



**Upper Tribunal
(Immigration and Asylum Chamber)**
AA/09883/2015

Appeal Number:

THE IMMIGRATION ACTS

Heard at: Field House

Decision Promulgated

On: 1st August 2017

On: 3rd August 2017

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**MS
(anonymity order made)**

Appellant

And

Secretary of State for the Home Department

Respondent

**For the Appellant:
Co Solicitors**

Ms Benfield, Counsel instructed by Satha &

For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Sri Lanka born in 1989. He appeals with permission¹ the decision of the First-tier Tribunal (Judge Khawar) to dismiss his protection appeal.

¹ Permission was granted by the First-tier Tribunal (Judge Andrew) on the 12th April 2017

Anonymity Order

2. This appeal concerns a claim for international protection. Part of that claim turns on the Appellant's *sur place* activities and whether they have come to the attention of the Sri Lankan authorities. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Background and Decision of the First-tier Tribunal

3. The Appellant came to the United Kingdom in 2012 with leave to enter as a student. He claimed asylum in January 2015 alleging that he would face a real risk of persecution in Sri Lanka for reasons of his political opinion/ethnicity. He stated that he had suffered ill-treatment in the past when he was (rightly) accused by the security forces of association with the Liberation Tigers of Tamil Eelam (LTTE). He feared that this would be repeated in the future, not least because the security forces had continued to demonstrate that they were interested in him and members of his family. He submitted various documents in support of his claim. These included receipts of complaints made to the Human Rights Commission of Sri Lanka, a letter from a lawyer and a document confirming that he had been arrested and held at Dehiwala Police Station.
4. The claim was rejected on the 26th June 2015. The Secretary of State for the Home Department did not consider it plausible that the Appellant would have been able to exit the country had he been a person of interest; she identified a discrepancy between the evidence that the Appellant had given about the circumstances in which he was released from detention, and the description of the same in the letter from a lawyer in Sri Lanka. In respect of the documentary evidence the Secretary of State noted that the contents of the documents generally “resonated with the asylum narrative” but declined to give the evidence any significant weight on the basis that forged documents are easily available throughout the country.

5. The Appellant appealed to the First-tier Tribunal and his representative lodged a bundle of further evidence. This included evidence of *sur place* political activity in the Appellant's support for the London-based Transitional Government of Tamil Eelam (TGTE). The bundle also included a medico-legal report prepared by Dr Raj Perseud, Consultant Psychiatrist. The report was dated the 7th June 2016. Dr Perseud concluded that the Appellant was depressed and found him to be exhibiting classic symptoms of Post-Traumatic Stress Disorder (PTSD). As to the specific question of fitness to participate in proceedings, Dr Perseud said this:

“In my opinion he is currently not fit to give evidence but this depends quite a bit on his mental state on the day as he appears to be suffering from too serious a set of symptoms which lead him to be distracted and confused. If he is better on the day and the proceedings are handled sympathetically and take into account his psychiatric disorder and that questions about past trauma are of particular difficulty for those suffering from PTSD then under those circumstances he may be fit to attend legal proceedings and instruct Counsel”

6. At a Case Management Review hearing on the 10th June 2016 the Respondent put the Appellant on notice that she intended to challenge the veracity of the report said to have been written by Dr Perseud. The note of proceedings made that day by First-tier Tribunal Judge Bart-Stewart records that the HOPO Mr Das Gupta submitted a redacted copy of a report prepared by Dr Perseud in another case. He submitted that the text therein bore striking similarities to that in the report about the Appellant and that this gave rise to deep concerns. The matter was adjourned to enable Dr Perseud to comment on the comparison drawn by the Secretary of State. Directions were made that he disclose notes of his consultation with the Appellant.

7. In response to these directions the Appellant's representatives had obtained a further letter from Dr Perseud. He wrote on the 28th September 2016 to confirm that he was the author of the report about the Appellant. He confirmed that he had seen the Appellant in his Harley St consulting rooms, that he had applied standard diagnostic tests and had had regard to the Appellant's GP notes. He observed that patients exhibiting PTSD symptomology will, by definition, be experiencing similar things: “what this means is that this group will tend to tick all the boxes in any questionnaire measuring whether they have psychiatric diagnoses such as PTSD. If they are ‘ticking all the boxes’ aggregately in terms of having all the symptoms, then when this is recorded in case after case they will start to look very similar if not identical”.

