



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

Appeal Number: PA/00327/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 20th June 2019**

**Decision & Reasons Promulgated
On 03 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

**[N G]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Chapman, Counsel, instructed by Kanaga Solicitors
For the Respondent: Mr L Moore, Home Office Presenting Officer

DECISION AND REASONS

Introduction

This is an appeal against the decision of Judge Beg to dismiss the Appellant's appeal against the Respondent's refusal of his protection claim.

An anonymity direction was not made in the First-tier Tribunal and it therefore seems to me that little purpose would be achieved by making one now.

The appellant's case

The Appellant is a citizen of Sri Lanka who was born on 12th December 1980. He claims that in May 2002, whilst returning from a visit to his parents in Jaffna, he was stopped by LTTE soldiers and escorted to a camp where he was persuaded to act as a spy for the organisation. He was arrested by the police on suspicion of espionage in November 2004 and was detained and ill-treated for about six weeks before his employer (who was also a Tamil) bribed the police to release him.

Following his release, he was too afraid to return to work and, in June 2005, fled to Vanni mainland, which was then under the control of the LTTE. He received training in espionage and thereafter acted as a spy for the LTTE in Colombo. He there met a man called [U]. [U] was part of an LTTE breakaway faction called Karuna, which worked with the Sri Lankan authorities. [U] was subsequently abducted by the LTTE and the Appellant was told to report to Kilnochchi immediately. The Appellant was concerned that he may be in trouble with the LTTE because he had failed to inform them of [U]'s name and involvement with the Karuna. He was also concerned to learn that members of the Karuna faction were making enquiries about him and had visited the house where he was staying. His uncle therefore arranged for him to leave Sri Lanka with the assistance of an agent. He now fears ill-treatment from the authority in Sri Lanka, not only because of his activities before leaving the country, but also because of his support for the Transitional Government of Tamil Eelam (TGTE) whilst in the United Kingdom.

The oral evidence at the First-tier Tribunal

The Appellant did not give evidence in the First-tier Tribunal because he was medically unfit to do so. He did, however, call four witnesses.

Firstly, he called a man called '[SY]', who holds a senior position in the United Kingdom with the TGTE. Mr [Y] said that the Appellant had been involved with many of its activities since he had come to this country.

The Appellant's brother, [PN], also gave evidence. He is a refugee who is in contact with their parents in Sri Lanka. He recounted an occasion when the Sri Lankan police had shown their father photographs of the Appellant's involvement in TGTE activities in the UK and told him (the Appellant's father) that both his sons should surrender to them.

Thirdly, the Appellant's sister ([MN]) gave evidence. She has leave to remain in the United Kingdom as the spouse of a person settled here. She too has kept in contact with their parents. She recounted how their father was regularly detained by the Sri Lankan police and how they had told him that his sons should surrender to them.

Finally, the Appellant called his cousin, '[KJ]', who said he had known the Appellant when they were both living in Sri Lanka. He said that he knew the Appellant as a member of the TGTE, and that they had attended meetings and protests together whilst in Sri Lanka in 2009. Mr [J] had returned to Sri Lanka in 2011 and been questioned about his links with the Appellant.

The previous decision of Judge Warner

Judge Beg considered an earlier adverse decision made by Judge Warner. She recited the various reasons Judge Warner had given for his decision, including a finding that it was, “highly implausible”, that the Appellant would have shared accommodation with [U] for three or four months in circumstances where both were supposedly spying for opposing factions of the political divide (see paragraph 33) and/or that he would be permitted to leave Sri Lanka using his own passport if he was truly wanted by the Sri Lankan authorities.

The decision of Judge Beg

It will suffice at this stage to say that whilst accepting that the Appellant had been involved in some sur place activities with the TGTE whilst in the United Kingdom, Judge Beg did not accept that these put him at risk of being ill-treated on return to Sri Lanka. Moreover, Judge Beg did not find any part of the Appellant’s account of events in Sri Lanka credible.

The grounds of appeal to the Upper Tribunal

There are three Grounds of Appeal against Judge Beg’s decision in respect of which permission to appeal has been granted.

