Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04788/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 September 2013	**On 10 October 2013**

Before

UPPER TRIBUNAL JUDGE MOULDEN
UPPER TRIBUNAL JUDGE MACLEMAN

Between

MR THILAN FERNANDO
(No Anonymity direction made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Chirico of counsel instructed by Birnberg Peirce & Partners
For the Respondent: Mr K Norton a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the determination of the Upper Tribunal approved by both of us. The appellant is a citizen of Sri Lanka who was born on 15 February 1977. He has been given permission to appeal the determination of a panel consisting of First-Tier Tribunal Judge Petherbridge ("the FTTJ") and non legal Member Mrs R I Emblin JP who dismissed his appeal against the respondent's decision of 23 February 2012 to make a deportation order against him as conducive to the public good by virtue of section 3 (5) (a) of the Immigration Act 1971.

2. The appellant was granted leave to enter the UK as a student on 7 October 2003 for a period expiring on 31 October 2004. He made a further application and this leave was extended on 24 November 2004 but subsequently curtailed so that it came to an end on 28 February 2005 because there was insufficient evidence that he was still studying. Nothing was heard from the appellant until he was encountered by the police on 23 October 2008. He was served with an administrative removal notice as an overstayer on 24 October 2008.

3. On 26 October 2009 at Snaresbrook Crown Court the appellant was convicted of sexual assault on a female child under the age of 13. On 30 November 2009 he was sentenced to 36 weeks imprisonment, placed on the Sex Offender Register for 10 years and disqualified from working with children. He did not appeal against conviction or sentence. The respondent says that deportation was not pursued following this conviction because the appellant did not meet the criteria of a foreign national who had received a custodial sentence of 12 months or more.

4. On 8 August 2011 the appellant was arrested for suspected theft and then charged with handling stolen goods. He was sentenced on 1 December 2011 at Wood Green Crown Court to 7 months imprisonment. He did not appeal against conviction or sentence.

5. Following this conviction the respondent concluded that the appellant met the criteria for deportation as in aggregate his sentences of 36 weeks and seven months exceeded one year.

6. On 23 January 2012 the appellant made an application for asylum. The respondent considered that it was not practicable to consider this at that stage. On 23 February 2012 and in accordance with section 3(5)(a) of the Immigration Act 1971 he was served with a notice of the decision to make a deportation order. On 17 August 2012 the respondent sent a detailed reasons for refusal letter running to 11 pages in which the appellant’s asylum and humanitarian protection claims were considered and rejected. It was concluded that removing the appellant from the UK would not be contrary to the UK's obligations.

7. The appellant instructed solicitors and they submitted his appeal dated 5 March 2012 to the First-Tier Tribunal. The appeal was brought on Article 2, 3 and 8 grounds and on the basis that the decision was disproportionate given the nature of his offending history. It was said that the grounds might be amended. It is clear that by the time of the hearing before the panel the appellant was arguing that his appeal should succeed on asylum and Articles 3 and 8 human rights grounds.

8. The panel heard the appeal on 23 April 2013. The appellant was represented by Mr Chirico and the respondent by Mr Norton both of whom appear before us. The appellant attended but chose not to give evidence. The only oral evidence was from Detective Constable Holberton, called by the respondent. The panel had before them the documentary evidence set out in paragraphs 15 to 19 of the determination and a skeleton argument from Mr Chirico.

9. In the determination the FTTJ concluded that the appellant had not raised his subsequent claims of mental ill-health as explanation or mitigation in his criminal trials. There was no medical evidence to indicate that there were mental health reasons which prevented him from giving evidence. As a consequence he had not taken the opportunity to address the extensive credibility issues in the appeal. Although there were errors and inconsistencies in the evidence of DC Holberton there was no intention to mislead and he had not cherry picked the evidence in assessing the appellant. Great care should have been taken in the preparation of his evidence but nevertheless the nine incidents referred to in his evidence indicated that the appellant had a willingness "to act in a criminal and wanton way for his own ends with little or no heed to his responsibilities to society as a whole".

10. In relation to the asylum claim the FTTJ found that if the appellant had a genuine fear of persecution in Sri Lanka he would not have waited until January 2012 to claim asylum, four days after the letter indicating the intention to deport him. There had been plenty of time and earlier opportunities to make the claim. He had not produced the warrant he said had been issued for his arrest and no medical evidence of the treatment he claimed to have received as a result of beatings by the father of his claimed boyfriend or the Sri Lankan army. It was not accepted that he had left Sri Lanka using a false passport. It was concluded that the appellant was of no adverse interest the authorities or anyone else in Sri Lanka and that on return he would not be at risk of persecution or treatment which would infringe his Article 3 human rights.