8. When the matter came before Judge Khawar on the 30th January 2017

the Appellant's representative Counsel Mr Paramjorthy indicated that he would not be calling the Appellant to give evidence. He relied on the Appellant's written statements and the evidence of Dr Perseud. In its 'assessment of credibility and fact' the First-tier Tribunal made clear that this was not a decision, or evidence, that had impressed. The Tribunal noted that Dr Perseud did not appear to have considered how the Appellant had managed to achieve a 2:1 in his BSc and provide detailed instructions to his solicitors. Nor were his conclusions consistent with the evidence from the TGTE that the Appellant had been attending numerous meetings, organising events and taking an active role in the movement in the UK. The report contained a substantial number of paragraphs that were "word for word" identical to those written about another patient and the Tribunal did not consider that an adequate explanation had been given for those similarities. The determination further notes that the report was, by the time of the hearing, some eight months old and that there was no further evidence about fitness to give evidence. For these reasons the Tribunal concluded that the opinion offered by Dr Perseud was "unsustainable".

9. As to the remaining evidence the determination found, at paragraph 27, that it contained "significant examples which show a lack of internal consistency, contradictions and improbable events". The determination notes that the Appellant's "failure to provide oral evidence means there is no explanation proffered and thus an adverse credibility conclusion being drawn". At paragraph 33 the Tribunal declines to place weight on the Sri Lankan documents filed "in view of the objective evidence as to the ease with which ostensibly genuine documents are capable of being obtained in Sri Lanka". The global conclusion is drawn at paragraph 34 with the Tribunal finding that there is no risk to the Appellant as a person perceived to have a significant role in post-conflict Tamil separatism. The appeal is thereby dismissed.

The Appellant's Challenge

Procedural Unfairness

10. The primary ground of appeal is that the decision is flawed for 'procedural unfairness' in that the Judge's conduct of the hearing was unfair, or alternatively that it gave rise to the impression that the Appellant was not permitted a fair hearing. In particular, it is alleged:
- a) That the Tribunal, having formed a provisional view of the evidence, did not maintain an open mind;
 - b) That the Tribunal refused to explain its concerns about the evidence to Counsel, thus preventing him from addressing

those forensic challenges;

- c) That the Tribunal refused to permit Counsel to make submissions/failed to take his submissions into account;
- d) That the Tribunal erred in drawing an adverse inference from the fact that the Appellant was not called.

11. The ground of appeal reproduce what is described as the verbatim note taken by Counsel for the Secretary of State for the Home Department, a Mr Sobowale, during an exchange between the Judge and the Appellant's Counsel Mr Paramjorthy:

Judge: Mr Paramjorthy I have not had the opportunity to fully consider the asylum interview record but even on a cursory reading there are a number of issues which arise in respect of the Appellant's credibility

Counsel: Sir, can you draw my attention to those matters, so that I can assist the Tribunal and deal with.... (Counsel is stopped from speaking)

Judge: No. You are not here to give evidence on behalf of your client and for example there is no explanation as to how your client was able to conduct an asylum interview then and now be unable to give evidence

Counsel: Sir, I can assist the Tribunal by making submissions on the basis that mental health symptoms are erratic and I can refer you to..... (Counsel is stopped from speaking)

Judge: No you are giving evidence again I won't allow it

Counsel: But Sir, I can refer you to the report attached to Dr Perseud's letter and to the findings in Dr Perseud's report as to the fact that the A's mental health condition is dependent on how the A feels

any
make
on the day in question and further I can refer you to the background evidence and the case law, pertaining to concerns that you have in respect of the evidence and submissions; that would not be giving evidence.

Judge: No I will not permit you to give evidence for your client.

Counsel: Sir, will you please record in your determination that I sought to make submissions on matters that this experienced Tribunal had concerns about but was prevented from doing so

Judge: Mr Paramjorthy with pleasure, with pleasure. I will not be threatened in this jurisdiction or any other jurisdiction for that matter and I will record your request in the determination

Counsel: Sir, the reason that I have asked you to record the matter is so that it is on the record and I am representing a client who *prima facie* has mental health issues and I must discharge my duty of care to my client and at the same time comply with my duty of candour to the Tribunal.

