



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

Appeal Number: AA/00714/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 16 May 2017**

**Decision Promulgated
On 22 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

**D P
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Murphy, Counsel

For the Respondent: Mr S Staunton, Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellant is a citizen of Sri Lanka, aged 29. He has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal M B Hussain, dismissing his appeal against a decision of the respondent to refuse his protection and human rights claims. The appellant, who is Tamil, claimed to have been detained and tortured in Sri Lanka on account of his perceived support for the LTTE.

2. The First-tier Tribunal made an anonymity direction. I continue that direction in order to protect the identity of the appellant.
3. The appeal was heard at Hatton Cross on 14 November 2016. The appellant was represented by counsel and gave oral evidence. He supported his appeal with medical evidence showing he had scars said to be 'diagnostic' of the being beaten on his back. He also produced copies of a summons, an information provided to a magistrate and an arrest warrant, all said to relate to his detention in November 2013 and the prosecution initiated by the Terrorist Investigation Division (TID) Colombo. The respondent, in arguing the documents were not reliable, relied on a document verification report stating that the TID had confirmed the reference number on the documents did not relate to any case of theirs. The appellant responded by providing a letter by Mr B R P Jayasinghe, an attorney-at-law in Sri Lanka, who confirmed that his investigations showed that the documents were copies of originals held by the court.
4. Judge Hussain identified the determinative issue in the appeal as being whether the appellant's account of his detention and torture in November 2013, while on holiday in Sri Lanka, was credible. He concluded the appellant was not credible and therefore dismissed the appeal. His reasons can be summarised as follows:
 - The appellant's account of being taken to court two weeks after his detention was inconsistent with the court documents, which showed he was produced at court the day after his arrest;
 - The appellant said he was released on bail to return to court on 9 December 2013 but the letter from his father said the police came looking for him on 8 December 2013;
 - If the appellant's father told the police that the appellant had left the country, it was unclear why a summons would be issued;
 - It was surprising that a summons was issued instead of an arrest warrant given the appellant had breached his bail;
 - Despite the fact the appellant's friend had informed the authorities that the appellant had been involved in terrorist activity, he was not interrogated about that matter but was asked why his arrival in Sri Lanka coincided with the Commonwealth summit;
 - Arguments to the effect that the document verification report should not be relied on because the TID had an incentive to lie to ensure the appellant returned to Sri Lanka were "entirely speculative";
 - The appellant's credibility was damaged by the lateness of the asylum claim; and
 - The usefulness of the medical report was undermined by the fact the expert had not dealt adequately with the likelihood the appellant's injuries were self-inflicted.
5. At paragraph 53 the Judge accepted the appellant may have taken part in Tamil social welfare events but he considered those activities were unlikely to bring him to the adverse attention of the authorities.

6. Permission to appeal was granted by Judge of the First-tier Tribunal Ford. She found it was arguable that Judge Hussain had erred in relying on the document verification report given the respondent's actions in approaching the TID were in breach of Article 30 of the Council Directive on Asylum Procedures (2013/32/EU). It was also arguable that Judge Hussain erred in failing to make any findings in relation to the appellant's claim to have been detained in 2007, in failing to make any findings on the evidence countering the document verification report and in misunderstanding the dates given by the appellant's father in his letter.
7. The respondent filed a rule 24 response opposing the appeal.
8. I heard submissions from the representatives on whether the Judge made a material error of law. Mr Murphy developed the points made in the grounds seeking permission to appeal. I have recorded his arguments in full in the record of proceedings. Mr Staunton, having heard Mr Murphy's arguments, agreed that the decision of Judge Hussain contained a material error of law and should be set aside. Both representatives agreed that the appropriate course was to remit the appeal to the First-tier Tribunal to be heard again with no findings preserved.
9. I set aside the decision of Judge Hussain for the following reasons.
10. It is clear that this experienced Judge directed himself correctly as to the burden and standard of proof and that, having heard the appellant give evidence, he did not believe his account, even to the lower standard of proof. The Upper Tribunal is, in general, reluctant to interfere with a judicial assessment of credibility. However, in the case before me, I find the Judge has erred by failing to have regard to significant arguments made to him and to have regard to important parts of the evidence. Alternatively, if it is the case that the Judge had regard to them but rejected them, then there is a failure to give reasons for his decision to do so.
11. As noted, the appellant supported his account of being detained and tortured with court documents and a medical report. Permission to appeal was not granted on the point that the Judge did not give adequate consideration to the medical evidence. In relation to the court documents, the Judge rejected them as unreliable, setting out his reasons in paragraph 50. In essence, he accepted the information contained in the document verification report showed there was no court case.
12. It is clear that counsel for the appellant objected to the report. In his skeleton argument he argued that the TID would be able to establish the appellant's name from the court reference number and would recognise from the source of the enquiry that he was seeking asylum in the UK. This would place the UK in breach of Article 30 of Directive 2013/32/EU. This states as follows:

