



**Upper Tribunal  
(Immigration and Asylum Chamber)  
Number: PA/01438/2017**

**Appeal**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 30<sup>th</sup> May 2017**

**Decision & Reasons  
Promulgated  
On 6<sup>th</sup> June 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCGINTY**

**Between**

**SS**

**(ANONYMITY DIRECTION MADE)**

**and**

**Appellant**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Mr D Lewis of Counsel instructed by Theva Solicitors  
For the Respondent: Mr P Armstrong, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge O'Keefe promulgated on 27<sup>th</sup> March 2017 in which Judge O'Keefe dismissed the Appellant's appeal against the Respondent's decision dated 30<sup>th</sup> January 2017 to refuse his asylum claim.
2. The Appellant is a citizen of Sri Lanka who was born on 2<sup>nd</sup> January 1990. The Appellant has now appealed against the decision of Judge O'Keefe. It is argued within the Grounds of Appeal, inter alia, that when rejecting the

Appellant's claim for asylum in respect of his credibility, that the Judge misunderstood what the Appellant had said in interview regarding the reasons for his arrest in 2011 and that therefore it is said that although the Judge found that there were inconsistencies in the evidence given by the Appellant regarding the reasons for his interview by the authorities in 2011, it is argued within the Grounds of Appeal that there were in fact no inconsistencies. The Appellant relies upon the answer to question 35 of the substantive interview in that regard and the answer given thereto which was recorded within the decision of Judge O'Keefe with regards to what was 'their reason for arresting him in 2011'. The Appellant replied in answer to that question in interview:

"I was working hard towards reforming the tiger group and liaising with those parties outside of Sri Lanka who were trying to do the same thing. And also that I have been a member of the tigers, that I have done so many things against the government."

3. Judge O'Keefe in her decision at paragraph 20 went on to find that:

"Later on in the interview the appellant said that he had been arrested because the authorities said that he was an LTTE member and he was trying to reorganise the group. He said that he was not trying to reorganise the group and that a former LTTE colleague had informed on him to the police. I find that the appellant has given inconsistent reasons as to why the GOSL would have been interested in him in 2011. On his own account, the appellant was a reluctant supporter of the LTTE and his involvement with them was short lived and at a very low level of support."

4. It was argued that in the Grounds of Appeal that the Judge had misinterpreted that answer at question 35 as being inconsistent when it was not.
5. Further within the Grounds of Appeal it is said that the Appellant had relied upon the medical report from Dr Izquierdo-Martin who found numerous scars upon the Appellant's body which overall was typical of injuries caused by torture, but in the grounds it is argued that the Judge gave little weight to that because it is said that the doctor had not been made aware of the fact the Appellant had been hit by a car in 2007 and had not considered that that might be a possible cause for the scars found, and further that the GP records of the Appellant said that he had injured his knee whilst a child and that was a traumatic injury, rather than being an injury related to torture as claimed by the Appellant. It is argued within the Grounds of Appeal that the Judge should have given the Appellant the opportunity of explaining that evidence for himself, or providing a further witness statements, or indeed asking further questions of Dr Izquierdo-Martin to deal with those matters. It is argued the Judge applied too high a standard of proof in respect of the medical evidence and was wrong therefore to reject that evidence in support of the Appellant's case.

6. Permission to appeal in this case has been granted by First-tier Tribunal Judge Landes who found it was arguable that the Judge misunderstood what the Appellant said at paragraph 35 of his interview and that may have affected her consideration of the credibility of the Appellant's claim, as set out at paragraphs 6 to 8 of the Grounds of Appeal. Judge Landes said it was not clear to her that the reasons were inconsistent and it is arguable that the Judge may indeed have meant as averred by the Appellant, that his answer to question 35 was inconsistent with his being reluctant in support of the LTTE. She said that that did not appear to be a real inconsistency and although the Judge she found gave other reasons for rejecting the Appellant's claim, the Judge's repetition of the finding of inconsistency meant it was arguable that the Appellant inconsistency was central to a finding that the Appellant had not given a credible account of his reasons for leaving Sri Lanka.
7. Although Judge Landes did not restrict the Grounds of Appeal and granted permission to appeal on all grounds, she did not consider that the Judge should have acted as argued within the skeleton argument in terms of seeking further clarification regarding the expert evidence. She found that the Judge had to bear in mind the totality of the evidence before her and whether or not there were other possible causes to the trauma and therefore she was not bound to make further enquiries.
8. In this case that the Appellant himself did not actually give evidence. The Learned First-tier Tribunal Judge dealt with that at paragraph 3 of her decision where she noted there is a psychiatric report from a Dr Saleh Dhumad, Consultant Psychiatrist dated 7<sup>th</sup> March 2017 who found that in his opinion the Appellant was unfit to attend the hearing and give oral evidence.
9. I have fully taken account of the Grounds of Appeal and also all of in the case in the round, including the Rule 24 notice and the submissions made by both legal representatives this morning.
10. Within the Respondent's Rule 24 notice which is dated 4<sup>th</sup> May 2017 it is said that the Respondent opposes the Appellant's appeal and the Judge inter alia has directed herself appropriately. It is argued that when read as a whole, the determination came to sustainable conclusions concerning the Appellant's involvement with the LTTE and at paragraph 17 the Judge gave reasons why the Appellant initially refused to assist the LTTE and made findings at paragraph 18 that were open to her. The Appellant had only bought medication for the LTTE and ceased to do so after 2008. It was said at paragraph 19 the Appellant was said to have given a different gloss in terms of an answer that he was working on reforming the Tigers and that the Judge's conclusion at paragraph 20 that the answer was an inconsistent one the Judge was entitled to come to, as was a conclusion that the Appellant's involvement with the LTTE was short lived and was a very low level of support and that the evidence in that regard was inconsistent. It is argued that the grounds amount to no more than disagreement with the findings of the Judge.