The first ground is that the judge not only treated the decision of Judge Warner as her starting point but also her finishing point.

The second ground is that the judge ought not to have attached any significant weight to the decision of Judge Warner, given that that decision had been made within the “Fast Track Procedure”, which has subsequently been found to be unfair and unlawful.

The third ground is that the judge’s approach to the risk on return as a result of the Appellant’s sur place activities in the United Kingdom was flawed.

I shall take the grounds in reverse order.

Analysis of the grounds of appeal

I have difficulty in following the reasoning of the third Ground of Appeal. It is said, for example, that the judge misdirected herself in relation to evidence that the Appellant had provided testimony to the UN OISL, “as it was not suggested that the Sri Lankan authorities would be aware of it”. It seems to me entirely logical to find that a person will not be at risk on return by reason of activities conducted in the United Kingdom of which the authorities in the country of origin are oblivious. The nature of the supposed ‘misdirection’ is therefore a mystery. The remainder of this ground is couched in particularly vague terms. It is said at paragraph 11, for example, that, “the Ftj erred in failing to apply anxious scrutiny to the sur place activity issues that were before her”. The only particular of this allegation given is that the judge failed to provide reasons for her finding that the Appellant’s attendance at TGTE meetings was a cynical attempt to bolster a weak claim. However, given that

the Appellant's case was not apparently put on the basis that the Sri Lankan authorities would be aware of his attendance at such meetings, I find it difficult to comprehend how such a claimed error is said to be material to the outcome of the appeal. I therefore hold that this ground has not been made out.

I turn to the second ground. This is founded upon the following passage in the judge's decision, which appears at paragraph 36:

"Mrs Rothwell submitted on the Appellant's behalf that less weight should be given to the determination of Judge Warner because at the time of that appeal hearing the Appellant was in the Fast Track at Harmondsworth hearing centre and that that process was subsequently found by the higher courts to be unfair. She also submitted that the Appellant since that determination, has now become involved with sur place activities in the United Kingdom. She also relied upon the medical evidence in the bundle. I find that there is no credible evidence before me that the Appellant was unable to fully put his case before Judge Warner. It is clear from the determination that the Appellant was represented by Counsel."

This ground appears to me to be misconceived. It is perfectly possible for a safe decision to be made in proceedings that are inherently unfair, in just the same way as it is possible for an unsafe decision to be made within proceedings that were conducted entirely fairly. If Judge Beg had suggested that less weight should attach to evidence that could have been placed before Judge Warner, then there may have been force in an argument that it would be an error of law not to make due allowance for the difficulties faced by appellants in presenting his case in the 'fast-track' procedure. However, I do not read paragraph 36 making that suggestion. All that Judge Beg was saying was that the mere fact that the Fast Track procedure had been subsequently declared unfair and unlawful was not of itself a reason to question the safety of the findings made by Judge Warner. With that, I agree.

I turn, finally, to the first ground. I confess that this ground has given me considerable pause for thought. I should say from the outset that Judge Beg gave very detailed and thorough consideration to the evidence. However, the paragraph that causes me particular concern is paragraph 58.

"For the reasons set out in the determination of Immigration Judge Warner, I do not find the Appellant's account of what happened to him in Sri Lanka to be credible. Consequently, I do not find that the Appellant was arrested, detained and ill-treated in detention. I do not find that the Appellant has a record of someone who has been previously detained by the authorities or someone who is wanted by the authorities. I do not find that there is a photograph that the authorities have of the Appellant in Sri Lanka which can be matched to someone who has attended a demonstration in the United Kingdom. I find that the Appellant's participation in demonstrations in the United Kingdom has been one of someone who is part of the crowd. I do not find that the Appellant has a profile as such in Sri Lanka." (Emphasis added)