11. The FTTJ agreed with the assessment that the appellant was at high risk of reoffending. Having regard to the presumption in paragraph 364 of the Immigration Rules that the public interest required the deportation of a person who was liable to deportation and to the appellant's circumstances, which were set out in detail,

the FTTJ concluded that the appellant's removal would not be of a person who was entitled to asylum or that it would infringe his human rights. The appeal was dismissed on asylum, humanitarian protection and human rights grounds.

12. The appellant sought and was granted permission to appeal. There are six grounds of appeal and the grant of permission, whilst not addressing all of them, does not appear to limit the scope of the appeal. We accepted that all the grounds could be argued.

13. The grounds of appeal, prepared by Mr Chirico, rely on his description of events which took place at the hearing before the panel. The respondent was asked whether these facts were agreed and Mr Chirico indicated that if they were not he would provide a witness statement, give evidence if required and another counsel would appear for the appellant. In the event this question was not resolved until the day before the hearing and we were notified on the morning of the hearing. There is now a statement of common position agreed between Mr Chirico and Mr Norton accompanied by a draft witness statement from Mr Chirico. The common position is that the respondent agrees that submissions were made to the panel as described in paragraphs 4 (i) and (ii) of the draft witness statement. The relevance of these facts is not agreed and the parties emphasise aspects of their respective positions. These were dealt with in more detail in submissions to us.

14. We have all the documents which were before the panel together with the additional documents referred to in the last paragraph. The appellant was produced from custody and attended the hearing. He submitted a letter written the previous day which was part apology, part explanation for his offending behaviour, part reiteration of his case and a plea not to return him to Sri Lanka.

15. We heard submissions from both representatives on the questions of whether the FTTJ erred in law and if so what action we should take. Thereafter, whilst making it clear that we had not reached any conclusion as to errors of law, we invited the representatives to make submissions as to whether and if so how we should re-determine the appeal if we set aside the decision of the FTTJ and decided that a further hearing was not required. These submissions are recorded in our record of proceedings and addressed in the reasoning which follows. We reserved our determination.

16. Mr Chirico indicated that the main grounds of appeal were those numbered 2 and 3 although all were relied on. The grounds incorporate by reference Mr Chirico's skeleton argument which was before the panel.

17. The first ground of appeal submits that the FTTJ erred in law by failing to determine a ground raised in the skeleton argument

namely that the respondent's decision of 23 February 2012 was not in accordance with the law because it was taken without detailed consideration of the appellant's asylum claim. The reasons for that decision set out in the letter of the same date indicated that the asylum claim had not been considered. Mr Chirico amplified this by arguing that either the decision of 23 February 2012 should be treated as a single decision which had never been withdrawn or supplemented by a further immigration decision or that it was a continuing decision which could be perfected by further submissions and reasoning. If it was the second of these and the respondent was entitled to perfect her decision with later reasoning and submissions then she relied irrationally on the flawed evidence of DC Holberton. This ties in with the second ground of appeal which addresses the question of the evidence of DC Holberton and how this was treated by the FTTJ.

18. We conclude that the deportation decision of 23 February 2012 was not a single decision which had never been withdrawn or supplemented by a further immigration decision and that it was not treated by the panel as such. The appellant’s asylum claim was considered by the respondent. He was interviewed on 27 March 2012 and his claim addressed in detail in the reasons for refusal letter of 17 August 2012. The FTTJ referred to these in paragraphs 5 and 13 of the determination. He recorded Mr Chirico's reliance on his skeleton argument and the submission that the decision was not in accordance with the law in paragraph 51. It is clear from what is said in paragraph 57 as well as the whole tenor of the determination that the FTTJ addressed all aspects of the appellant’s claim including the asylum claim and all the reasons for which he claimed to fear persecution and serious ill-treatment in Sri Lanka.

19. Whilst the FTTJ did not, in terms, reach a separate conclusion on the submission that the respondent's decision was not in accordance with the law for the reasons advanced by Mr Chirico in his skeleton before the panel, which is less detailed than the grounds before us, it is clear from the wider conclusions that the FTTJ did not accept that the decision was not in accordance with the law. We find that when taken together the whole of the respondent's decision-making process was both appropriate and in accordance with the law. All the grounds of appeal raised by the appellant, including the asylum grounds, have been fully addressed. We have not been told how the appellant might have been disadvantaged and we find that he has not.

20. The second ground of appeal is that "In its assessment of the evidence of Detective Constable Holberton, the Tribunal failed to have regard to material considerations, failed to determine submissions made to it, failed to give adequate reasons and/or reached conclusions which were perverse.”

