



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/10379/2014

THE IMMIGRATION ACTS

Heard at Newport
On 2 February 2016

Decision & Reasons Promulgated
On 11 February 2016

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AAMR

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer

For the Respondent: Ms E Harris instructed by Nag Law Solicitors

REMITTAL AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order on the basis of the respondent/claimant's circumstances. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the claimant. This direction applies to both the claimant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge M Whitcombe) allowing AAMR's appeal against a decision to remove him dated 7 November 2014 following the refusal to grant him asylum, humanitarian protection or leave under the ECHR.
3. For convenience, I will refer to the respondent in this appeal as the "claimant" hereafter.
4. The claimant is a citizen of Sri Lanka who was born on 31 January 1988. He is of Tamil ethnicity. He claims to have arrived in the UK on 7 February 2011. However, he did not claim asylum until 30 September 2014. The basis of his claim was that his brother and brother-in-law were suspected by the Sri Lankan government of involvement with the LTTE. His brother had been arrested and questioned in September 2008 and June 2009 but was released and had subsequently come to the UK.
5. The claimant's case is that he was arrested on 30 August 2011 at his parents' home by the Sri Lankan authorities. They were looking for his brother. The claimant was interrogated and asked about his brother and his brother-in-law whom they alleged was an intelligence officer in the LTTE. The claimant was accused of passing information to him. During his detention the claimant was physically abused suffering scars and was also sexually abused. After 2 ½ months in detention, the claimant was released without conditions after his family paid a substantial bribe to secure his release. Having received treatment in hospital for his injuries, the claimant shortly after obtained a student visa to the UK where he arrived on 7 February 2011.
6. The Secretary of State rejected the claimant's account and that, therefore, he would be at risk on return to Sri Lanka. The Secretary of State's reasons are set out in her decision letter dated 7 November 2014.

Appeal to the First-tier Tribunal

7. The claimant appealed to the First-tier Tribunal. At the hearing before the FtT, the claimant and his brother gave oral evidence. In addition, the claimant relied upon a medical report dated 2 March 2015 from Mr M Andrew Mason, a Specialist in Accident and Emergency Medicine. In addition, the claimant relied upon a summons and arrest warrant issued (he said) by the Batticaloa Magistrates' Court requiring the claimant to appear on 15 August 2014.
8. Judge Whitcombe found the claimant to be credible. He referred to the expert report which, he noted, stated that the claimant's scarring was "consistent" (and in some instances "highly consistent") with the claimant's account.
9. In respect of the summons and arrest warrant relied upon by the claimant, the Secretary of State placed into evidence (after an adjournment to obtain them) two document verification reports in respect of the summons and arrest warrant obtained

from the British High Commission in Colombo prepared by an officer there following a faxed request to the Registrar of the Batticaloa Magistrates' Court and a telephone response from the Acting Registrar on 26 May 2015. Those documents stated that the arrest warrant and summons were "not genuine". Nevertheless, the Judge considered that there were "clear and worrying defects" in the verification reports and a certain lack of care in their preparation which undermined their probative value. As a result, the Judge stated that he was:

"... prepared to give the summons and arrest warrant some limited weight. I give the Appellant the benefit of the doubt."

10. On the basis that the Judge accepted the claimant's account concerning his arrest and detention and that of his brother and, additionally, taking into account that there was an extant warrant for his arrest, at paragraphs 45 and 55 the Judge found that the claimant fell within the risk category in paragraph 7(a) of the Country Guidance decision of GJ (Post-civil War: Returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). The Judge also concluded that the claimant was at risk on return because he fell within the risk category in paragraph 7(d) of the head-note in GJ because, given the extant arrest warrant, he would be on a "stop list" and would be arrested at the airport.
11. As a consequence, the Judge allowed the claimant's appeal on asylum grounds and under Article 3 of the ECHR.

