



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004996

First-tier Tribunal No: PA/50871/2022
IA/02427/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 January 2025

Before

DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

ML
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P. Turner, Counsel instructed by Imperium Chambers
For the Respondent: Ms S. McKenzie, Senior Home Office Presenting Officer

Heard at Field House on 9 January 2025

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this Order could amount to a contempt of court. This Order is made in light of the international protection issues in the appeal.

DECISION AND REASONS

Introduction

1. The Appellant is a national of Sri Lanka, born on 30 May 1990. On 24 October 2024 the First-tier Tribunal granted him permission to appeal to the Upper Tribunal against the decision of First-tier Tribunal Judge Tozzi (“the Judge”) promulgated on 4 July 2024.

Relevant background

2. As the Judge noted at §4, the Appellant’s core claim for international protection consisted of two elements: association with the LTTE and that he is a gay man. I add that the Appellant entered the UK in 2011 and claimed asylum in September 2012. The claim was refused by the Respondent in 2012 and the Appellant did not appeal that decision.
3. In March 2019 the Appellant lodged further submissions which were refused by the Respondent on 15 February 2022. The appeal came before the Judge on 25 June 2024.
4. In a detailed decision the Judge concluded that the Appellant was not a credible witness in respect of both claims and dismissed the appeal.
5. In coming to that overall conclusion, the Judge made the following relevant observations/findings:
 - a. Counsel for the Respondent conceded that if the Appellant established that he is a gay man he would fall within a particular social group and that he would be at risk of persecution on return to Sri Lanka, §8.
 - b. At §21 the Judge outlined that the Appellant’s account as to his involvement or perceived involvement with the LTTE was so inconsistent as to be rejected in its entirety.
 - c. The Appellant had been materially inconsistent as to why the Sri Lankan army had taken adverse interest in him including that he did not mention in 2012 (as he did in his later claim) that he was arrested because of the connection to his brother-in-law who was suspected of LTTE involvement and had been in custody: §23.
 - d. Furthermore, the Appellant claimed in 2022 that he believed that he was considered a member of the LTTE because his group of friends were members but this had not been raised during the original claim in 2012: §25.
 - e. The Appellant had relied upon documentary evidence which was inconsistent with itself, and no explanation was provided as to why they had not been produced by the Appellant at the time of his original claim in 2012. The Appellant had also failed to provide the documentation which he claimed confirmed that his brother-in-law was a member of the LTTE: §24.
 - f. The Appellant was unable to explain the discrepancy in his evidence between 2012 and 2022 when he initially claimed to have been imprisoned for one week and then moved to a hostel for five months compared to the later claim that he was detained for around four months: §26.

- g. The Appellant had also given materially inconsistent evidence about his release from detention - originally claiming that a guard had felt sorry for him leading to his release in October 2007 following the payment of a bribe but with no reporting conditions and later in claiming that his parents contacted a politician to organise his release (§27).
 - h. The Appellant had also been discrepant in asserting that he told his father about the systemic sexual abuse which he suffered in detention (the 2012 interview) whereas in the 2022 hearing the Appellant was adamant that his father did not know: §28.
 - i. The Appellant was also discrepant about where he resided for the period between October 2007 and May 2011, as well as the number of visits from the army to the family farm: §30.
 - j. Furthermore, the Judge noted the expert's view that it was plausible that the Appellant could have escaped Sri Lanka by the use of bribery or corruption however the Appellant had no recollection of bribery having taken place but merely asserted that this may have happened. The Appellant had also given inconsistent evidence as to whether it was his intention to come to the UK to study or as part of a journey onwards to Canada: §32.
 - k. The Judge also concluded that no reasonable explanation had been given for why the Appellant waited until the end of his student visa in 2012 to claim asylum if he was in fear for his life. The Judge also held against the Appellant's credibility the fact that he did not appeal against the 2012 refusal and only raised further submission seven years later. In coming to this conclusion the Judge rejected the Appellant's explanation that the delay was caused by his depression following his father's death. The Judge noted that the Appellant had been inconsistent about when it was that his father died and noted that there were no entries for the Appellant's claim of depression in his GP records prior to 2018 despite the fact that the Appellant was registered with his GP since 2011: §33.
 - l. The Judge ultimately concluded that the Appellant's claim was untrue and there was no other reason to think that he would reasonably likely be on a stop or watchlist: §34.
6. In respect of the Appellant's sexuality, the Judge went on to make the following findings:
- a. The Judge firstly noted that the Appellant had not raised a claim for protection on the grounds of sexual orientation until 2019 which was eight years after his arrival in the UK. The Appellant explained in the hearing that his recollection was now poor following a head injury in 2022 but he thought he had raised it in the past. The Judge took into account the Appellant's medical records showing that he sustained a head injury following an attack in October 2022 and that he attended his GP in March/April 2024 reporting some memory loss for 6 to 12 months. The Judge observed that there was no diagnosis at that time and further tests were being undertaken: §35.
 - b. Overall the Judge accepted that the Appellant may have suffered from intermittent issues with headaches and memory since March/April 2023 but