11. I have also heard and fully taken account of the submissions made by both the representatives this morning which are fully recorded within my Record of Proceedings. In summary it is argued by Mr Lewis on behalf of the Appellant that the Judge has misinterpreted the answer to question 35 in the interview, which he argues is a material error of law. He says that this is a finding of fact, when considering the evidence as a whole, which was not actually open to the Judge in terms of there being an inconsistency and that the Appellant was not talking about his own activities at question 35 but was clearly talking about what the authorities perceived were his activities and that had the Judge looked at all of the evidence in the interview in that regard that is the conclusion she should have come to. He argued, in fact the Appellant's own evidence was that he was simply a reluctant person who was forced into working for the LTTE and had simply sourced some medicines and sorted out of accommodation. Mr Lewis argues that the Judge repeated that error on five occasions which he says does mean that it is actually material to the core findings that the First-tier Tribunal Judge made.
12. On his case this is an error of fact which is said to amount to an error of law. Mr Lewis refers me to the guidance and criteria set out by the Court of Appeal in the case of **E & R [2004] EWCA Civ 49** in terms of whether or not a mistake of fact gives rise to unfairness that can be an integral challenge in an appeal on a point of law, but in order for it to be found that there is unfairness resulting from an error of fact such as amounts to an error of law various criteria need to be met. Firstly, there has to be a mistake as to existing facts including a mistake as to the availability of evidence of a particular fact. He said that this is clearly an existing fact, based upon the contents of the interview. Second, the evidence must be uncontentious and objectively verifiable; third that the Appellant must not have been responsible for the mistake or his advisors must not be responsible for the mistake and, fourth, the mistake must have had a material though not necessarily decisive part in the Judge's reasoning. He says that in this case the mistake looking at the interview as a whole is uncontentious and is objectively verifiable. He said it was not actually the appellant's fault, based upon the way that the question was posed to him in interview. He gave an answer based upon the question he was asked in terms of the authorities' reasons for arresting him, rather than his own reasoning and he says that this did play a material even if not necessarily decisive part in the Judge's reasoning. He said that although this error of fact does amount to a material error of law in the circumstances of this case.
13. In his submissions, Mr Armstrong on behalf of the Home Office seeks to say that in fact there is no material error of law in this case. He relies upon the Rule 24 notice which I have fully considered. He argues in particular that the evidence given at question 35 was simply an inconsistent answer given by the Appellant, as to the reasons why he was arrested and that did contradict with the other evidence he says given by the Appellant in interview in terms of him being a reluctant helper for the LTTE and that he had been asked to join them, but then forced to go to

training and that he simply purchased medication, sorting out accommodation in Colombo. In any event Mr Armstrong argues that even if it was an error it was not a material error and he submits that the Judge gave numerous other reasons for rejecting the Appellant's credibility including the fact that the Appellant had waited four and a half years before claiming asylum after initially arriving in the UK and also in terms of the Judge's rejection of the medical evidence regarding the scarring and the reasons given for not placing weight upon that medical evidence. He submits that even on the Appellant's case he was a low level member of the LTTE who on the Respondent's case was said not to be of interest to the authorities now. The Respondent did not accept he had been arrested and tortured in 2011 as claimed and said that basically he had been only a low level member for a short period of time and was of no interest to the authorities. It is argued by the Respondent that there would be no reason now as to why he would be seen to be a threat to the unity of the state of Sri Lanka and therefore no reason why he would fall within the risk categories set out within the country guidance case of **GJ (Sri Lanka)** [2013] UKUT 00319. It is argued by the Respondent that he would not be on any stop list as mentioned within the country guidance case.

