



IAC-AH-KEW-V1

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

Appeal Number: AA/03185/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 10 February 2016**

**Decision & Reasons Promulgated
On 24 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

**MR JEEVARAJA KANAPADIPILLAI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Paul Turner, of Counsel, instructed by Greater London Solicitors

For the Respondent: Mr L Tarlow, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant against a decision of First-tier Tribunal Judge N M Paul promulgated on 20 July 2015 in which he dismissed the appellant's appeal against the respondent's decision of 6 February 2015 refusing the appellant's claim for asylum.

Background

2. The appellant is a citizen of Sri Lanka born on 24 June 1986. The appellant applied for a Tier 4 Student visa to come to the United Kingdom on 11 April 2011. This visa was granted valid until 22 September 2014. The appellant travelled to Qatar on 11 June 2011 on a fake passport supplied by an agent. The appellant flew to the United Kingdom on his own passport arriving on 11 June 2011. The appellant claimed asylum on 12 September 2014 and was issued with form IS.151A as an illegal entrant. The respondent rejected the appellant's asylum claim as she did not accept that the appellant was credible and consistent and did not therefore accept the appellant's claim to have been arrested, tortured and found guilty of being a member of the LTTE in Sri Lanka. The respondent also rejected the appellant's claim to be at risk on return to Sri Lanka. The respondent considered that the appellant did not qualify for humanitarian protection and that there was not a real risk of treatment that would amount to a breach of either Articles 2 or 3 of the European Convention on Human Rights ("ECHR"). The respondent considered Article 8 in respect of private life and found that the appellant did not meet the Immigration Rules and that there were no exceptional circumstances that would warrant a grant of leave to remain outside the Rules.

The Appeal to the First-tier Tribunal

3. The appellant appealed against the decision of the respondent to the First-tier Tribunal. The Tribunal found, in relation to the documents submitted by the appellant, that there was no proper audit trail and that the originals had not been provided and neither had there been a formal witness statement producing the documents. The Tribunal did not accept that the appellant's claim to have been detained and tortured in Sri Lanka was credible. The Tribunal considered that the lack of any evidence as to the provenance of the funds used to bribe to obtain his release was a weakness in the appellant's case. The Tribunal found that the injuries sustained were not indicative that he was detained and tortured as alleged. The Tribunal therefore found that the appellant was not at risk of any ill-treatment if he were to be returned to Sri Lanka.

The Appeal to the Upper Tribunal

4. The appellant sought permission to appeal against the First-tier Tribunal's decision to the Upper Tribunal. The grounds of appeal assert that the judge failed to engage with the appellant's explanation as to why he did not claim asylum for three years and when his student leave was about to lapse. It was also submitted that the judge erred at paragraph 41 when stating that there was no audit trail linking the certified copy of the Sri Lankan court file to the Sri Lankan attorney. It was further asserted that the judge erred in requiring corroboration for the appellant's account. On 13 August 2015 First-tier Tribunal Judge Heynes granted the appellant permission to appeal. The grant of permission sets out that it is arguable that the findings of the judge from paragraph 45 onwards are inadequate.

The Hearing before the Upper Tribunal

5. At the beginning of the hearing Mr Turner referred to two letters submitted with the grounds of appeal. These were letters dated 2 August 2015 and 21 December 2014 from Mr Dharmasena – a Sri Lankan lawyer. These letters were not before the First-tier Tribunal Judge. I indicated that they had not been served with the grounds of appeal to the Upper Tribunal despite being referred to as appendices. Mr Turner contacted his instructing solicitor and a further faxed bundle was received by me after the hearing which contained those letters. However, as the letters were not before the First-tier Tribunal I have not taken them into consideration when considering the submissions on error of law.