The Appeal to the Upper Tribunal

12. The Secretary of State sought permission to appeal on three grounds. On 6 October 2015, the First-tier Tribunal (Judge Grant-Hutchinson) granted the Secretary of State permission to appeal on those grounds in the following terms:

"It is arguable that the Judge erred in law (a) by committing a procedural irregularity capable of making a material difference to the outcome and procedural fairness of the proceedings by placing little weight on inconsistencies not put to the Appellant in cross-examination when it is for the Judge to consider all the evidence particularly when the Appellant had made a witness statement dealing with the reasons for refusal letter where he did not rebut some of the points made; (b) by failing to give adequate reasons why the expert content of the verification reports should be discounted and (c) by finding that the Appellant was perceived to be a threat to the integrity of Sri Lanka without precisely stating why the Sri Lankan authorities perceive the Appellant in that matter without taking into account the categories as set out in the Country Guidance case of GJ (Sri Lanka) CG [2013] UKUT 00319 (IAC)."
13. At the hearing before me, Mr Richards relied upon all three grounds which he developed in his oral submissions.
14. On behalf of the claimant, Ms Harris contended that the Judge had not erred in law and that each of the three grounds was unsubstantiated. I will deal with the substance of both representatives' submissions shortly.

Discussion

15. Dealing with each of the three grounds in turn, Mr Richards submitted that the Judge's positive credibility finding was flawed because the Judge, in para 48 of his determination, had failed to take into account inconsistencies in the claimant's evidence set out in the reasons for refusal letter and relied upon by the Presenting Officer at the hearing. Mr Richards submitted that the Judge was not entitled to disregard those inconsistencies as "carry[ing] little weight" simply because the Presenting Officer had not cross-examined the claimant upon them. Mr Richards submitted that there was nothing unfair to the claimant who was represented and had a full opportunity both in his statement and in his oral evidence-in-chief to raise any matter he wished to in respect of the inconsistencies relied upon by the Secretary of State. There was no unfairness and the inconsistencies remained unresolved.
16. Ms Harris submitted that the Judge had been entitled to disregard those inconsistencies unless they were put to the claimant (which they were not) in cross-examination. She referred me to the decision in RR (Challenging Evidence) Sri Lanka [2010] UKUT 274 (IAC) where at paragraph 4 of the head-note it is stated:
- "If the Respondent does not put its case clearly it may well be difficult for the Tribunal to decide against an Appellant who has not been given an opportunity to deal with the respondent's concern."
17. Further, she submitted that in the grounds the Secretary of State had failed to point out what inconsistencies were in fact relied upon. She drew my attention to paras 3(j) and (k) of the refusal letter and a number of answers given by the claimant in interview at Questions 20, 21, 32 and 51. She submitted that, in fact, there were no inconsistencies and the claimant had provided an explanation in his witness statement dated 17 March 2015 at paras 10-12 in particular. This dealt with matters raised in the refusal letter:
- (1) whether the claimant had given inconsistent evidence where his family saw him when they came to the prison (inside his cell or outside) and whether it was 1 or 2 ½ months after his detention;
 - (2) whether he had said that his brother had been of interest to the authorities because he was selling insurance policies to the LTTE or whether, as a result of that business, his brother had travelled to an LTTE area where he had come into contact with individuals such as the claimant's brother-in-law, involved with the LTTE;
 - (3) whether the claimant had said that he had been arrested at the family home because he was suspected of being his brother or because the authorities could not find his brother there.

Ms Harris submitted that the appellant's explanation at paras 10-12 and a sensible reading of the claimant's answers in interview demonstrated that there were no real consistencies. In any event, she submitted that at paragraph 46 the Judge had dealt with the issue of inconsistencies and had considered them not material because they are:

“... very minor matters explained by difficulties with translation, or minor misunderstandings ...”

18. There is no doubt that an appellant in a Tribunal hearing is entitled to know the case put against him by the Secretary of State and to be given an opportunity to deal with the issues raised by his evidence or otherwise (see RR). Fairness requires nothing less. What is required is that the claimant knows the case against him. The case against an appellant will usually be set out in the refusal decision. Indeed, it is common practice for Presenting Officers, in their submissions, to begin by adopting the reasons for refusal letter. In the usual case it will be clear to an appellant (particularly one who is legally represented) that, subject to any concession by the Presenting Officer, that the refusal letter and the reasons within it represent the basis of the respondent's case before the Tribunal. It is not, in my judgement, necessary for a Presenting Officer to cross-examine an appellant on each and every point raised in a refusal letter before it can be said that those matters are relied upon by the respondent and with which an appellant must have an opportunity to deal in the course of a hearing. That opportunity will usually mean that an appellant, to the extent he wishes, gives written and/or oral evidence about the matters raised where they relate to his evidence such as, in this case, claimed inconsistencies in what he said.
19. Of course, where the appellant is not legally represented the issues raised in the refusal letter may less obviously be ones which the appellant can be taken to realise are live issues in the hearing. It is good practice in such cases for the Judge to identify with the appellant the issues raised by the respondent in the refusal letter at the outset so that the appellant has a fair opportunity to deal with them in his evidence.
20. Some issues may arise subsequent to the refusal letter, for example after the refusal letter is written and even at the hearing itself. Those matters will need to be dealt with in the hearing and, it may be appropriate, by cross-examination, so that an appellant is aware of what is said against him by the respondent and has an opportunity to respond.
21. There cannot, however, be an obligation on the Presenting Officer in every case to cross-examine an appellant in order on a particular matter for it to be said that an issue arises between the respondent and appellant and so that the appellant is given a fair opportunity to deal with the issue. Each case must depend upon the particular circumstances, in particular whether the issue is clearly raised and whether the appellant has been given a fair opportunity to deal with it.
22. In paragraph 48 of his determination the Judge in this appeal said this:

