



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

Appeal Number: PA/10822/2019

THE IMMIGRATION ACTS

Heard remotely at Field House

**Decision & Reasons
Promulgated**

On 2 September 2020 via Skype for Business

On 23 September 2020

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**LA
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R. Toal, Counsel, instructed by York Solicitors

For the Respondent: Ms A. Everett, Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to are in the appellant's bundle of 168 pages, the respondent's bundle, and the grounds of appeal the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: the parties were content that the hearing had been conducted fairly in its remote form.

1. This is an appeal against a decision of First-tier Tribunal Judge Roots promulgated on 20 April 2020 dismissing the appellant's appeal against a decision of the respondent dated 25 October 2019 to refuse his asylum and humanitarian protection claim.

Factual background

2. The appellant, LA, is a citizen of Sri Lanka, born in May 1987. He arrived in the United Kingdom in February 2011 as a student and held leave to remain in that capacity until it was curtailed in June 2015. The day before the curtailment became operative, the appellant made detailed legal submissions concerning leave outside the rules, but the application was refused in circumstances that did not attract a right of appeal exercisable from within this country. On 6 November 2017, the appellant claimed asylum, and it was the refusal of that decision that was under appeal before the First-tier Tribunal.
3. The appellant claims to have had a friend in Sri Lanka called K. They met in late 2009. K is a close friend of the family and they stayed in touch throughout the appellant's time here. What the appellant did not know about K, however, was that he had very close links to the LTTE in Sri Lanka. Because of those links, the appellant claims that he was arrested, detained and beaten by the army or police during a return visit to Sri Lanka in December 2015. His father was also beaten during the same raid. He died shortly afterwards. The appellant was released from police detention following the payment of a bribe, and an uncle helped him to leave the country using his own passport through the airport. The uncle facilitated his departure without it being hindered by the usual checks, he claims.
4. The appellant now experiences a range of psychiatric conditions and was unable to give evidence before the judge. The case proceeded on submissions alone.
5. The judge did not find the appellant to be credible. Part of the appellant's case had originally been that his mother received an arrest warrant in his name: see question 85 of the asylum interview. The appellant retained a local lawyer in Sri Lanka, and there was a detailed letter from the lawyer in the appellant's bundle outlining the steps that taken on behalf of the appellant to verify the existence of the arrest warrant. The judge had significant credibility concerns that the appellant had not produced a copy of that warrant, or made any efforts to obtain it (see, for example, [26]), despite having engaged local legal representation in Sri Lanka. The judge was also concerned that there was confusion in

the lawyer's letter as to how many arrest warrants there had been. It was "very unclear" whether the arrest warrant the lawyer referred to was the original warrant issued in January 2015, or an additional warrant issued subsequently.

6. At [26], the judge said,

"I find that on balance, the failure to give a clear and credible explanation as to whether this warrant was actually received... does damage his credibility."

7. At [34], the judge said,

"on balance, the letter from the lawyer leave [sic] so many questions unanswered that I give the lawyer's letter little weight."

8. At [35], the judge rejected a concern raised by the respondent that the appellant had given an account in his screening interview that was inconsistent with the account he would later give in his substantive asylum interview,

"On balance given that he did clearly stated question 4.1 that he had been arrested by the army, I do not find the apparent alleged omissions are questions 5.3 and 5.4 to be of great significance".

9. Overall, the judge was not satisfied that the appellant had provided an explanation as to why the authorities would be interested in him in the manner claimed. The delay in the appellant's claim for asylum was significant, especially when one considers the representations he made on 15 June 2015 concerning leave to remain outside the rules. The judge noted that the representations, signed under the hand of the appellant, featured detailed legal representations, by reference to the key authorities on Article 8 of the European Convention on Human Rights ("the ECHR"). It was clear that the appellant was well advised, or that he or someone helping him had some knowledge of immigration law and procedure, when he drafted or signed that letter. Significantly, the letter spoke in detailed terms of the hardship the appellant would face upon his return to Sri Lanka. The letter post-dated the events the appellant claimed to have taken place in Sri Lanka, yet he did not mention any of the claimed difficulties he would later seek to base his claim for asylum upon.

10. The judge made allowances for the appellant's mental health, by reference to a psychiatric report which the appellant had relied upon, but did not consider that those conditions provided an adequate explanation for his failure to claim asylum at the time he made his June 2015 representations. The judge noted that, when making those representations, the appellant had been able to give a detailed account of the reasons why he claimed his return to Sri Lanka would place the United Kingdom in breach of its obligations under Article 8 of the ECHR. If he was able to make those representations, considered the judge, then he should have been able to explain his protection-based reasons, too.

