



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

Appeal Number: PA/00975/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 20 January 2022**

**Decision & Reasons Promulgated
On 08 February 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**H P
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge O'Garro ("the judge"), promulgated on 29 April 2021, by which she dismissed his appeal against the Respondent's refusal of his protection and human rights claims.
2. The Appellant is a citizen of Sri Lanka and is of Tamil ethnicity. He arrived in the United Kingdom in late April 2016 and claimed asylum on arrival. It appears as though he did not maintain contact with the Respondent at

various points in time. This may explain why his claim was not refused until 20 January 2020.

3. The Appellant's claim was essentially as follows. He had associated with an LTTE operative when living in Sri Lanka. He was accused by the Sri Lankan Army of assisting this individual and, in turn, the LTTE itself. In November 2015 the Appellant attended a commemorative event organised by, or related to, the LTTE. The army appeared on the scene and began shooting. The Appellant managed to escape. However, his home was visited by the authorities the day after the event. The Appellant was not at home and instead his father was taken for questioning and then released. The Appellant went into hiding at a relative's home and arrangements were put in place for him to leave Sri Lanka.
4. Some years later (it is not entirely clear when) the Appellant received evidence from Sri Lanka purporting to show that a criminal case had been initiated against him on the basis of alleged LTTE involvement. Two items of documentary evidence, an information sheet and an arrest warrant, were obtained. Following this, and presumably with the assistance of legal representatives, evidence from a Sri Lankan lawyer was sought relating to checks made to ascertain whether the arrest warrant was genuine and whether there was indeed a case against the Appellant in his home country.
5. On appeal to the First-tier Tribunal, it was the Appellant's case that he would be on a stop list on return and would be detained at the airport. Failing this, he would be on a watch list and would be detained at some point thereafter. He asserted that he would be at risk of persecutory treatment. The Appellant's case had also to be seen in the context of what had been accepted to be significant mental health problems in respect of which evidence has been provided over the course of time.

Decision of the First-tier Tribunal

6. At the hearing, which was heard remotely by CVP, the Appellant was represented by Reeves & Co Solicitors and by Ms A Benfield, Counsel. The Appellant gave oral evidence with the assistance of an interpreter.
7. Having set out relevant background information, the judge accepted that the Appellant suffered from mental health problems and was a vulnerable witness: see [41]. She went on to acknowledge that his vulnerability had been factored into her assessment of credibility. At [45] to [47] the judge accepted that the Appellant had attended the event in November 2015 and that his home had been visited by the Sri Lankan authorities the following day in order to "speak" to him or "possibly to warn him". The judge found that if the authorities had had any genuine ongoing interest in the Appellant they would have placed him under surveillance. The absence of such surveillance indicated that the Appellant was not of

continuing interest. He was not, the judge found, perceived as a threat to the integrity of Sri Lanka.

8. The judge then went on to consider the documentary evidence at [49] to [55]. In short, the judge found that the Sri Lankan authorities “would” have arrested the Appellant before he left Sri Lanka if there “was any truth” to the contents of the information sheet allegedly provided to the court in Sri Lanka. The judge found that the absence of any arrest and the lack of contact between the Appellant and the LTTE operative mentioned earlier led to the conclusion that the information sheet was not a reliable document and no weight was placed upon it. It followed, in the judge’s analysis, that no weight could be attached to the arrest warrant and the evidence provided by the Sri Lankan lawyer.
9. The judge considered the alternative submission that the Appellant would be at risk simply as a failed asylum-seeker of Tamil ethnicity and rejected this in light of her credibility findings: [56]. At [58] she stated as follows:

“In the Appellant’s case, he is a Tamil. I accept that the Appellant had attended the Heroes Day commemoration event on 27 November 2015 and that he was able to escape before he was arrested and detained but the Appellant has provided no credible evidence that the authorities has had any further interest in him. ...”
10. Article 3 was addressed briefly in terms of the mental health problems, with the judge concluding that it did not meet the high threshold. Article 8 was not dealt with in any detail on the basis that Counsel had not pursued this particular aspect of the claim.
11. The appeal was duly dismissed on all grounds.

The grounds of appeal and subsequent events

12. The grounds of appeal relate specifically to what the judge said in [58], the analysis of the documentary evidence, and the way in which she dealt with the issue of failed asylum-seekers (with reference to illegal exit). Permission was granted on all grounds.
13. Following the grant of permission the Upper Tribunal was informed by the Appellant’s now former representatives that there were difficulties communicating with him. It seemed as though his mental health problems were causing an obstacle to the obtaining of adequate instructions. Directions were sent out in November 2021 requiring the solicitors to confirm whether they were still acting for the Appellant. It appears as though there was no response until Monday 17 January 2022, when the Tribunal was informed that Reeves & Co were no longer acting.