“The other alleged inconsistencies referred to in the reasons for refusal letter were not put to the Appellant in cross-examination. I made it very clear to the Respondent's representative that anything to be relied on in closing would have to be put to the Appellant in order to ensure a fair hearing. The Appellant is entitled to a fair chance to

comment on the case against him. Alleged inconsistencies that were not put to him in those circumstances carry little weight.”

23. With respect to the Judge, that is not the correct approach. Here, the matters relied upon by the Secretary of State in the refusal letter were in issue and the claimant had a fair opportunity to deal with them. As Ms Harris sought to contend in her submission, the claimant had effectively dealt with them in his witness statement. This was not a case, as envisaged in RR in the citation from the head-note set out above, where the respondent had not clearly put her case against the claimant.
24. In those circumstances, the Judge was required to deal with the substance of the issues relating to the claimant’s evidence which were relevant to his credibility and whether his account was to be accepted. As the Upper Tribunal recognised in Budhathoki (Reasons for Decision) [2014] UKUT 00341 (IAC) (Haddon-Cave J and UTJ Coker) as set out in the head-note:

“It is...necessary for Judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost..”
25. Consequently, in this case it was, in my judgement, incumbent upon the Judge to engage with the Secretary of State’s reasoning in the refusal letter and provide adequate reasons for accepting or rejecting the points relied upon and their relevance to the Judge’s ultimate decision on credibility.
26. Ms Harris submitted that the Judge had done just that in paragraph 46 of his determination where he said this:

“Having applied those principles, I find the Appellant’s account to be credible. When interviewed he was asked a great many questions about the fine detail of his detention and abuse and he answered all of them in impressive detail. In my assessment his account has been consistent, and the alleged inconsistencies are very minor matters explained by difficulties of translation, or minor misunderstandings about (for example) the difference between the occasion of his brother’s arrest and earlier voluntary attendance for questioning. In any event, those matters do not go to the core of the Appellant’s account. The Appellant’s account remained consistent throughout cross-examination. His evidence was clear, firm and cogent.”
27. Further, as I have already indicated, Ms Harris submitted that the Judge was entitled to conclude that the inconsistencies were in fact “minor matters” which did not go to the core of the appellant’s account.
28. Whilst Ms Harris’ submission is not without some merit, I have concluded that the Judge’s reasoning in para 46 is inadequate. First, he fails to engage explicitly with the inconsistencies relied upon in the refusal letter. It is far from clear precisely what inconsistencies he considers to be “minor matters” apart from the one example he gave. It may well be that the Judge would be entitled to take the view, in the light of the claimant’s evidence in his witness statement, and reading his interview answers in a reasonable and not overly rigid manner that the inconsistencies at least in part evaporate or were minor. However, I cannot be confident that a Judge would be

bound to reach such a view. The Judge's reasons in para 46 do not, in themselves, adequately "identify and resolve key conflicts in the evidence and explain in clear and brief terms" why they do not damage the claimants' credibility.

29. Secondly, I am also not satisfied that the Judge's additional reasons for finding the claimant to be credible are such that any error would be immaterial. The Judge was clearly impressed by the claimant's interview which he described as "impressive" in its detail. He also noted that his account was largely consistent and also consistent with the medical evidence. The Judge's latter finding is at para 49 of his determination and is not challenged. However, a central part of the claimant's case was that as a result of what had happened to him and his family in Sri Lanka he was subject to a summons and arrest warrant. For the reasons I will give shortly, the Judge's approach to that evidence is flawed. It is quite impossible to say that, as a result, the Judge's overall positive credibility finding can stand.