21. The FTTJ set out the evidence of DC Holberton in paragraphs 22 to 37 of the determination. This includes, in paragraph 22, that DC Holberton asked for a number of amendments to be made to his statement. Mr Chirico's submissions in relation to this evidence are summarised in paragraph 52. In paragraph 72 to 74 the FTTJ assessed the evidence of DC Holberton and said;

> "72. Whilst there were errors and inconsistencies in DC Holberton's witness statement, we do not consider that these have arisen out of any intent whatsoever on the part of the officer to mislead the court. We accept that he had made the best attempt to summarise the findings of the extracts of the CRIS report, which themselves run to 266 pages into a fair distillation of the summary offences of which the appellant has been convicted and sentenced and those of which he had been the subject of allegations, which had been investigated but not pursued in the way of criminal proceedings.
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> 73. We do not find that DC Holberton has "cherry picked" the CRIS extracts to show the appellant in an unfavourable light for the purpose of his exercise in preparing the report.
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> 74. What we do say, however, and we accept that the joint exercise of the UKBA and the Metropolitan Police (NEXUS) does need the very greatest of care to be taken in providing witness statements, such as that which DC Holberton has produced before the Tribunal which, in his case, regrettably cannot be said to have been exercised by him with the care that we would have expected. However, this is not to have impugned the essence of his witness statement in that the nine separate incidents referred to in his statement clearly illustrate the appellant as having a willingness on his part to act in a criminal and wanton way for his own ends with little or no heed to his responsibilities to society as a whole."

22. It is important to note that Mr Chirico does not call into question the accuracy of the reporting in the CRIS reports, as opposed to DC Holberton's assessment of them, and that the appellant admits that seven of the nine incidents resulted in criminal charges to which he pleaded guilty. Whilst the appellant disputes significant details about some of the admitted incidents we find it difficult to see why any unsupported evidence of an appellant so lacking in credibility should be preferred over what is said in the CRIS reports, the pre-sentence reports, the records of conviction and the sentencing remarks.

23. Mr Norton's submissions in relation to this ground were that at the beginning of the hearing DC Holberton corrected a number of mistakes in his statement and during his evidence frankly accepted that there were other errors. The FTTJ was appropriately critical of his evidence but made a proper assessment of it in paragraphs 72 to 74 at the end of which he reached conclusions open to him on that

evidence. It was clear from what he said that he had in mind and was addressing Mr Chirico's submissions.

24. Mr Chirico submits that the FTTJ was not entitled to accept DC Holberton's report as a fair distillation of the CRIS reports. However, the FTTJ did not say this. He accepted "the essence" but not the detail of DC Holberton's witness statement.

25. There are two incidents where the appellant denies any culpability. They are the incidents numbered 3 and 8 in DC Holberton's report. Number 3 relates to an alleged sexual assault by touching a 17-year-old female and number 8 to alleged common assault on the appellant's landlord. The CRIS reports deals with these between pages 76 and 119 and 210 and 236 respectively. It is apparent from the CRIS reports and what is said by the appellant that there were two incidents where there were no prosecutions and the accounts of events given by the appellant and the other parties involved were very different. In his witness statement the appellant said that the woman who made the allegation, who was known to him, stole a mobile phone from a mobile phone repair shop where he was, ran away and he chased her. He says that she knew that he was on the Sex Offenders Register and made the allegation to prevent her being investigated for stealing the phone. Page 109 of the CRIS report records that he said to the police that he chased after the young woman, grabbed her arm and then put his hand down the back of her trousers to try and get the phone which she had put there. He admitted that his DNA could be on her knickers at the back because he touched her bottom when taking hold of the phone. He was arrested but not subsequently charged because the complainant decided to withdraw the allegation. In relation to incident 8 the appellant admits that there was an incident involving him and his landlord. Each of them accused the other of assault. The complainant landlord called the police who attended. He alleged that he had been assaulted by the appellant who had punched him in the face. The appellant denied that he had assaulted anyone.

26. We find that it was open to the FTTJ to come to the conclusion that there were nine incidents. It is clear from the appellant's own admissions as well as the CRIS reports that there were nine incidents. The question is not whether there were such incidents but whether taken as a whole with the admitted incidents, they justified the FTTJ’s conclusion that the appellant had "a willingness.....to act in a criminal and wanton way for his own ends with little or no heed to his responsibilities to society as a whole." This also needs to be read with the FTTJ's assessment in paragraph 109 that the appellant had been a sexual predator of young girls and that as a result of the factors which he set out the appellant posed a high risk of reoffending. We can find no indication that the FTTJ treated the appellant as having committed more than one sexual assault or a violent non-sexual assault. Whilst the FTTJ did not reach these conclusions we have to say that on the appellant's own evidence to

the police, putting his hand down the back of a young woman's trousers whether or not in an attempt to recover an allegedly stolen phone was, whatever the provocation, likely to have been a sexual assault for which he would have been at risk of conviction had she pressed charges.