Summary of Submissions

The Appellant's Submissions

6. The first ground of appeal asserts that the judge, at paragraph 39, found that the appellant's credibility was damaged by the fact that he did not claim asylum until his student leave was about to lapse. The judge took into account Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. It is submitted that, although the judge set out the factual summary, he failed to have regard to the fact that the appellant had sought to address the issue of delay and had done so in an arguably credible and congruent manner. The appellant asserted that he approached a solicitor in Wembley who advised him to keep a low profile under a student visa as the government had arranged a charter flight to clear Sri Lankan asylum seekers. In 2013 the appellant sought advice from another firm of solicitors but was not properly advised or served by them. It is asserted that this firm was later intervened by the Solicitors Regulation Authority. The grounds assert that the delay in claiming asylum was as a result of bad advice by those with licences to practise law. The case of **FP (Iran) v Secretary of State for the Home Department [2007] EWCA Civ 13** is relied on.
7. Mr Turner submitted that, at paragraph 40 of the decision, the judge does not deal with the appellant's account as to why he did not claim asylum. The appellant explained in detail in his interview that he had approached a firm of solicitors shortly after entering the UK. He explains that he was advised not to make an asylum claim at that point because the Home Office had arranged for charter flights and for Sri Lankan asylum seekers to be returned home. Mr Turner submitted that that was factually accurate at that time as the Home Office was doing that. I indicated to Mr Turner that he was giving evidence in making such an assertion. He submitted that the appellant gave details of who he contacted with the names of solicitors at questions 137, 138 and 139 of his interview and explained why he did not claim asylum at that time at question 144. At paragraph 39 the judge makes absolutely no reference to the appellant's explanation holding the delay against the appellant as affecting his credibility. He submitted that the finding that the delay affects the

appellant's credibility infects the findings at paragraph 40 in relation to a failure to contact his lawyer in Sri Lanka during the period he was in the UK prior to making his claim for asylum.

8. Ground 2 - the grounds assert that the judge erred at paragraph 41 in stating that there was no audit trail that would link the certified copy of the Sri Lankan court file to the Sri Lankan attorney Mr Dharmasena. It is submitted that the finding cannot be regarded as factually correct. It is asserted that the appellant's solicitors wrote to Mr Dharmasena on 28 November 2014 and a link response was provided on 1 December 2014. The appellant refers to a letter from Mr Dharmasena dated 21 December 2014 and 2 August 2015 which confirm that he was a Sri Lankan attorney who supplied the case file. It is asserted that this letter delivers a fatal blow to the determination of the First-tier Tribunal especially given that the authenticity and credibility of the attorney have not been challenged.
9. Mr Turner submitted that the judge has placed no weight on that evidence firstly because the judge found that it was a curious feature of the case that the appellant had not been in contact with his lawyer in Sri Lanka to establish whether or not there was any arrest warrant or whether any action had been taken once it had been discovered that he had fled the country during the time that the appellant was in the UK prior to his claim for asylum. The judge, at paragraph 41, appears to find it curious that after more than three years the appellant was able to contact his lawyer in Sri Lanka. He submitted that there was no challenge to the bona fides of the Sri Lankan attorney Mr Dharmasena. He submitted that the documents obtained were good corroborative evidence that the appellant was detained and appeared before the Sri Lankan court and was granted bail. The judge has failed to engage with the fact that the appellant in interview referred to obtaining documents from his lawyer for example at questions 86, 83, 81 and 80 the documents were not produced at the last minute. He submitted that the letter from the lawyer in Sri Lanka has to be seen in the context. The court documents submitted show that Mr Dharmasena was the lawyer appointed therefore there is a link between the court documents and the appellant's lawyer in Sri Lanka.
10. It is asserted that the First-tier Tribunal Judge applied an excessively high burden of proof despite rehearsing the standard of proof required at paragraph 36 as being that of the balance of probabilities. The appellant relies on the case of **Chiver (Asylum; Discrimination; Employment; Persecution) (Romania) [1994] UKIAT 10758 (24 March 1994)**.
11. Ground 4. It is asserted that the judge has fallen into error in requiring corroboration for the appellant's account. The appellant relies on the case of **Kasolo v Secretary of State for the Home Department (13190)** and on the case of **ST (Corroboration - Kasolo) Ethiopia [2004] UKIAT 00119**.
12. Mr Turner submitted that the judge placed undue weight on the need for corroborative evidence. He referred to paragraph 45 of the judge's

