



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/00393/2013

THE IMMIGRATION ACTS

Heard at Field House
on 31st July 2013

Determination Promulgated
on 27th August 2013

Before

UPPER TRIBUNAL JUDGE SPENCER

Between

MOHAMED WAHEER AHAMED LEBBE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr P Saini, counsel, instructed by Nag Freshlaw Solicitors
For the respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before the Upper Tribunal following a grant of permission to appeal in the Upper Tribunal by Upper Tribunal Judge King on 15th April 2013.
2. The appellant is a citizen of Sri Lanka, born on 5th January 1990. He advanced a claim for asylum on the basis that his father had a transport business. On 23rd May

2010 the appellant was taking a lorry load of iron belonging to a customer of his father and was accompanied by the driver of the lorry and two of the customer's employees, when he was detained at a checkpoint at Omanthai where the security forces accused him of smuggling weapons. He was taken to a nearby camp where he was questioned about the weapons and his involvement with the LTTE, which he denied. He was moved to another camp when he was beaten up by CID officers and forced to give his father's customer's address. He was later moved to a jail where he was detained for a month and tortured every day until he went to court on 24th June 2010, when he was charged with supporting the LTTE. He was made to sign a document in Sinhalese which he could not read and was released on 17th December 2010 with a condition that he signed on once a week at Polonnoruwa Police Station. On his release he telephoned his mother who told him that his father and uncle had been arrested. Therefore he went to Colombo where he stayed at a friend's house for eight months whilst an agent applied for a visa. The agent got him past the security checks at Colombo Airport and he arrived in the United Kingdom on 31st August 2011 where he was permitted to enter because he had a visa as a student.

3. After a hearing in the First-tier Tribunal, on 12th February 2013, First-tier Tribunal Judge Fitzgibbon QC dismissed the appellant's appeal against the decision of the respondent, made on 23rd December 2012, to remove the appellant from the United Kingdom to Sri Lanka, following the refusal of his asylum and human rights claims. The First-tier Tribunal judge indicated in his determination, promulgated on 26th February 2013, that he rejected the appellant's account as not being credible.
4. It is clear from the comments which Upper Tribunal Judge King made in granting permission to appeal that he did not think that any of the grounds numbered 1 to 4 demonstrated that there was an arguable error of law in the determination of the appeal. He expressly gave permission to appeal in relation to grounds 5 and 6.
5. When the appeal came before me, Mr Saini, on behalf of the appellant, sought to renew his arguments on grounds 1 to 4, as he put in it his skeleton argument, dated 30th July 2013.
6. The first ground of appeal asserted that the consideration of the appellant's case by the First-tier Tribunal judge lacked anxious scrutiny. The appellant relied upon the decision of the Court of Appeal in ML (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 844, in which Moses LJ noted the meaning given to the phrase "anxious scrutiny" by Carnwath LJ, as he was then, in R (YH) v Secretary of State for the Home Department [2010] EWCA Civ 16, when he said that it underlined "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." It is well to remember, however, that in the passage of his judgment in which he set out his interpretation of "anxious scrutiny" Carnwath LJ also said that there was a balance to be struck and anxious scrutiny might work both ways. He said the cause of genuine asylum seekers would not be helped by undue credulity towards those advancing stories which were manifestly contrived or riddled with inconsistencies.

