared in the First-tier or had settled the grounds) argued that the Judge had accepted the Appellant was vulnerable and that this would create difficulties for him. The Judge had a letter from another doctor, Mr Isaacs not referred to in the determination confirming that the Appellant had suffered trauma. The Appellant had spent substantial time with the clinical team relating his account to them. He had been diagnosed with PTSD. Doctor Murray who had had ten sessions with the Appellant considered the Appellant's presentations were consistent. The Judge had noted extracts of the evidence but had understated it at [55].
19. The surgical scar was diagnostic of an operation, the injury was typical of a severe blow to the head. Some of the scars on the Appellant were typical of and some were highly consistent with the Appellant's account. The Judge described this evidence as consistent with the Appellant's account whereas it was of a higher degree of proof. What the Judge had not done in the light of the JPG was to factor in the brain injury and the PTSD when considering what impact that might have on the Appellant's ability to give consistent evidence. I queried with counsel what steps the representatives had taken before and during the hearing to ensure that their client had access to justice given that he was vulnerable and given that the authorities including AM Afghanistan imposed a duty on the representatives to suggest appropriate steps for a vulnerable witness. Counsel did not indicate that the Appellant's representatives had taken any such steps stating instead that it was incumbent on the Judge to apply the JPG. Contrary to what the Judge had said the medical evidence did not support his findings.

20. Moving onto ground two counsel acknowledge that this was a reasons-based challenge. The Judge had not accepted that the Appellant had been arrested on a second occasion. It was not clear from [59] whether the Judge was or was not accepting the fact of the second arrest. He seemed otherwise to have accepted the majority of the Appellant's account.
21. Grounds three and four concerned the application of the country guidance authority of GJ and complained of a lack of adequate reasons. In [60] the Judge did not accept that the Sri Lankan authorities would believe or suspect the Appellant to be a risk "to this country." It was not clear from that whether the Judge meant a risk to the United Kingdom or to Sri Lanka. The Appellant had been a member of the LTTE and the TGTE in the United Kingdom and more should have been said on the issue of whether the Appellant was at risk.
22. As to ground four, it had been accepted that those in custody in Sri Lanka were liable to mistreatment. All the Judge said was that the Tribunal did not accept there was a risk as the Appellant would not be perceived as someone undermining the state. There was more to the country guidance authority of GJ than that. The Judge had not made clear at [57] whether he accepted the Appellant was on a stop list. This was more than a disagreement with the Judge's findings. Whether the Appellant was or was not on a watchlist required a clear finding by the Judge. The Appellant had an arguable case that he was at risk on return, there were material errors of law in the determination.
23. In response the Presenting Officer argued that it was quite clear why the Judge had rejected the Appellant's account. It was not necessary for the Judge to deal with each and every piece of evidence. The Judge had considered the medical evidence in some detail at [27] to [30] of the determination. The medical experts could not say that the Appellant's injury had been caused by the Sri Lankan army. There was evidence of a blow to the head but no evidence that it was caused by the army. The Judge had considered all the evidence as he was required to do. The Appellant had only made his application for asylum when he was faced with removal. It was the last option open to him. The Judge had factored in section 8 of the Treatment of Claimants etc Act 2004 as part of the credibility assessment.
24. The Judge had noted that the Appellant was able to answer questions without difficulty. All issues were considered. The reasoning had to be sufficient and it was in this case. The conclusion was that the Appellant was not in a risk category, since membership of the LTTE would not of itself put the Appellant at risk. Even if there was a typing error at [60] (see paragraph 21 above) that did not show that the determination itself was flawed. Even if the TGTE was proscribed, the Judge had taken into account that the Appellant's involvement with them was limited. There was no material error of law in the determination.
25. In conclusion counsel acknowledge that the medical reports had not indicated who had inflicted the blow to the Appellant's head, all they could say was that it was

consistent with the assault described by the Appellant. The question was what should the Judge have done with his finding that the medical evidence could not provide certainty as to the cause of the Appellant's serious head injury? The duty to give reasons meant giving adequate reasons. The Appellant had been conscripted into the LTTE and his past and present membership should have been analysed more clearly.

## **Findings**

26. The appeal against the Judge's decision in this case comes down to 2 main points. The first is that the Judge did not apply correctly the JPG on vulnerable witnesses. The second is a reasons-based challenge to the Judge's adverse credibility findings. To a certain extent the two challenges are linked because it is argued that the Judge did not factor in the Appellant's vulnerability when assessing the consistency and credibility of the Appellant's evidence. Both the JPG and the subsequent Court of Appeal decision in AM Afghanistan [2017] EWCA Civ 1123 are concerned with ensuring that vulnerable witnesses have full and proper access to justice. There are a number of aspects to this including ensuring that appropriate arrangements are made for the hearing such as limiting questioning and explaining matters in plain English. Secondly when assessing the overall evidence given by witness the Judge should take into account what problems that witness may have had in giving evidence so that an unfair assessment is not carried out.
27. In relation to the first point, it does not seem that the Judge received any particular assistance from the Appellant's representatives. Indeed, it is clear from the determination that Appellant's counsel who did not settle the grounds of onward appeal and did not appear before me, was at pains to argue that the Appellant had given his evidence in court in a straightforward and clear manner having had the opportunity of fully preparing for the hearing. The Judge was aware that the Appellant had had a serious head injury and had had a major operation following an injury. He was also aware that the Appellant was a vulnerable witness and that this was a case where credibility was central to determining the appeal.
28. As Judge Davidge pointed out when refusing permission to appeal in the First-tier, the Judge had considered the concerns raised and examined the medical evidence in some detail before reaching a conclusion in the round. At [55] the Judge specifically addressed the potential for difficulties that the Appellant's vulnerability would create. The Judge evidently had an assessment of the credibility of a vulnerable witness very much in the forefront of his mind as he went through the evidence in a holistic manner. The problem was that the medical evidence indicated that the Appellant had been inconsistent as to the reason why he had needed an operation, see paragraph 7 above. The Judge also noted that the Appellant had been able to pursue his studies in the United Kingdom over a period of some years indicating he had made a recovery from his injuries.