decision and submitted that there was no real evaluation of the report provided by Dr Arnold. The judge refers, at paragraph 39, to the report but comments that the appellant had not sought medical assistance at the time of his injuries in Sri Lanka. He referred to paragraph 43 of the judge's decision wherein the judge cites that it is self-evident that whenever injuries have been sustained a contemporaneous record is by far the best tool for assessing what has happened. He submitted that it was not put to the appellant that he could have scarred his own back. The appellant gave an account of his detention and torture in Sri Lanka. He has obtained a report from a reputable doctor that states that the location and multiplicity of the scars makes it virtually impossible that they could be self-inflicted. The doctor concluded that the scars are diagnostic of torture by branding. He submitted that the judge rejected the doctor's report on the basis that there was no contemporary report. He asserted that this was frankly not good enough in respect of an asylum claim where the standard of proof is to a lower standard. He referred to paragraph 45 of the decision where the judge set out "*I do not discount the possibility that he may have received injuries to his back.*" Mr Turner submitted that it is clear from this passage that the judge doubted even that there were injuries and scars. This is completely contrary to the evidence as the report shows that the appellant did have injuries to his back. The judge has not explained why he rejected the doctor's evidence but it appears to be that the only reason was because the appellant did not get contemporaneous medical reports. He submitted that there is no requirement or obligation to provide corroborative evidence in an asylum claim but in any event in this case there was good corroborative evidence that consisted of the medical report and the court documents. He asserted that the judge has not properly recorded at paragraph 41 the contents of the letter and has not engaged with the first part of that letter where Mr Dharmasena confirms that he attended at court and represented the appellant and made a bail application for him. That of itself is corroborative evidence. In the absence of any challenge to the bona fides of the lawyer the judge was wrong to find that there was no corroborative evidence. He asserted that the appellant would be at risk on return falling within paragraph 356(iv) of **GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)**. The appellant would be detained because there was an arrest warrant out for him and because he had skipped bail. If detained, he would be at risk of ill-treatment.

The Respondent's Submissions

13. The respondent served a Rule 24 (of the Tribunal Procedure (Upper Tribunal) Rules 2008) response. The respondent asserts that the appellant's complaint about the judge's lack of engagement with the appellant's explanation of having been let down or ill-advised by representatives in the UK is flawed. It is submitted that numerous cases have made clear that any such allegation is a serious one that must be made with those accused given the chance to provide rebuttal. The respondent relies on the case of **BT Nepal [2004] IAT** and **Azimi-Moayed UKUT [2012]**. It is further submitted that in any event the judge

is clearly taking a broader point about credibility relating to the appellant's alleged injuries and the absence of any medical assistance. With regard to the complaint made in the grounds about the burden of proof it is asserted that the appellant suggests that the correct burden of proof is that of the balance of probabilities. This is obviously incorrect. The respondent submits that the judge was not confused as he states the standard correctly at paragraph 38.

- 14.** Mr Tarlow relied on the Rule 24 response. He asserted that the judge did no more than what he had to. He sifted the evidence and arrived at his conclusion. The judge was entitled to make the finding he did in relation to Section 8. The appellant had not sought medical assistance in Sri Lanka. He asked the doctor to prepare the report for the purpose of his asylum claim. The findings at paragraph 40 and 41 were entirely open to the judge to make. Regarding the finding at paragraph 41, that the Sri Lankan lawyer said that the court file was not available and might be furnished in due course, led the judge to consider that he was not satisfied as to the circumstances regarding the production of the documents from Sri Lanka. He submitted that the comment of the judge at paragraph 43, regarding a contemporaneous record, is simply an observation by the judge. He referred to paragraph 44 and noted that the judge took into consideration that no evidence was provided with regard to where the funds came from to pay the bribe. He submitted that the key points were at paragraph 45. The judge considered what the risk on return was. The judge is required to make credibility findings and paragraph 46 does just that. In response to a question that I asked regarding whether or not the Home Office had ever questioned the bona fides of Mr Dharmasena, Mr Tarlow indicated that there had not been any assertion that the bona fides of this attorney had been questioned. He referred to the letter of 3 July 2015 and the general letter from the High Commission (in the First-tier Tribunal bundle) which sets out that the majority of letters from Sri Lankan attorneys are not credible.