30. I now turn to the challenge to the court documents which is the Secretary of State's second ground.

31. Mr Richards submitted that the Judge was not entitled to disregard the verification reports on those documents on the basis given in paragraph 50 of his determination. There, the Judge said this:

"I also give some weight, but not great weight, to the court documents produced by the Appellant. On the one hand the Respondent has obtained verification reports disputing their authenticity. On the other, there are clear and worrying defects in the verification reports themselves. The lack of care in the verification reports undermines their probative value. In all the circumstances I am prepared to give the summons and arrest warrant some limited weight. I give the Appellant the benefit of the doubt."

32. Ms Harris submitted that the Judge had set out the "clear and worrying defects" in the report and the lack of care in preparing them at paragraph 31 of his determination where he said this:

"In response, and following an adjournment of the date originally fixed for this appeal hearing, the Respondent has obtained "Document Verification Reports" from the British High Commission in Colombo. An Entry Clearance Assistant, whose name and contact details have been redacted, states that she or he has checked the authenticity of the court documents relied upon by the Appellant. On 13th May 2015 a verification request was faxed to the Registrar of the Batticaloa Magistrate's Court. On 26th May 2015 a reply was received by telephone from the Acting Registrar of that court stating that the arrest warrant and summons were not genuine for the following reasons:

- (i) the seals on the arrest warrant are not in the format of the seals used by the court (the correct seal is not described nor is any example given);
- (ii) the format of the wording is not that used by the court (the usual wording is not given by way of comparison);
- (iii) the handwriting does not match that of the relevant member of staff (who is not identified);
- (iv) the signature of the magistrate does not match that of the one present on the alleged date of issue (no names are given);

- (v) similar points are made in relation to the summons, although rather troublingly the document verification report in relation to the summons erroneously refers to the arrest warrant. Clearly some “cut and pasting” has occurred incorporating errors. It is impossible to know what the document should have said in relation to the summons.”
33. Ms Harris submitted that the Secretary of State’s case (which Mr Richards accepted was so before me) was that the documents were not genuine and therefore the burden was on the Secretary of State to prove on a balance of probabilities that they were false documents. The reasons given by the Judge in paragraph 31 were, Ms Harris submitted, such that the Judge was entitled to find the Secretary of State had not discharged the burden of proof upon her.
34. By and large, the proper assessment of evidence is that special domain of a first instance judge. In the context of assessing oral evidence the Judge will have had the benefit of seeing and hearing the witness give evidence. It is trite law to state that an appellate court or tribunal will be cautious in interfering with a Judge’s finding based upon his or her assessment of the oral evidence of a witness. Of course, in an unusual case, the Judge’s assessment maybe wholly irrational (or obviously unsustainable in the light of other evidence) such that an appellate court or tribunal is entitled to identify an error of law in a Judge’s assessment.
35. The reluctance, however, to interfere with a Judge’s assessment of evidence is much less marked where the evidence is documentary or in written form in circumstances in which the appellate court or tribunal is in as good a position to assess that evidence as the Judge at first instance.
36. Here, I am concerned with the assessment of two documentary verification reports. The Judge’s conclusion in respect of them at para 50 is not entirely clear. He plainly took the view that their probative value was undermined by “clear and worrying defects” and the lack of care in preparing them. In the result, the Judge stated that he was “prepared to give the summons and arrest warrant some limited weight. I give the appellant the benefit of the doubt.”
37. In fact, at para 53 in assessing the objective risk to the claimant on return he took into account that “there is an extant warrant for his arrest”. It is clear, therefore, that he rejected the verification reports which concluded that both the warrant and summons were “not genuine” and that the Secretary of State had not proved that they were other than genuine.
38. In my judgement, the Judge was not entitled to reach that view for the reasons he gave. The verification reports were based upon a telephone call, following an enquiry by the BHC in Colombo, from the Acting Registrar of the Court from which it was said the summons and arrest warrant had been issued. That evidence was clear that the seal on the arrest warrant was not the format used by the Court. It was not necessary for the verification report to set out what was the correct seal. Secondly, the report stated that the format of both documents was not that used by the Court. The fact that the “usual wording” was not included in the documents did

not undermine the force of that evidence from an officer of the Court who would have been fully aware of the “usual wording” in making the comparison. Thirdly, that reports both state that the handwriting of the “relevant member of staff” in respect of each document was not a match with the staff member designated. Again, that evidence was not materially undermined simply because that member of staff was not identified. Finally, the documents both state that the signature of the Magistrate does not match the one present on the date the documents were issued. Again, the fact that the name of the relevant Magistrate was not included in the document does not undermine the strength of the evidence.