7. In ground 1 it was said that there was no ostensible consideration of the appellant's response to paragraph 33 of the refusal letter on a point by point basis. It was also said that in disbelieving the appellant's evidence the First-tier Tribunal judge failed to examine his evidence which rebutted the refusal letter and then failed to explain why that rebuttal evidence did not satisfy him to the lower standard. It was suggested that the analysis by the First-tier Tribunal judge in paragraph 17 of his determination was scant and unsatisfactory.
8. In paragraph 33 of the letter of refusal the respondent said that the appellant said that the Sri Lankan authorities were looking for him on 25th December 2010 as he was supposed to sign on on 24th December 2010. When asked why the authorities were looking for him he said "Because I have connections with the LTTE, they assume things" (AIR Q92). This claim was inconsistent with his earlier evidence in interview when he said he knew no LTTE people (AIR Q24).
9. It is apparent from reading paragraph 21 of the determination that the First-tier Tribunal judge did consider the appellant's explanation for this apparent inconsistency but in his view the appellant's comments did not explain it and it remained an inconsistency. The First-tier Tribunal judge made it clear by reference to the appellant's witness statement, dated 12th February 2013, that he had indeed considered his comments.
10. As to the assertion that the First-tier Tribunal judge had failed to examine the appellant's evidence which rebutted the refusal letter, it is apparent from reading paragraph 3 of the determination that the First-tier Tribunal judge read with care all of the material in the appellant's bundle of documents, which included his witness statement.
11. In paragraph 27 of the letter of refusal the respondent said it was noted that the appellant had failed to adequately explain why the Sri Lankan authorities decided he was transporting weapons and started beating him when he had no affiliation with the LTTE and was transporting iron materials. There was no reason from the information he had provided why the Sri Lankan authorities decided he was carrying weapons when he was carrying iron material which he had brought cheaply to sell. The reference to the iron materials having been bought cheaply to sell came from the appellant's answer to question 20 in his asylum interview, in which he said because the war was over iron materials were cheap so they used to buy them from there and sell in Colombo. The explanation offered in the appellant's witness statement was that he was not told the reason why they had arrested him. What he was told was that he had been involved with the LTTE and had helped the LTTE to transfer weapons to Colombo. He said from the information he received from the authorities in Sri Lanka he believed that these people (the people in the lorry) were LTTE members and they had transferred weapons to Colombo during the time of the civil war. As they had been involved with them in the business, the authorities suspected that they had also been involved with this and had helped the LTTE to transfer weapons to Colombo. It is the case, however, that this response contradicted

what the appellant said in answer to question 21 in his asylum interview in which he said:

“After that they took me to the camp. They questioned me there. They asked me where I was taking the weapons to and from where I was bringing them. They said that there were weapons there. I came to know about the weapons only after they told me. I did not know they were on the lorry. They asked me how long I had been doing this.”

12. In his witness statement the appellant dealt with a number of points of criticism advanced by the respondent in the letter of refusal. These included criticism of the appellant for not having adduced medical evidence to support his assertion of having been tortured, when he claimed that his friend had brought a doctor to his house and treated him for his injuries, criticism of the appellant for his claim that notwithstanding his army pass and ID card were taken off him in the camp when he was arrested, he was able to identify himself merely by name when he went to the police station every week and criticism of the appellant for an inconsistency in his account since notwithstanding he claimed he was charged with supporting the LTTE when he was produced at court on 24th June 2010, he also claimed he was later released without charge. The First-tier Tribunal judge identified these points of criticism in paragraph 11 of his determination.
13. The Upper Tribunal judge dealt with these points of criticism by saying that the comments on the reason for refusal in the appellant’s witness statement added little to the case for the appellant as set out in the determination. It is clear from paragraph 18 of the determination that the First-tier Tribunal judge had regard to the appellant’s explanations. He said that if the appellant had been transporting weapons it was extremely unlikely that he would have been released because (so far as the authorities were concerned) he would have been an active terrorist who was continuing on the LTTE’s armed campaign after the formal end of hostilities. The First-tier Tribunal judge said the appellant did not say that he paid a bribe for his release and he had given contradictory evidence as to whether the case against him was formerly discontinued. He went on to say that the appellant stated that a friend (unnamed) told him that people who had been released were later killed by the authorities as a tactic but no evidence had been produced to support this. He said he asked the appellant’s representative if he could point to any background evidence which showed the authorities did this to LTTE suspects instead of continuing with Court proceedings but he had been unable to do so.
14. It is clear from what Upper Tribunal Judge King said that he agreed with the First-tier Tribunal judge that what the appellant said in relation to these points of criticism added little to his case and Upper Tribunal Judge King was also of the view that it was clear that the First-tier Tribunal judge had had regard to certain of the appellant’s comments in any event. In my view is apparent from reading the determination as a whole that in giving his reasons for finding that the account of the appellant was not credible the First-tier Tribunal judge demonstrated that he had taken account of the appellant’s comments. It is particularly significant that in paragraph 14 of his determination he said that in determining the appeal he had given consideration to the totality of the evidence as well as to the appellant’s

submissions and the respondent's reason for refusal. He said if an item of evidence, or a point taken in argument was not specifically referred to, it did not mean that he had not considered it. He said he had been aware of his duty to give each relevant matter the most anxious scrutiny but for the purposes of justly deciding the appeal he had concentrated on what he regarded as the critical determinative issues.