27. We find that in relation to the evidence of DC Holberton the FTTJ did not fail to have regard to material considerations, did not fail to determine material submissions, did give adequate reasons for his conclusions and did not reach conclusions which were remotely perverse.

28. The third ground of appeal is that in its assessment of the evidence of PC Pollard, the Tribunal failed to record or determine submissions made to it, failed to take account relevant considerations and/or acted perversely in treating that evidence as reliable. In the statement of common position what is set out in paragraph 4 (ii) of Mr Chirico's witness statement is accepted namely; "I made clear at the outset of the hearing that the contents of Mr Pollard's evidence were not accepted (see para 23 of the grounds), and made the submissions recorded at Paras 25 and 27 of the grounds (that there was a lack of details about specific data relied on by Mr Pollard in conducting his risk assessment, with the effects set out in paragraph 3 of the grounds; and that his assessment appeared to have been based upon his view that the appellant had committed two sexual assaults, and was thus unreliable (see paragraph 7)."

29. We note that the respondent did not seek an adjournment in order to call PC Pollard to give oral evidence. On the other hand there was no application for an adjournment by the appellant in order to cross examine PC Pollard. We accept that the FTTJ did not in terms refer to Mr Chirico's submissions in relation to this evidence. However, Mr Chirico's admittedly incomplete recollection of DC Holberton's evidence does not substantiate the contention that PC Pollard's assessment was made on the incorrect assumption that the appellant had committed two sexual assaults. The FTTJ reached his conclusion that the appellant was at high risk of reoffending not only on the basis of PC Pollard's statement but also the CRIS report (described as the context of DC Holberton's statement) and the pre-sentence report prepared by the Probation Officer which set out appellant’s revealing statements to the Probation Officer. PC Pollard’s statement contains information as to the basis on which the report was prepared and it was open to the FTTJ to conclude that this gave a sufficient indication that he was appropriately qualified. Whilst the grounds argue that there was no indication that the report or the date was changed to reflect changing circumstances the last paragraph of the report states that the assessments were made on 25 August 2010, 2 September 2011 and 13 December 2012.

30. We find that in relation to the evidence of PC Pollard the FTTJ did not fail to have regard to material considerations, did not fail to determine material submissions, did give adequate reasons for his conclusions and did not reach conclusions which were remotely perverse.

31. The fourth ground of appeal submits that the FTTJ failed to consider explanatory evidence and/or submissions advanced on the appellant's behalf in relation to the significance of his ability to leave Sri Lanka in 2003 and evidence that his mental health was corroborative of his account of events.

32. The FTTJ found that the appellant had not, as he claimed, left Sri Lanka using a false passport. He left using his own passport which indicated that at the time of departure he was of no concern to the authorities in Sri Lanka. The grounds argue that the FTTJ failed to take into account the submission that the appellant left Sri Lanka during the early years of the ceasefire when the conflict between the authorities and the LTTE were at their lowest ebb and that if he was safe in 2003 he could not be presumed to be safe now because the situation had worsened.

33. We find that it was open to the FTTJ to come to the conclusion that the fact that the appellant was able to leave Sri Lanka using his own passport was one of the factors indicating that he was not of adverse interest to the authorities at that time. This was only one of the compelling reasons which the FTTJ gave for concluding that the appellant was not a credible witness, that his account of events in Sri Lanka was not to be believed and that he was of no adverse interest to the authorities. If these findings were open to the FTTJ and we find that they were, then the question of whether the position for genuine and credible asylum seekers had deteriorated since 2003 was not material.

34. The fourth ground also contains the submission that the panel failed to consider submissions in relation to the evidence of Prof Katona that "the appellant's presentation and present mental health is corroborative of his account of past torture". The FTTJ referred to Prof Katona's report in paragraph 18 and Mr Chirico's submissions in relation to this report contained in his skeleton argument at paragraph 51. There is an assessment of the medical evidence from Prof Katona and Dr Duffield between paragraphs 58 and 66. Prof Katona said that "my impression however is that Mr Fernando's clinical presentation is in keeping with the experience of severe trauma that he describes" and "is in my opinion in keeping with the traumatic experiences he has suffered in Sri Lanka". Prof Katona considers the possibility that other factors could have caused the appellant’s PTSD but expresses the opinion that whilst they may have worsened the symptoms they cannot explain his core PTSD symptoms. We find that there is a summary of Prof Katona's evidence in paragraph 60 which properly addresses Mr Chirico's

submissions. Clearly the FTTJ preferred the evidence of Dr Duffield and in our judgement he was entitled to do so.

