



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/10810/2012

THE IMMIGRATION ACTS

Heard at Taylor House
On 10 July 2013

Determination Promulgated
On 6 August 2013

Before

UPPER TRIBUNAL JUDGE DAWSON
DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

S R
(ANONYMITY DIRECTION MADE)

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Jegerajah, Counsel instructed by Jein solicitors
For the Respondent: Ms Ong, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant SR is a citizen of Sri Lanka and was born on 7 September 1974. On 15 November 2012, the Secretary of State refused his application on the basis that key elements of the claim were not accepted, that the appellant was not entitled to asylum or humanitarian protection and that his return to Sri Lanka would not breach his protected rights under Articles 3 and 8 of the ECHR. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Morgan (the judge) in a determination promulgated on 22 February 2013. An application was made for

permission to appeal to the Upper Tribunal. Permission was granted on 22 April 2013. Upper Tribunal Judge Freeman said the following:

“At the fifth (regrettably un-numbered) preliminary question, the interviewer, having been told the Appellant was taking pills for depression, which made him feel unfit for interview that day, said this ‘Unless you have exceptional reasons for not going ahead with the interview, your claim for asylum may result in being withdrawn’. This is described in the renewed grounds of appeal as ‘nothing short of outrageous’: whether that comment, itself rather immoderate in tone, could be justified may be questionable. However, while the interviewer would almost certainly have been justified in warning the appellant that, if he were not ready to proceed with an interview within a reasonable time, then his claim might be decided on whatever information was before the Secretary of State, the correctness or otherwise of the action he did take is arguable.”

2. The appellant’s solicitors prepared a bundle for the hearing before the First-tier Tribunal, also relied upon before the Upper Tribunal.

Background

3. The appellant is a Sri Lankan Tamil, originally from Point Pedro. He is married with two children. He said that in 1995 he was recruited as a pharmacist in the Jaffa region of Sri Lanka and worked as a pharmacist following his training. He joined LTTE during the peace talks in August 2004 and underwent military training with them. In September 2006 he was detained and ill-treated by the Sri Lankan army at Point Pedro army camp. His release was arranged following the payment of a bribe. The appellant said he was detained again in 2010 in Vavuniya. During detention he was tortured. His fingerprints and photographs were taken and he was made to sign a confession in Sinhalese. He was released following the intervention of his uncle, his MP and the EPDP. Fearing for his safety, the appellant’s uncle arranged his departure from Sri Lanka.
4. The appellant said his wife had been visited on four occasions between September 2011 and January 2012. He said he feared that he was wanted by the authorities and if returned faced a risk of ill-treatment and torture similar to that which he had already suffered.

Did the First-tier Tribunal make an Error of Law?

5. There was no skeleton argument. Ms Jegerajah relied upon the grounds in support of the application for permission to appeal which argued that the judge erred in the following respects:

Ground 1 – Unclear Findings

6. Failed to make findings of fact on material parts of the appellant’s account and/or in failing to make clear what his findings were. The judge referred to inconsistencies in the appellant’s claim, concluded that he was unable to accept core features of the appellant’s claim and expressly rejected the appellant’s account of being detained

and ill-treated in 2010 or that the authorities were looking for him. Nevertheless, at the end of paragraph §31 the judge said inter alia:

“..... I note however that if the country guidance is significantly expanded, for example to include a risk category for those who have spent time in the United Kingdom and have any historical links to the LTTE, then the appellant will be entitled to make a fresh claim”

7. Given the judge’s comments set out above that he accepted the appellant had links with the LTTE, despite his earlier conclusion that core features of the appellant’s claim were not accepted, there was doubt as to what the judge did in fact accept and what he rejected.

Ground 2 – Reliability of Interview Record

8. Failed to consider the reliability of the contents of the interview in light of the appellant’s mental health at the time, bearing in mind the interview record at G39 and G40 of the respondent’s bundle and the judge’s comments with regard to the same at §28 - 29 of the determination. Ms Jegerajah drew our attention to a document handed up at the hearing described as UKBA Detention Centre Rule 35. It is a consent form signed by the appellant and a doctor whose name is illegible authorising release of medical information to UKBA with regard to the appellant’s allegation of a special illness or condition including a torture claim. Ms Jegerajah submitted that the judge erred in failing to take that document dated 14 October 2012 into account although she subsequently conceded after enquiries were made that it was not before the judge at the hearing.

Ground 3 – Documentary Evidence and Witness Evidence

9. Failed to address, consider or make findings on the documentary and oral evidence of witnesses that were before him, in particular, the report of Dr Martin, correspondence from the Mental Health Trust and GP, correspondence from Freedom From Torture, report of Dr Dhumad, consultant psychiatrist, report of country expert Dr Cris Smith and witness statements of two persons, both of whom had been recognised as refugees by the respondent and who were on the basis of their own knowledge, able to confirm the appellant’s involvement with the LTTE.
10. Further, the judge’s assessment on risk on return contained a material error in that he concluded at §31 the appellant would not be at risk as he was released from an “unofficial” detention, without any explanation as to what he meant by that. In addition, the judge did not engage with any of the various risk factors identified in the country guidance case of **TK**.

The Submissions

11. Ms Jegerajah repeated her reliance on the grounds. She took us to the interview record in terms of the appellant’s mental health and then to the determination to see how the judge dealt with that evidence and asked us to conclude that there was a

procedural unfairness. She identified the evidence before the judge, regarding which he had made no findings which we have out at §9 above.

12. As regards ground 1, Ms Ong submitted that given the judge's adverse credibility findings, it was clear he was rejecting the appellant's account. As regards ground 2, Ms Ong submitted that the judge was cautious in what he said and had to operate with what he had before him. As regards ground 3, Ms Ong conceded the judge did not deal with all of the evidence before him but that it was not a material error.

Our Conclusions

13. We find all the grounds are made out. As regards ground 1, we find that the judge did err, in that he failed to make express findings with regard to the appellant's history and in particular with regard to the appellant's links to the LTTE. The judge's observation at §31 that the appellant would be entitled to make a fresh claim if the country guidance was significantly expanded to include those with any historic links to the LTTE was inconsistent with his finding that he was unable to accept the core features of the claim. We find ground 2 is made out in that the judge allowed a procedural unfairness to infect his decision. The judge considered the manner in which the interview was conducted at §28 - 29. He referred to the manner in which the interview was conducted as "*unhelpful*". He went on to describe comments made by the interviewer as "*very unhelpful*". In such circumstances, the judge had an obligation to consider the evidence in terms of the Joint Presidential Guidance Note number 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance, which he failed to take into account. As regards ground 3 Ms Ong conceded the judge's error but asked us to find that it was not material. We do find the error material. In our view, there was significant evidence from various sources in respect of which the judge erred because he failed to engage with any of it.
14. The decision of the First-tier Tribunal contains material errors of law. None of the findings are preserved. The decision must be remade following a de novo hearing of a freshly constituted Tribunal of the First-tier.

Direction Regarding Anonymity - Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

The appellant is granted anonymity unless and until a Tribunal or Court otherwise directs. No report of these proceedings shall directly or indirectly identify the appellant or any member of the appellant's family. Failure to comply with this direction could lead to proceedings for contempt of Court.

Signed

Date 25 July 2013

Deputy Upper Tribunal Judge Peart

No fee is paid or payable and therefore there can be no fee award.

Signed

Date 25 July 2013

Deputy Upper Tribunal Judge Peart