29. The Appellant had made no mention of assaults or medical difficulties in the applications he made to the Respondent until he came to make his claim for asylum in January 2015 which was only made after removal directions were set. Prior to that the Appellant had engaged extensively with the immigration system in this country by making applications and two separate appeals to the Tribunal. Yet he had failed to mention his ill treatment or fear of return during that time. It was not open to the Appellant to say that simply because he was a vulnerable witness therefore he could not be challenged on any of the difficulties in his account. What the Judge had to do was to consider the inconsistencies against the background of the medical evidence indicating an injury and an operation.
30. Counsel at the First-tier hearing had raised the issue as to the effect of the Appellant's PTSD and that the Appellant's English was now better than it had been when he had attended a screening interview. It had been drawn to the Judge's attention that consideration should be given to the reason for any inconsistencies in the Appellant's version of events. Was he lying or were those inconsistencies the result of his medical condition? At [59] the Judge made clear that he had concluded that the Appellant had exaggerated his evidence. The Judge had been asked to make a finding on whether the Appellant was a credible witness or not and this the Judge had done.
31. The grounds put forward by the Appellant in this case are merely a lengthy disagreement with the Judge's conclusions in the matter. The Judge had carefully read the medical evidence and a significant part of the determination is taken up with the Judge's summary of that evidence. There was no medical evidence from Sri Lanka of the operation itself that was carried out on the Appellant and the medical evidence was not as clear on causation as was submitted to me that it was. At [27] the Judge pointed out that Doctor Murray had said that the Appellant's difficulties were not fully explained by the PTSD and that the Appellant's report of problems might be caused by either psychological problems or the brain injury or a combination of the two. Some of the Appellant's symptoms were not characteristic of PTSD.
32. Doctor El-Leithy had concluded the Appellant was fit to give evidence and at [29] the Judge noted the doctor's view of what difficulties could arise for someone suffering from PTSD when they gave an account of what had happened to them. The doctor had not undertaken any test to identify the presence of exaggeration or malingering. The Judge was entitled to point out that the medical evidence did not say that the Appellant had received a blow to the head from the Sri Lankan army. The most the medical evidence could say was that the Appellant's account was consistent with the need for a subsequent operation but that merely meant that there were other possibilities besides those offered by the Appellant. It was not for the Judge to speculate on that point. I do not find there was any material error of law in the Judge's treatment of the medical evidence or of the Appellant's vulnerability. The Judge looked at the evidence in the round before arriving at his conclusions.
33. The Appellant had not referred to a second arrest in his screening interview. That omission was a matter for the Judge to consider together with the fact that the



Appellant was able to obtain a visa for the United Kingdom using his own passport and had then been able to leave Sri Lanka without any difficulties. Whilst the Appellant claimed he was able to do this because he had assistance from an agent, it was a matter for the Judge to assess the credibility of that. The Judge evidently felt that that was not a satisfactory explanation for what had happened, and that the truth of the matter was that the Appellant had left Sri Lanka on his own passport because he was not of adverse interest to the authorities. He was not on a watch list.

34. Ground three argued that the Judge had failed to determine whether the Appellant's diaspora activities placed him at risk. The Judge noted that the Appellant's sur place activities had come very late in the day and that the Appellant was only ever a minor figure and not therefore likely to be of adverse interest to the authorities. The Appellant appears to have attended some demonstrations and meetings, but it is difficult to see from the evidence the Judge received that the Appellant was a significant figure in the activities of any of the organisations proscribed by the Sri Lankan government. The Appellant disagrees with the Judge's conclusion that the Appellant would not thereby be at risk, but it is no more than that, a disagreement.
35. The fourth ground is the Judge failed to take into account the risk of detention upon return but the point the Judge was making was that there was no risk that the Appellant would be detained upon return because he was not of adverse interest to the authorities. The Appellant might well need to apply for a travel document and if someone was of adverse interest that might in some circumstances put them at risk upon return but there was nothing in this Appellant's profile to suggest that he would be of adverse risk upon return. If he was not of adverse interest he would not be detained upon return or be ill-treated. This ground too is no more than a disagreement.
36. The Judge gave clear and cogent reasons for his conclusions. It was not necessary for him to deal with each and every piece of evidence that was put forward. The Judge was aware of the Appellant's vulnerability and what test he ought to apply in assessing that evidence and had such matters in the forefront of his mind as he was giving his decision. The Appellant had no reasonable explanation for his failure to apply for asylum earlier. The Appellant had engaged with the immigration system in this country and had had numerous opportunities during that time to raise his concerns. This was not a case of someone who did not need to apply for asylum because he already had leave. The Appellant's leave had been curtailed because his college had been removed from the register. If he required international protection that at the very least was the time he should have applied for it. It is difficult to see how the Appellant's vulnerability could mitigate this particular aspect to which the Judge was entitled to give due weight when assessing the Appellant's overall credibility. The grounds are merely an overlong disagreement with the decision. They do not indicate any material error of law in the Judge's decision. I dismiss the appeal.

**Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 11 September 2018

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Judge Woodcraft  
Deputy Upper Tribunal Judge

**TO THE RESPONDENT**  
**FEE AWARD**

No fee was payable and I have dismissed the appeal and therefore there can be no fee award.

Signed this 11 September 2018

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Judge Woodcraft  
Deputy Upper Tribunal Judge