35. Ground five submits that the FTTJ erred in law by failing to give adequate reasons and consequently failed to have regard to material evidence and considerations in relation to the expert evidence of Dr Chris Smith and the evidence that the appellant is gay. The FTTJ addressed Mr Chirico's submissions in relation to Dr Chris Smith's report in paragraph 97 in which he said; "with no disrespect to the report of Dr Chris Smith of the 19 April 2013, this is nothing more than a personalised view of the current situation in Sri Lanka. It does not in any way engage with the view of the respondent with regard to why the appellant could not be returned to Sri Lanka".

36. In paragraph 19 of his report Dr Chris Smith says; "First of all, I am aware that Mr Fernando's overall credibility is a matter for the court, not for me. What I can legitimately say is nothing in his account of events in Sri Lanka is reasonably unlikely to me, or inconsistent with objective evidence on which I am aware, including information and sources not cited here. The information I have obtained from the appellant's bundle is broadly consistent with events that took place in Sri Lanka." The FTTJ found that the appellant was not a credible witness and did not believe his account of events in Sri Lanka, giving compelling reasons for this conclusion most of which are not challenged by the appellant. In the light of this we find that the FTTJ gave sufficient and proper consideration to Dr Chris Smith's report.

37. The second limb of ground five argues that the FTTJ erred in law by failing to give any reasons for the conclusion that the appellant is not homosexual. We find that the FTTJ's conclusion in paragraph 102 that the appellant is not homosexual needs to be read in conjunction with the determination as a whole and in particular his case which is set out in paragraphs 81 and 82 which include the claims as to his homosexuality and homosexual relationships followed by the clear conclusion that he is not a credible witness and that his account of events is not be believed in paragraph 90. These are sufficient reasons for the conclusion.

38. The sixth ground of appeal submits that the FTTJ erred in law by misdirecting himself as to the law on discretion and sexual identity by applying a test of whether the appellant would be safe if he was "discreet". The grounds do not fully or correctly reflect what the FTTJ set out in paragraphs 98 to 102. In his asylum interview the appellant did not claim that he would or would wish to openly lead a homosexual life in Sri Lanka or promote himself as a homosexual openly in society. However, even if we had come to the conclusion that the FTTJ erred in law in this regard, it would not be a material error or an error which should result in the decision being set aside

because of the conclusion, open to him, that the appellant is not homosexual.

39. The determination of the FTTJ is detailed, careful and comprehensive. We add that even if we had reached the conclusion that the FTTJ had erred in law in relation to grounds three and four and that the evidence of DC Holberton and PC Pollard should have been excluded we would have come to the conclusion that the totality of the remaining evidence about the appellant and his criminality would have led to his appeal being dismissed. The determination of the FTTJ sets out a number of factors which are relevant to his final conclusion but have not been directly relevant to the questions we have needed to address. They include the other offences admitted by the appellant three of which relate to the possession of cannabis and two relating to failure to comply with notification requirements. The appellant's statement to the Probation Officer set out in the pre-sentence report that the sexual assault on the nine-year-old girl for which he was convicted was for his own sexual gratification, was uncontrollable and was triggered by the sight of the victim's bare legs and his attraction to young girls makes disturbing reading. In the context of his attitude to underage girls the appellant claimed to have had a relationship with a 14-year-old girl although he later said that she was 16. Subsequently, he said that this was an exaggeration. He claimed to have had a relationship with a woman who had given birth to his child but was unable to give her name or contact details. Later he said that this was untrue and he had made it up because another prisoner suggested that it would get him a more lenient sentence. The offence for which he was convicted at Wood Green Crown Court took place during the riots in August 2011. The sentencing judge said that the appellant was very close to the sports shop from which the items were taken and that his deliberate act was "as close to burglary as it is possible to get" and "a very deliberate, very mean-spirited, very opportunistic crime." The appellant should have left the UK in February 2005 but remained as an overstayer. He has no family life in this country and a very limited private life. The evidence from the two police officers could be excised without disturbing the clear overall outcome that the public interest in removing the appellant was not displaced by any significant factors in his favour.

40. We have not been asked to anonymise this determination and see no reason to do so of our own motion.

41. We find that the FTTJ did not err in law and alternatively that any error of law was not material or such that the decision should be set aside. We uphold the decision of the First-Tier Tribunal.

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Signed Date 18 September 2013

Upper Tribunal Judge Moulden