15. Ground 2 criticised the statement by the First-tier Tribunal judge, in paragraph 17 of his determination, that it appeared to him to be extremely unlikely that if the LTTE were using the appellant's father's lorry to transport weapons, they would have allowed someone who was not a member or closely connected to the organisation to be involved. The determination did not reveal whether the matter had been put to the appellant when it should have been. Mr Saini had to concede that the record of evidence made by the First-tier Tribunal judge had not been called for to show what had transpired. In any event I take the view that the appellant was represented by counsel at the hearing of his appeal and could not reasonably have expected that the points of adverse credibility ultimately taken against him would be put to him. It was the duty of his counsel to seek an explanation for any obvious points such as the one in question. It was then said that there was no evidence that the Home Office Presenting Officer had taken the point in his closing address so that the appellant's representative was not given the opportunity to address the point in his closing address. What I have said above applies equally to that proposition. It was said in the third place that in making such a finding the First-tier Tribunal judge had not demonstrated that it was based on necessary evidence elicited from the appellant which would explain how the LTTE would even have a say in who drove the appellant's father's lorry. In my view the finding by the First-tier Tribunal judge was not based on direct evidence. It is impossible to see how it could have been. It was an inference which he was properly entitled to draw from the evidence as a whole. Upper Tribunal Judge King said that the comment was open to be made and was made in the overall context of the evidence of the appellant's arrest.
16. Ground 3 criticised the First-tier Tribunal judge for stating that he agreed with the Secretary of State that it was extremely unlikely that the appellant would have been released under any circumstances as he would have been viewed as an active terrorist who was continuing with the LTTE's armed campaign after the formal end of hostilities. It was suggested that nowhere in the letter of refusal did the Secretary of State advance such an argument and there was no background material advanced by the respondent to support such a theory. It was said that clearly courts granted bail to all variety of persons but it had not been shown by reference to any objective or background evidence that due to his specific category of LTTE association the appellant could not have been released by the court.
17. It is the case in paragraph 38 of the letter of refusal the respondent stated that it was considered the appellant had failed to adequately explain why the Sri Lankan authorities took him to court on 24th June 2010, charged him with supporting the LTTE, put him in jail for another six months and then released him without charge to sign on at the police station. Therefore it undermined his claim that he was detained or released as claimed. While it may be the case that the Secretary of State did not

aver that the appellant would not have been released under any circumstances, in my view the comment of the First-tier Tribunal judge was fully justified having regard to the determination of the Tribunal in TK (Tamils, LP updated) Sri Lanka (rev 1) CG [2009] UKAIT 00049. In that determination the Tribunal found that since the military defeat of the LTTE in May 2009 the principal focus of the authorities continued to be persons considered to be either LTTE members, fighters or operatives or persons who had played an active role in the international procurement network responsible for financing the LTTE and ensuring it was supplied with arms. In my view the First-tier Tribunal judge was perfectly entitled to draw the conclusion that if the appellant had been arrested after the defeat of the LTTE on suspicion of supplying the LTTE with arms it was extremely unlikely that he would have been released.

18. In his skeleton argument Mr Saini said that ground 3 would be supplemented by excerpts from the recent country guidance case of GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC) but in my view neither the findings of the Tribunal in a determination promulgated after the determination of this appeal nor the evidence which was adduced before that Tribunal, which was not adduced in the instant appeal, are capable of supporting the proposition that the First-tier Tribunal judge made an error of law in his determination of the appeal.
19. Upper Tribunal Judge King expressed the view that although possibly not said by the respondent in terms, it was clear that it was not considered credible that, having been detained for seven months for smuggling arms, the appellant would be released on bail, albeit with reporting conditions. That was a finding open to be made. I respectfully agree.
20. Ground 4 suggested that the First-tier Tribunal judge had unfairly criticised the appellant for failing to produce medical evidence of torture when the appellant had made it clear and openly admitted that he had no scars. As has been pointed out, however, the appellant said that he was treated for his injuries which he sustained as a result of torture by a doctor called by his friend. It is perfectly plain from reading the determination that the First-tier Tribunal judge did not expect that a medical report could deal with non-existent signs of injury. What he said in paragraph 20 of his determination was that it was striking that despite his claim that he was tortured every day for a month, he had produced no medical or psychiatric evidence. The First-tier Tribunal judge mentioned that the appellant said that his friend in Colombo brought a doctor to the house who gave him Aryurvedic treatment. He said there was no statement from the friend or the doctor. Either of them could have described how the appellant was when he got out of prison. As it was he only had his account of it. He said in answer to his question about what the 'torture' consisted of, the appellant said that his captors hit him while they questioned him. The appellant said he had back pain as a result but no scarring. His suffering was mainly mental. The First-tier Tribunal judge said that the vagueness of his account and the lack of any supporting evidence, which should in principle have been available, detracted further from the credibility of his claim.