### **My Findings on Error of Law Materiality**

14. In considering this appeal I have considered all of the submissions and all of the evidence in the round before making any findings. When one gives close consideration to the findings of Judge O'Keefe it is clear that Judge O'Keefe at paragraphs 19 and 20 did find there were inconsistent reasons as to why the Government of Sri Lanka would have been interested in him in 2011. At paragraph 19 she stated that he was asked in interview at question 35 what was the reason for his arrest and torture in 2011. He replied:

"I was working hard towards reforming the tiger group and liaising with those parties outside of Sri Lanka who were trying to do the same thing. And also I have been a member of the tigers, that I have done so many things against the government."

At paragraph 20 she then went on to say:

"Later on in the interview the Appellant said that he had been arrested because the authorities said that he was an LTTE member and he was trying to reorganise the group. He said that he was not trying to reorganise the group and that a former LTTE colleague had informed on him to the police. I find that the Appellant has given inconsistent reasons as to why the Government of Sri Lanka would have been interested in him in 2011. On his own account, the Appellant was a reluctant supporter of the LTTE and his involvement with them was short lived and at a very low level of support."

15. However looking at the evidence given by the Appellant himself as to the reasons for his arrest both in terms of the original screening interview and also in the substantive interview the picture does not appear to be that as

understood by Judge O'Keefe. Within the screening interview when the Appellant was asked briefly as to the reasons why he could not return to his home country at question 4.1 the answer he had given at that stage was that "If I go back to Sri Lanka I will be arrested by the TID because I was arrested before and tortured and accused of re-establishing the LTTE and helping them."

16. As correctly stated by Mr Lewis of Counsel the actual question asked at question 35 of the substantive interview was, "what was their reason for arresting you and torturing you in 2011?". The questions he rightly points out was not what was the reason for arresting you and torturing you in 2011, or what did you do to lead to you being arrested or tortured in 2011. The question that was asked by the Interviewing Officer at that stage was "what was their reason" as in what is the authorities' reason for arresting you and torturing you in 2011? The Appellant's answer was as stated above:

"I was working hard towards reforming the tiger group and liaising with those parties outside of Sri Lanka who were trying to do the same thing. And also that I have been a member of the tigers, that I have done so many things against the government".

17. Further on in interview though when actually giving evidence about his own involvement with the LTTE at question 69 when initially asked about his joining the Tigers he said that they asked him to join them and he refused. They explained to him because he was Tamil they needed his participation, but he refused and told them that he was studying. They told him to do the training to safeguard himself for his own benefit. Even then he refused and they started to get forceful and told him to think about it. He goes on in interview to describe how he was forced to go on the training and simply purchased medication for them and helped sort out some accommodation in Colombo. His evidence was as stated by Judge O'Keefe to the effect that basically later on in interview that his involvement was short lived and at a very low level.
18. However later on in the interview when asked specifically as to again in question 189 "what was their reason for arresting you?" he said, "saying I was an LTTE member and I was trying to reorganise the group".

Again at question 206, "what questions did they ask you?":

"They asked me if I was LTTE and whether I helped them. They asked if I was trying to re-establish the LTTE. Are you collecting money for the LTTE? Are you in touch with the same organisations abroad and trying to do something against the government? Are you thinking of going and joining them?"

At question 207, "what was your response?" "I said no to everything".

19. When one looked at the entirety of the interview and not simply question 35 in isolation question 35 was clearly understood by the Appellant to be

asking what the authorities' reasons were for arresting him were. When asked that same question "what was their reason for arresting you at question 189" he gave a clear answer "saying that I was an LTTE member and I was trying to reorganise the group". He was not seeking to give evidence as to what his own involvement was, he was seeking to say what the perception of his involvement was by the authorities in Sri Lanka at question 35. Clearly questions in interview cannot simply be taken in isolation.