“For the purposes of examining individual cases, Member States shall not:

- (a) disclose information regarding individual applications for international protection, or the fact that an application has been made, to the alleged actor(s) of persecution or serious harm;
- (b) obtain any information from the alleged actor(s) of persecution or serious harm in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant or his or her dependants, or the liberty and security of his or her family members still living in the country of origin.”

13. I do not need to make any finding as to whether the actions of the Home Office in obtaining a verification report breached Article 30. I am aware that a panel of Upper Tribunal Judges has heard an appeal with full argument on exactly this point and their decision is awaited. It would therefore be unwise to issue any opinion now but, in any event, it is clear in the circumstances of this case that the Judge’s approach to the report was erroneous. It may be that the evidence should have been disregarded as having been obtained in breach of Article 30. Certainly, caution was required as regards the reliability of information obtained from the TID, an organisation which is known to use torture and ill-treatment during interrogations.
14. The arguments made to the Judge about the TID being likely to lie in order to ensure the appellant is returned may well have involved a large degree of speculation. Assessing future risk almost always involves speculating but the point is that the process must be rational, informed and balanced, involving consideration of the evidence adduced by both parties. There does not appear to have been any attempt by the Judge to assess critically the evidential value of the report despite the paucity of information contained in it.
15. More significantly, in my judgment, the Judge does not give any reasons for rejecting the evidence of Mr Jayasinghe which would tend to show the documents were genuine. The appellant’s solicitors provided copies of their letter of enquiry and Mr Jayasinghe provided copies of his credentials. Copies of the covering emails were also provided. As noted, the evidence supported the appellant’s account that there was a genuine case against him. The Judge did not have to accept this evidence but, if he rejected it, he was required to give cogent reasons for doing so. There is no mention of the letter in the decision.
16. Counsel for the appellant reminded the Judge of the guidance given by the Court of Appeal in *PJ (Sri Lanka) v SSHD* [2014] EWCA Civ 1011. A similar point was made at paragraphs 41 and 42 of Fulford LJ’s judgment in that case.
17. In short, the Judge failed to give adequate reasons for relying on the document verification report and he failed to assess the evidence in the round. In particular, he failed to have regard to evidence which potentially showed the

appellant's documents were genuine.

18. The errors are such that the Judge's decision and his findings cannot stand and the decision is set aside.
19. The parties were not prepared for the appeal to be re-heard at the same hearing. No interpreter had been provided. As a fresh hearing is necessary, I agree with the representatives that the appeal must be remitted to the First-tier Tribunal in line with paragraph 7.2 of the Practice Direction.
20. The appeal must be heard de novo by a different Judge of the First-tier Tribunal. To assist with that task I make the following directions:

DIRECTIONS

- (1) The appeal will be heard by any Judge of the First-tier Tribunal except Judge M B Hussain on a date and at a place to be notified;
- (2) None of the findings made by Judge Hussain are preserved;
- (3) A Tamil interpreter will be provided unless the appellant's solicitors inform the Tribunal that one is not required;
- (4) If either party wishes to file additional evidence not previously filed, a consolidated bundle should be prepared containing the fresh evidence and all the evidence previously filed, which bundle must be filed at the Tribunal and served on the other party no later than 14 days before the hearing.
- (5) The Tribunal will assess the medical report in line with the guidance in *KV (Sri Lanka) v SSHD* [2017 EWCA Civ 119].
- (6) The Tribunal will make full findings regarding the appellant's activities in the UK in the light of the judgment in *UB (Sri Lanka) v SSHD* [2017] EWCA Civ 85.
- (7) The Tribunal will decide whether to make a fee award.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside. The appeal will be heard again in the First-tier Tribunal.

An anonymity direction has been made.

Signed

Date 16 May 2017

**Deputy Judge of the Upper Tribunal
Froom**