21. Upper Tribunal Judge King said that the criticism in ground 4 had to be seen within the overall context of paragraph 20 of the determination with beatings every day for a month without physical injury. It was clear that the judge had engaged with the account of the ill-treatment.
22. Had permission to appeal been granted in respect of grounds 1 to 4 I would not have found that the First-tier Tribunal judge made an error of law as therein alleged so that in these circumstances there is no point in interfering with the order of Upper Tribunal Judge King.
23. Ground 5 argued that the First-tier Tribunal judge failed to properly assess the appellant's exit from Sri Lanka. It was said that he failed to assess the appellant's evidence that he employed an agent to obtain an entry clearance permit which enabled the appellant to flee Sri Lanka on his own passport. The First-tier Tribunal judge stated at the end of paragraph 22 of his determination it was not credible the appellant would have fled Sri Lanka on his own passport as he would have been identified as an absconder. It was said that this reasoning conflicted entirely with the COIS Report on exit checks from Sri Lanka at the airport which had long made it clear that a person could only be stopped from exiting Sri Lanka if his passport had been impounded by a court or if he had had an arrest warrant issued against him or if he was on a rare and case specific wanted list. The source of that evidence was paragraph 25.21 of the COIR on Sri Lanka, dated 7th March 2012, which referred to a letter from the British High Commission, dated 5th January 2012. An earlier identical letter, dated 14th September 2010, was referred to in paragraph 45 of the letter of refusal.
24. The difficulty with the complaint made on the appellant's behalf is that as he made clear in his witness statement the appellant's account was that he had been charged before a court with supporting the LTTE and the charges had not been dropped. Moreover he failed to report on 24th December 2010, which was about eight months prior to leaving Sri Lanka. In his witness statement the appellant said he breached his bail conditions so that there must be an arrest warrant issued against him. In my view it is likely that if the appellant were telling the truth an arrest warrant would have been issued against him prior to him leaving Sri Lanka. There is every reason to believe, therefore that if he had been released on bail notwithstanding that he had been charged with helping the LTTE by the supply of arms, an arrest warrant would have been issued against him soon after his failure to report and certainly by the time that he left Sri Lanka. As the Tribunal noted in TK (Tamils, LP updated) the records the Sri Lanka authorities keep on persons with some history of arrest and detention have become increasingly sophisticated; their greater accuracy is likely to reduce substantially the risk that a person of no real interest to the authorities would be arrested or detained. That suggests in my view that someone falling into the category of a person that the appellant claimed to be, that is to say someone suspected of being involved in supplying the LTTE with arms who had absconded, would inevitably be made subject to an arrest warrant. He would have been placed on the DIE's database as a wanted person.

25. In relation to ground 5 in granting permission to appeal, Upper Tribunal Judge King pointed to the fact that the exit had to be seen in terms of the claim that the authorities were actively seeking the appellant on 25th December 2010 and he not leaving until eight months later.
26. Ground 6 asserted that the First-tier Tribunal judge failed to have regard to the risk factors set out in LP and TK. At the hearing Mr Saini conceded that if the findings of the First-tier Tribunal judge as to the appellant not being on reporting conditions or having no LTTE connections could not be impugned the only relevant factor would be the fact that he left Sri Lanka unlawfully. It is difficult to see, however, how the appellant would have left Sri Lanka unlawfully when he left on his own passport with a student visa to enter the United Kingdom. Upper Tribunal Judge King said that the grounds did not identify what were the risk factors absent any detention or release of the appellant.
27. In paragraph 24 of his determination the First-tier Tribunal judge said that he rejected the account of the appellant. He was not satisfied that there was a realistic possibility that he could face persecution for a Convention reason or grave breaches of his human rights if he went back to Sri Lanka. He said having reminded himself of the relevant country guidance in LP and TK, he found that he faced no real risk of such treatment in Sri Lanka. In my view the First-tier Tribunal judge was perfectly entitled to deal with the risk factors identified in LP and TK in the summary way in which he did.
28. It is obvious on reading the determination of the First-tier Tribunal judge that he gave other reasons for not finding the appellant had been credible. In my view having regard to the reasons which he gave overall, it cannot be said that he made an error of law in his determination of the appeal. Therefore the appeal to the Upper Tribunal is dismissed so that the determination of the First-tier Tribunal shall stand.

Signed

Dated

P A Spencer
Judge of the Upper Tribunal