20. I therefore do not accept that in fact there was an inconsistency in the Appellant's answers given in interview at question 35 compared to the rest of the answers given in interview. When looking at all of those answers properly in the round the Appellant's case in terms of his own involvement is quite clearly different from his case regarding the view that the authorities in Sri Lanka took regarding his involvement. In that regard I do find that regrettably First-tier Tribunal Judge O'Keefe has made an error when talking about the answers given at question 35 and in terms of whether or not there were inconsistencies when dealing with that issue at paragraphs 19 and 20 of her Judgement. It is clear to me that in that regard it is a mistake of fact rather than a legal proposition but I bear in mind that following the Court of Appeal case of **E & R [2014] EWCA Civ 49** that a mistake of fact can give rise to unfairness as a separate head of challenge in an appeal on a point of law such that the mistake of fact can be so unfair as to amount to an error in law and indeed a material error of law, if appropriate.
21. The Court of Appeal set out the ordinary requirements for findings of unfairness to be that there must be a mistake of an existing fact, including a mistake as to availability of evidence on a particular fact. I find that it is clearly a mistake as to existing fact in terms of whether or not the answer to question 35 was an answer given by the Appellant as to his own activities or the authorities' belief as to his activities.
22. Secondly, the fact I find has been established in the sense that it is objectively verifiable from the interview. When one looks at the interview in its entirety I find that in fact it is uncontentious and the Appellant was asked what their reasons for arresting him rather than what the reasons for arresting him were at question 35.
23. Thirdly, I do find that neither the Appellant nor his advisors have been responsible for the mistake. The question asked in terms of what were 'their reasons' does seem to indicate that it was the reasons the authorities thought he should be arrested rather than his own activities that he was asked about. The Judge in that regard seems to have then sadly mistaken that as being an inconsistency when it was not.
24. In terms of whether the mistake played a material though not decisive part in the Judge's reasoning the Judge has given other reasons as to finding against the Appellant. In terms of credibility and gave reasons for finding that she could not place weight upon the medical evidence

regarding scarring and took account of the Section 8 credibility issues in terms of the four and a half years had passed before the Appellant had actually initially claimed asylum, together with his low level participation within the LTTE. However, Judge O'Keefe referred to the purported inconsistency not just within paragraphs 19 and 20. She also again referred to the purported inconsistency at paragraph 23 and then again at paragraph 34 of her judgment and states specifically at paragraph 34 that:

“He gave an inconsistent account in interview as to his reasons why the Government of Sri Lanka would be interested in him some 2 years after the ending of the civil war. The appellant has given no plausible reason as to why the Government of Sri Lanka would be interested in him in 2011 given the very minor role that he played in LTTE activities. The appellant's account of his arrest in 2011 is inconsistent with the background material referred to in **GJ** and the conclusion that the Government of Sri Lanka operates on the basis of sophisticated intelligence.”

In paragraph 37 Judge O'Keefe went on to find that

“The appellant does not have or would be perceived to have a significant role in the post-conflict Tamil separatism or a renewal of hostilities within Sri Lanka. I do not accept that the appellant's name is on a 'watch' list or a 'stop' list or that he has any profile within the Sri Lankan authorities.”

25. It is therefore clear that Judge O'Keefe had placed considerable weight upon what she considered was an inconsistency between the answer at question 35 and the balance of the evidence given by him in interview. That was clearly a material factor taken into account by the Judge when considering the question of credibility. I therefore do find that that error of fact did give rise to unfairness as to mean that it does amount to a material error of law in the circumstances of this case.
26. In terms of the other Grounds of Appeal which regarded assertion that the Judge was wrong to reject the medical evidence. I find that the Judge actually has given clear reasons for finding that she could not attach weight to the evidence of Dr Izquierdo-Martin despite his finding that those scars were typical of someone who has been subjected to torture and at paragraph 25 set out that within the GP records it was said that there was an injury to the knee as a child which the GP had not taken account of and further at 26 there is reference to the Appellant being hit by a car in 2007 that the doctor had not taken account of that in coming to the conclusions regarding the causation of then scarring. The Judge in that regard was entitled to consider the medical evidence from Dr Izquierdo-Martin as consider what weight could be attached to it when considering that evidence in the round. The Judge did not then have to adjourn the case in order for further questions to be put to Dr Martin and in the circumstances of the case when the Appellant was not well enough to give evidence he



could not have been asked. The judge was entitled to consider the report of Dr Izquierdo-Martin and the Judge has given clear, adequate and sufficient reasons for not being able to place weight upon it. I do not consider that the Judge has attached too high a standard of proof in respect of either that evidence or in respect of the case as a whole.

27. But for the reasons set out above I do find that the Judge has made a material error of law in terms of the findings with regard to the purported inconsistency within the evidence in interview regarding the reasons for arrest and torture in 2011 and therefore I do set aside the entirety of the decision of First-tier Tribunal Judge O'Keefe. The parties agree that as the error found does go to the core of the credibility findings that the case should be remitted back to the First-tier Tribunal for a rehearing de novo.

### **Notice of Decision**

28. I set aside the decision of First-tier Tribunal Judge O'Keefe as containing a material error of law.
29. I remit the case back to the First-tier Tribunal for a rehearing de novo before any First-tier Tribunal Judge other than First-tier Tribunal Judge O'Keefe.

### **Anonymity Direction**

30. First-tier Tribunal Judge O'Keefe did make an anonymity direction in this case. It is appropriate for that anonymity order to continue. I therefore do direct that the Appellant is entitled to anonymity and that no report or other provocation of these proceedings or any part of this decision shall name him either directly or indirectly or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 5<sup>th</sup> June 2017



Deputy Upper Tribunal Judge McGinty