The hearing

14. On the day of the hearing there was no appearance from the Appellant. This was perhaps unsurprising given that the notice of hearing had been sent out only to the solicitors' address (this has been used as a care of address for a significant period of time). It did not appear as though the Appellant had provided a current residential address.
15. I considered whether it would be fair to proceed with the hearing in the Appellant's absence. Before reaching a final conclusion on what to do, I canvassed a number of issues with Mr Lindsay in respect of the judge's decision and the grounds of appeal. I raised some concerns as to certain aspects of the judge's approach. Mr Lindsay, whilst not making any formal concessions, responded in his customary fair and considered manner to acknowledge that there might be certain shortcomings within the decision as a whole. I rose to consider the appropriate course of action.
16. On resumption of the hearing I announced that I had concluded that there were material errors in the judge's decision, that it must be set aside, and the appeal remitted to the First-tier Tribunal for a complete re-hearing in due course.

Discussion

17. My reasons for the conclusion stated in the preceding paragraph are as follows.
18. Whilst it is fairly clear from what the judge said at [45] and [47], that she did not accept that the Appellant had a sufficiently high risk profile, she later went on to state at [58] that the Appellant had escaped Sri Lanka before being arrested and detained. It maybe that she did not intend to use this form of words in that paragraph. Nonetheless, on its face, this would appear to place the Appellant into a category of persons who might be at risk of being detained on return, namely those who had been under some form of active investigation (formal or not) before they left the country and without those investigations having been finally resolved. This is the point made in ground 1(i) of the grounds of appeal, with reference to what was said in ME (Sri Lanka) [2018] EWCA Civ 1486. Whilst reading the judge's decision sensibly and in the round, it is inescapable that there is a material tension between the aspects of her findings and conclusions. There is an error of law here which can be described as either failure to provide reasons, a failure to address a relevant matter (namely, a potential risk profile), or contradictory findings.
19. Further or in any event, I am satisfied that the judge erred in her consideration of the important documentary evidence. Having summarised at [49] the matters stated in the information sheet purported to have been presented to the Sri Lankan court, the judge stated at [50]

that if the information was true the authorities “would have” arrested the Appellant before he left the country. In effect, the judge was concluding that the only plausible outcome was that they would have acted in this way. In my judgment that imputed a high degree of rationality to the Sri Lankan authorities and/or also involved impermissible speculation on the part of the judge. “Would” is a fairly strong term, particularly when it is the lower standard of proof being applied. Beyond this, the judge was concluding that the document in question could only ever be reliable if all of the information stated therein was *in fact* truthful. In my judgment that was an erroneous approach. As pointed out in the grounds, it was entirely possible that some or more or all of the information was either factually inaccurate or concocted by the authorities in order to make a case against the Appellant. Whilst that position would involve a degree of speculation and I am acutely aware of the need for restraint before interfering with the judge’s findings, I am satisfied here that she had in effect applied placed too high a standard on the documents in respect of the assessment of reliability. In other words, she had to all intents and purposes required the Appellant to prove the factual accuracy of all matters set out in the information sheet.

20. Once the judge had discounted the reliability of the information sheet, she discounted the arrest warrant and information from the Sri Lankan lawyer: on her analysis, one followed inevitably from the other. This displays a failure to have considered the documentary evidence in the round. The assessment of the documentary evidence constitutes a further error of law.
21. Whether in respect of one of the errors described above or both, the judge’s decision is unsafe.

Disposal

22. The appeal will be remitted to the First-tier Tribunal with no preserved findings of fact. There may well be a difficulty in contacting the Appellant in respect of the remitted hearing. The First-tier Tribunal will no doubt make every effort to do so, as will the Respondent. There is only so much that can be done, but it is hoped that contact is made. If so, it may well be that the Appellant would be able to obtain legal aid for representation, given the nature of his case. This possibility should be borne in mind and communicated to the Appellant as best as possible.

Anonymity

23. An anonymity direction is justified in this case, given the protection issues involved.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I remit the case to the First-tier Tribunal.

Directions to the First-tier Tribunal

- (1) The appeal is remitted to the First-tier Tribunal (Hatton Cross hearing centre) for a complete re-hearing with no preserved findings of fact;
- (2) The remitted hearing shall not be conducted by First-tier Tribunal Judge O'Garro;
- (3) The First-tier Tribunal will make its best endeavours to contact the Appellant;
- (4) The Appellant is a vulnerable witness and shall be treated as such at any future hearing.

Signed H Norton-Taylor

Date: 27 January 2022

Upper Tribunal Judge Norton-Taylor