It is right to observe that the judge considered much of the fresh evidence before reaching the above conclusion. She in particular considered (at paragraph 38) the medical report of Dr Martin and (at paragraph 43) the psychiatric report of Dr Dhumad. The judge for various reasons, which for present purposes it is unnecessary to rehearse, appears to have attached little weight to those reports as support for the credibility of the Appellant's account. I am nevertheless concerned that, upon a literal reading of paragraph 58 of her decision, Judge Beg appears to have discounted the credibility of the appellant's account of what occurred in Sri Lanka, solely, "for the reasons set out in the determination of Immigration Judge Warner". Moreover, Judge Beg appears not only to have discounted the appellant's account of events in Sri Lanka on this basis, but also to have discounted his account of subsequent events for the same reason (see the list of other matters following the word, "consequently", which I have emphasised in my citation from paragraph 58, above). Thus, read in isolation, paragraph 58 appears to suggest that the reason for Judge Beg's wholesale discounting of the various aspects of the Appellant's claim was based upon an unquestioning acceptance of the decision of Judge Warner without regard to the fresh evidence that the appellant had adduced.

I have anxiously considered whether this literal interpretation of paragraph 58 is fair when it is set within the context of the decision as a whole. In this regard, it is right to say that Judge Beg returned to the question of the Appellant's credibility at paragraph 61.

"In assessing the evidence as a whole on the lower standard of proof I do not find the Appellant credible. Whilst I accept that the Appellant has attended TGTE meetings and demonstrations in the United Kingdom, I do not find that that in itself will place him at risk on return. I find that the Appellant's involvement with the organisation is an attempt by him to bolster a weak claim for asylum. I find that the Appellant's sister was able to return to Sri Lanka in 2016. She gave evidence that she went to Sri Lanka because her mother had suffered a serious injury after a fall."

The judge proceeded to give a number of further detailed reasons why she did not find the Appellant credible (see paragraphs 62 to 67). However, the difficulty is that the judge had by that stage already given the distinct impression of having already decided to disbelieve the Appellant solely on account of the reasons given by Immigration Judge Warner before turning to consider whether there might be other reasons for doing so. That is contrary both to the principle that, (a) the earlier decision of a judge should be treated as the start rather than the end-point for the assessment of credibility, and (b) the whole of the evidence should be considered in the round before making an adverse credibility finding.

There is a further complaint made by Ms Chapman on behalf of the Appellant concerning the judge's failure to take a holistic view of the evidence. This relates to the evidence of the country expert, Dr Chris Smith. The passage to which Ms Chapman referred me is contained within paragraph 67.

“Dr Smith’s report is based upon the Appellant’s claim that he was arrested and detained in Sri Lanka. For the reasons which I have given I do not find that to be the case.”

The difficulty with the above passage is that it fails to recognise that the plausibility of an account is an essential ingredient in determining whether the person giving it is a credible witness of truth. In other words, plausibility and credibility should be looked at holistically rather than, as the judge appears to have done, by firstly determining the credibility of the Appellant and then, having discounted it, dismissing the evidence of a country expert concerning plausibility as of little or no value because it was based upon the account of a witness who had already been found not to be credible. The issues of credibility and plausibility should thus have been considered in the reverse order to that in which the judge considered them, namely, by firstly acknowledging and giving credit for the plausibility of the appellant’s account, and then taking this into account as a non-decisive factor that weighed in the appellant’s favour when assessing his credibility as a witness of truth.

I confess that the conclusion to which I have come has been arrived at with great reluctance, given the very thorough and detailed consideration that Judge Beg gave to many aspects of the evidence. I am nevertheless clear in my conclusion that the judge failed to look at the evidence in the round, and instead sought to determine the Appellant’s credibility independently of the plausibility of his account, and by appearing to have determined the former solely by reference to the reasons given by Judge Warner in the earlier proceedings. That was an error of law that ultimately strikes at the root of all her factual findings. I am therefore driven to conclude that her decision must for this reason be set aside and that none of her findings of fact can be preserved.

Given my above conclusion, I feel that I have no alternative but to remit this case to be heard afresh in the First-tier Tribunal, sitting at Taylor House, before any First-tier Tribunal Judge other than Judge Beg.

Notice of Decision

The appeal is allowed. The decision of the First-tier Tribunal is set aside and remitted to be considered afresh by any judge other than Judge Beg.

No anonymity direction is made.

Signed

Date: 1st July 2019

Deputy Upper Tribunal Judge Kelly