Discussion

- 15.** The judge sets out clearly at paragraph 38 that the burden is on the appellant to show, to the requisite low standard, that he is at risk of persecution or significant ill-treatment if he is to be returned to Sri Lanka. Although the judge was entitled to arrive at a decision that failure to claim asylum for a period of nearly three years after entering the United Kingdom undermined the credibility of the appellant's claim. However, the appellant had given an explanation and whilst it might be open to the judge to have rejected that explanation he ought to have engaged with the explanation given and given reasons for rejecting it. The explanation has been given by the appellant in his asylum interview and in his witness statement before the Tribunal. Whilst I do not accept that there was any obligation on behalf of the Secretary of State to make the enquiries, and it might have been helpful had the appellant obtained some confirmatory evidence of his visits to solicitors, the judge ought to have considered whether or not that explanation was accepted or rejected by him. I also

accept Mr Turner's submission that that explanation was relevant as to why he may not have contacted his lawyer in Sri Lanka until the time of making his asylum claim. The judge at paragraph 40 sets out

"The very least that one would have expected is that he would have been in contact with his lawyer there to establish whether or not there was any warrant for his arrest or whether any action had been taken once it had been discovered that he had fled the country."

16. If the appellant was acting on incorrect advice from a solicitor this would have explained the reason for not contacting his lawyer. At paragraph 41 the judge appears to find it curious that the appellant was able to contact his lawyer in Sri Lanka after more than three years. Whilst it is open to the judge to take that into consideration it does not appear that the appellant was asked to explain why he was able to contact his lawyer after such a period of time.

17. The judge was entitled to take into consideration the lack of the audit trail and that there was no letter or formal witness statement producing the documents asserting to be a certified copy of the Sri Lankan court's file when considering the weight to be placed on the documents. The judge was also entitled to take into consideration that the letter from Mr Dharmasena of 1 December 2014 mentioned only that the case record is not available and that a certified copy might be furnished in due course. However, what the judge did not take into consideration is the first part of that letter which, as Mr Turner submitted, confirms that Mr Dharmasena appeared for the bail application on behalf of the appellant for a court case on 24 May 2010. The judge has made no finding with regard to whether or not he accepts that Mr Dharmasena did attend on behalf of the appellant at a court hearing in May 2010. In the appellant's interview at question 37 he indicates that he was produced to the court on 10 May 2010. At the very least the judge ought to have given reasons for rejecting that letter as corroborative of the appellant's account given in interview with regard to appearing in court on that date.

18. The judge has not given sufficient or adequate reasoning as to why he rejects the medical report produced by Dr Arnold. The judge records that so far as the scars on the back are concerned no specific time was put on those (paragraph 42) then at paragraph 43 the judge notes:

"It is self-evident that whenever injuries have been sustained, a contemporaneous record is by far the best tool for assessing what has happened. I take into account that, although the appellant was tortured in a way in which he claimed in Sri Lanka, he never sought to obtain any medical help whilst in Sri Lanka. That meant, of course, therefore that there was no independent source for confirming that the injuries had been inflicted at the time he claimed."

19. In paragraph 45 the judge sets out:

"... I do not discount the possibility that he may have received injuries to his back - although I have serious doubts as to whether the injuries to his arm

were caused by a third party. However, those injuries (in my view) are not in this case indicative that he was detained and tortured as alleged.”

20. Whilst that was a finding that would be open to a judge in this case the judge has failed to give adequate reasons as to how he arrived at that conclusion in light of the medical report which indicated that the location and multiplicity of the scars made it virtually impossible that they could have been self-inflicted and that the scars were diagnostic of torture by branding.
21. I am mindful of the anxious scrutiny required in considering appeals in asylum claims. Although a judge does not have to set out extensive reasons or refer to every single piece of evidence in this case the judge has failed to engage sufficiently with important aspects of the evidence and has failed to give adequate reasons for the findings reached.
22. I find that there are material errors of law in the First-tier Tribunal decision and I set aside that decision pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').
23. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.
24. I remit the case to the First-tier Tribunal for the case to be heard before a different judge pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. The case is to be listed at Taylor House for a *de novo* hearing before any judge other than Judge N M Paul the date of the hearing to be fixed at the next available opportunity.
25. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Notice of Decision

The decision of the First-tier Tribunal contained material errors of law. The decision is set aside accordingly. The case is remitted to the First-tier Tribunal at Taylor House for a *de novo* hearing before any judge other than Judge N M Paul.

Signed P M Ramshaw

Date 21 February 2016

Deputy Upper Tribunal Judge Ramshaw