39. In para 31(v) the Judge finds “rather troubling” that the verification report in relation to the “summons” refers, at one point, to the “arrest warrant”. That is, of course, a mistake. However, an overall reading of the report in relation to the “summons” clearly demonstrates that the report relates to the “summons” and not the “arrest warrant”. The Judge’s suggestion that there has been some “cut and pasting” is, with respect, highly speculative and, in any event, does not affect the evidence recorded in the document emanating from the Acting Registrar of the Court in Sri Lanka that each document has a number of features which are wholly inconsistent with either being a genuine document.
40. In my judgement, the Judge was not entitled, in effect, to conclude that the verification reports did not speak the truth for the reasons he gave in para 31 and which he incorporated by reference in para 50 leading to him accepting that both the summons and arrest warrants should be given “some limited weight” and, in relation to the arrest warrant at least, accepting it as being genuine given his treatment of the arrest warrant in paras 53 and 55 as relevant to the claimant’s objective risk on return applying GJ and Others.
41. For these reasons, I accept Mr Richards submissions that the Judge erred in law in his approach to the document verification reports which, in effect, he rejected and thereby accepted that the summons and arrest warrant were genuine documents upon which the claimant was at least entitled to place “some limited weight” in his claim.
42. It is axiomatic, in my view, that the Judge in approaching the issue of the claimant’s credibility had to have regard to all the evidence including the documentary evidence. His acceptance of the summons and arrest warrant as genuine documents – given the issues before him – must necessarily have had an impact on his overall credibility assessment. His error in approach to the genuineness of the summons and arrest warrant therefore, in my judgement, tainted his positive credibility finding.
43. Given that that finding cannot stand, the Judge’s assessment of the objective risk to the claimant applying GJ and Others in paras 52-55 is also necessarily flawed. That assessment is based upon an acceptance of the claimant’s past history, including the commencement of criminal proceedings against him and the existence of an extant arrest warrant.

44. It is, therefore, in my judgement unnecessary to deal with the Secretary of State's third submission that the Judge's assessment that the objective risk to the claimant on return was not supported by a proper understanding of the risk categories in GJ and Others. In the absence of a sustainable credibility finding, there is no basis upon which the Judge could have found the appellant to be at risk on return for the reasons he gave.

Decision and Disposal

45. Consequently, the decision of the First-tier Tribunal Judge to allow the appellant's appeal involved the making of an error of law. The Judge's positive credibility finding, including his findings in relation to the Court documents, cannot stand and, as a consequence, neither can his finding that the claimant was objectively at risk applying GJ and Others. The decision of the First-tier Tribunal to allow the claimant's appeal on asylum grounds and under Article 3 is, consequently, set aside and must be remade.
46. Given the nature and the extent of the fact finding required, applying para 7.2 of the Senior President's Practice Statement it is appropriate that the appeal be remitted to the First-tier Tribunal in order to remake the decision by a judge other than Judge Whitmore.
47. Ms Harris invited me, if that was my decision, to preserve the findings in paragraphs 47 and 49 in respect of the relevance of the claimant's delay in claiming asylum to his credibility and, in that regard also, the Judge's conclusion that on the basis of the medical report the claimant's scarring was "consistent" with his account.
48. Both of these matters go to the issue of the claimant's credibility. That is an overarching issue which the First-tier Tribunal must determine *de novo* at the remitted hearing. The Judge must, necessarily, consider all aspects of the evidence relied upon by the claimant and the Secretary of State including the matters raised in paras 47 and 49. It would be wholly artificial to preserve those limited findings given the need for the Judge to make an overall assessment of the evidence in reaching a view on the claimant's credibility. Consequently, none of the Judge's findings are preserved.

Signed

A Grubb
Judge of the Upper Tribunal