Permission to appeal

11. Permission to appeal was granted by Designated Judge of the First-tier Tribunal McClure, on the basis that it was arguable that the judge had failed to apply the correct standard of proof, given the multiple reliance on the term “on balance”.

Submissions

12. Mr Toal submits that the judge’s repeated use of the term “on balance” reveals that the functional analysis relied upon by the judge to dismiss the appellant’s appeal was by reference to a higher standard of proof than is permissible in asylum claims. Mr Toal accepted that there were a number of different meanings that could be ascribed to the phrase “on balance”, but that in common parlance it typically meant that a balancing act had been performed, whereby the factors militating in favour of one conclusion outweighed those in favour of the opposite conclusion. It is, he submitted, the language of the alternative, the language of the balance of probabilities; the language of whether something is more likely than not. He noted that the judge did correctly direct himself concerning the lower standard, see for example [23], [48] and [49]. However, even reading the decision as a whole, the use of the term “on balance” suggests that at the key operative parts of the decision, the judge may have been using the “balance of probabilities” civil standard. The standard paragraphs included by the judge, which feature in many asylum decisions, submitted Mr Toal, were insufficient to cure any uncertainty which otherwise arose from the judge’s use of the term “on balance” throughout his crucial reasoning.
13. Very fairly, Ms Everett noted that she had “some sympathy” for the submissions made by Mr Toal, adding that it was “never helpful” when language such as that relied upon by the judge was used, but nevertheless submitted that, when read as a whole, it was clear that the judge was well aware of what the correct standard of proof was, and applied it throughout. If one were to look at the operative reasoning of the decision, the judge relied on the correct standard of proof. It was difficult, she submitted, to read the decision as a whole, and conclude that the judge is working to the wrong standard.

Discussion

14. The difficulty with the term “on balance” is that there are different meanings which could be ascribed to that term. On the one hand, it can have meanings along the lines of, “*when all relevant factors have been considered carefully, the decision is X*”, or, similarly, “*having considered everything in the round, the conclusion I reached is Y*”. On the other, it can also denote that a 50/50 balancing act has been performed, whereby the

matters on one side of the scale outweigh those on the other side of the scale. Put another way, it can be the language of the civil standard of proof.

15. Aside from the concerns arising from the “on balance” terminology, the decision of the judge was meticulous and is very well written. The judge correctly direct himself as to the appropriate standard of proof, namely the lower standard, at various points. The reasons relied upon by the judge for dismissing the asylum claim were well within the range of options open to him, and it is not possible to fault its reasoning on that account; indeed, although the grounds of appeal upon which the appellant had obtained permission included collateral attacks on the judge’s analysis of the arrest warrant issue and the absence of an explanation by the appellant as to his failure to explain why the authorities had been interested in him at this late stage, Mr Toal rightly did not pursue those submissions orally. But for the use of the term “on balance”, the decision is in many respects a model decision, which is admirable for its clarity and brevity.
16. However, protection claims require exacting standards of procedural and substantive fairness. An appellant whose protection claim has been dismissed is entitled to know that the correct standard of proof has been applied throughout all operative parts of the decision’s reasoning. I accept that some real uncertainty does exist, even reading the decision as a whole, as to whether the term “on balance” refers to the civil standard, or simply to careful consideration, or something similar. While I suspect that it is the latter, it is not possible to reach that conclusion with the certainty that protection claims require. The judge deployed the term “on balance” in his operative reasoning at two separate points against the appellant, and at one point in his favour. While I note the judge did direct himself correctly at the outset of the decision, and in his concluding remarks, I do not consider that that correct self-direction is sufficient to overcome the real uncertainty that the use of the term throughout the decision creates, even reading the decision as a whole.

Conclusion

17. This appeal is allowed. I set the decision of the First-tier Tribunal aside, with no findings of fact preserved. It follows from my analysis that the appellant has thus far been deprived of a hearing before the First-Tier Tribunal conducted by reference to the correct standard of proof. Substantial findings of fact need to be reached. Under the circumstances, a remittal to the First-tier Tribunal is the only appropriate disposal.

Notice of Decision

The decision of Judge Roots involved the making of an error of law and is set aside.

The matter is remitted to a different judge of the First-tier Tribunal with no findings of fact preserved.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their 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 *Stephen H Smith*
September 2020

Date 18

Upper Tribunal Judge Stephen Smith