Judge: Move on with your submissions

12. The grounds are further supported by a signed witness statement prepared by Mr Paramjorthy, dated the 28th March 2017. Mr Paramjorthy adopts the note reproduced in the grounds and avers that it accords with his recall of events, and his own contemporaneous note of proceedings.

Failure to make findings/give reasons

13. The second ground of appeal centres on the findings at paragraphs 33 and 34 of the determination. In particular, it is submitted that the Tribunal:

- a) Failed to engage with the evidence, apparently accepted, that that the Appellant has had active involvement with the TGTE in London, an organisation considered by the

Government of Sri Lanka to be a proscribed terrorist group, members of whom will face arrest upon return to the country;

- b) Failed to give adequate reasons as to why no weight could be placed on the various supporting documents, accepted by the Respondent to “resonate with the narrative”.

The Secretary of State’s Response

Procedural Unfairness

14. Mr Avery indicated at the outset that he was not in a position to challenge the note set out in the grounds, or Mr Paramjorthy’s record of events. Counsel who had represented the Secretary of State before the First-tier Tribunal, Mr Sobowale, had been sent copies of the grounds and Mr Paramjorthy’s statement, and his comments invited. He had responded via email to indicate that he could recall the hearing very well, *inter alia* because “it was one of those rare appeals where there is a visible manifestation of conflict between the Judge and my opponent during the course of the hearing”. Although he was unable to access his notes of the hearing (due to them being in storage) he was able to say this:

“It is fair to summarise that during the course of my opponents submissions the Judge took issue with part of his speech and this caused friction between the two. My opponent wished to expand on a particular aspect of the evidence in the appellants bundle however the Judge was not prepared to entertain the issue being explored in these circumstances. The judge was quite robust in maintaining his position as was my opponent in trying to pursue the issue and ultimately before he moved on to the rest of his submissions he asked the judge to record that he had not been able to make the submission that he had wished to. I recall that as this exchange had unfolded, I then began to write down verbatim what was being said, in part as the atmosphere was beginning to get a little confrontational and I just wanted to keep my head down, so to speak”.

15. Given the position taken by Mr Sobowale, Mr Avery indicated that he had no questions for Mr Paramjorthy, who had attended the hearing in order to appear as a witness. Mr Avery nevertheless submitted that the conduct of the hearing had to be assessed in the context of the proceedings overall. The Tribunal had evidently been extremely concerned about the decision not to call the Appellant, and had rejected the contention that he was unfit to give evidence for medical reasons. It was entitled to expect evidence to come from the

Appellant directly and not from his Counsel.

Failure to make findings/give reasons

16. As to the remaining grounds Mr Avery submitted that paragraph 33 amounted to a *Tanveer Ahmed*² assessment of the Sri Lankan material. The Tribunal had rejected with reasons the evidence given by the Appellant himself, and viewing those documents in the round with that assessment in mind, and with the objective material indicating widespread availability of forgeries, it was perfectly entitled to afford those documents no weight. The Tribunal had properly directed itself to the risk categories in GJ and Ors (post-civil war, returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). It was entitled to conclude on the evidence that the Appellant would not be considered to be a threat to the unitary integrity of the state.

Discussion and Findings

Procedural Unfairness

17. I note that the First-tier Tribunal Judge has elected not to make any comment about the grounds of appeal, those having been forwarded to him in June of this year and his response invited.
18. In her submissions Ms Benfield asked me to recall that this was an Appellant who had been diagnosed with depression and PTSD. Although the determination addresses at length Dr Perseud's opinion about the Appellant's ability to give coherent evidence, the Tribunal nowhere doubts those diagnoses; nor indeed were they subject to challenge by the Secretary of State for the Home Department. Against this background, Ms Benfield placed reliance on two decisions of the President of this Chamber, Mr Justice McCloskey. In Elayi (fair hearing-appearance) [2016] UKUT 00508 (IAC) the President underlined the long-standing principle in English common law that justice must not only be done, it must be manifestly be seen to be done. In AM (fair hearing) Sudan [2015] UKUT 00656 (IAC) two related points, pertinent to this appeal, are made about how the inalienable right to a fair hearing should be protected. First:

“The assiduous judge who has invested time and effort in reading all of the documentary materials in advance of the

² TA v Secretary of State for the Home Department [2002] UKIAT 00439

hearing is entitled to form provisional views. Provided that such views are provisional only and the judge conscientiously maintains an open mind, no unfairness arises”.

And second:

“If a judge has concerns or reservations about the evidence adduced by either party which have not been ventilated by the parties or their representatives, these may require to be ventilated in fulfilment of the “*audi alteram partem*” duty, namely the obligation to ensure that each party has a reasonable opportunity to put its case fully”.

19. In this case, I regret to say, it appears to me inevitable that the hypothetical observer of the proceedings before the First-tier Tribunal would have been left with serious concerns about the fairness of that hearing.
20. The Appellant was faced with a general challenge to his credibility, based in the refusal letter on three points. First, there was a discrepancy about what he said and what his Sri Lankan lawyer had said about his escape from detention. Second, the supporting documents could have been forged. Third, an alleged variance between the Appellant’s claim to have left through the airport and the background material. The decision not to call the Appellant was taken by Counsel in light of those matters delineated in the refusal letter. Each point was addressed in the Appellant’s witness statement, and with reference to the country background material and/or the guidance in GJ.
21. What happened at the beginning of the hearing (in the absence of oral evidence, the outset of Mr Paramjorthy’s submissions) was that the Tribunal indicated that there were, on a “cursory reading” a number of *other* issues arising from the asylum interview that concerned the Tribunal. Mr Sobowale and Mr Paramjorthy appear unanimous in their recollection that having given that indication, the Tribunal declined to explain what those concerns were. They were later summarised [at paragraph 27 of the determination] as a “myriad of unexplained aspects” in the case but at the hearing itself Mr Paramjorthy was left with no idea what those concerns might have been. I have little doubt that had those reservations been explained, Mr Paramjorthy could have made submissions on the Appellant’s behalf without himself giving evidence. For instance, one of the matters raised in paragraph 27 of the determination was the apparent discrepancy between the Appellant’s evidence at the asylum interview that he was not involved in a political party in this country and the letter from the TGTE that he was in fact politically active in the diaspora. Had that concern been brought to Mr Paramjorthy’s

attention he would have been able to point out that no discrepancy arose, since the asylum interview took place in May 2015 and the Appellant did not join the TGTE until June 2016. I am satisfied that the Tribunal's decision not to explain its concerns deprived the Appellant of an opportunity to put his case, and that this was an error in approach. The hypothetical observer at the hearing would have seen an Appellant with a diagnosed mental illness, wholly reliant upon his Counsel, being deprived of an opportunity to address forensic challenges central to the determination of his case. It follows that justice was manifestly not seen to be done in this appeal, and the determination must therefore be set aside in its entirety.

Failure to make findings/give reasons

22. It follows that I need say very little about the reasoning at paragraphs 33 and 34 of the determination. That is fortunate, since there is very little to be said. The scant conclusions expressed therein do not engage with the great number of documents produced *inter alia* from the Human Rights Commission of Sri Lanka, nor with the apparently accepted evidence that the Appellant had latterly had a role to play in the activities in London of the TGTE. The Respondent is quite correct to say that the Tribunal would have been entitled to find, per GJ, no risk of harm on the basis of limited involvement in diaspora politics, but the Tribunal was nevertheless obliged to undertake some analysis of the evidence before reaching such a conclusion. Its failure to do so was an error of law. I note that since the First-tier Tribunal decision was promulgated involvement with the TGTE has assumed a particular significance in light of the Court of Appeal decision in UB (Sri Lanka) [2017] EWCA Civ 85.

Decisions

23. For the reasons set out above I am satisfied that the decision of the First-tier Tribunal contains material errors of law and it is set aside in its entirety.
24. The parties agreed that in the circumstances the appeal must be remitted to the First-tier Tribunal to be determined *de novo*.
25. There is an order for anonymity.

Upper Tribunal Judge Bruce
2nd August 2017