found that this did not explain his failure to raise a sexual orientation claim before his further submissions in 2019.

- c. Furthermore, the Judge noted that the Appellant had never claimed in his 2012 interview that the sustained sexual abuse which he experienced in detention was the trigger for his sexual orientation as was advanced during the hearing: §36.
- d. On the Appellant's own timeline, (which the Judge did not accept), the Appellant would have known about his sexual orientation after his release in 2007 and therefore well before his interview with the Respondent in 2012. The Judge decided that this delay significantly undermined his account: §36.
- e. The Judge also declined to place material weight on the unsigned and undated letter from Mr J who the Appellant contended had been his partner in the United Kingdom for about three years. The Judge also concluded that the messages which were purported to be between the Appellant and Mr J between 2019 and 2020 were generic and there was nothing to show where the printout had come from: §37.
- f. The Appellant explained that Mr J was not giving evidence in the hearing because they were no longer together and he had a new partner but the Judge went on to also find against the Appellant on the basis that he claimed that he lived 10 to 15 minutes walk away from Mr J's property yet the documentary evidence provided indicated that he in fact lived about an hour's walk away: §37.
- g. The Judge took into account the evidence of text messages which were said to be between the Appellant and different men arranging to meet up, and other social media messages some of which were redacted as they were sexually explicit. The Judge however reflected upon the fact that there were no names of the senders and/or recipients on the messages and also noted her overall concerns about the Appellant's credibility; she found that the messages were not a reliable indicator of the Appellant's sexual orientation.
- h. The Judge also concluded that there was no evidence to show that the Appellant attended gay events at a London nightclub: §38.
- i. At §39 the First-tier Tribunal noted that the Appellant twice claimed in his statement that he was living openly in the United Kingdom as a drag queen and highlighted that he could do this openly, freely and safely. The Judge contrasted this with the Appellant's oral evidence that living openly as a drag queen is something that he would like to do but he denied living openly in such a way. The Judge further noted the Appellant's evidence that he dressed up in drag at parties but did not live openly in this way and did not take photographs as he did not want to take the risk of them being published as no one knew about it. The Judge did not believe this evidence and concluded that it was not reasonably likely that the Appellant was a drag queen: §39.
- j. In respect of the current relationship with Mr N, the Judge noted that there was little detail given. The Judge found that the Appellant's recollection as to which month he met Mr N was "hazy", initially saying May 2023 and then

saying maybe June or July and put this lack of certainty down to the impact of the attack on his memory: §40.

- k. In respect of the claim to cohabitation the Judge noted the absence of documentary evidence which could reasonably have been provided i.e. the shared bills which they referred to and found that the parties had been inconsistent about the name of the flatmate who lived in the property despite not being accounted for on the council tax bill which was provided: §40.
 - l. The Judge went on to draw a negative inference from the lack of evidence from the flatmate as to the genuineness of the claimed relationship concluding that it could reasonably have been obtained.
 - m. In respect of Mr N's oral evidence in which he confirmed that he was in a gay relationship with the Appellant, the Judge noted that his statement was short and lacked detail. Mr N was himself inconsistent as to when the parties first met claiming it was either August or July 2023. Mr N also knew very little about the Appellant's background including when it was that he first came to the United Kingdom. The Judge decided that Mr N was not a credible witness: §42.
 - n. At §45 onwards the Judge applied section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and repeated the earlier observations that the Appellant had failed to claim asylum at the first opportunity and had not given a reasonable explanation for the delay.
7. Having concluded that the Appellant had lied about his experiences in Sri Lanka and his claim to be a gay man, the Judge went on to formally conclude that the Appellant would not face a real risk of persecution because of any imputed political beliefs: §51.
8. In respect of the international protection issues arising from the Appellant's claim to be a gay man, the Judge reiterated that she did not believe his account but also went on to find that the Respondent's counsel's concession about risk was inconsistent with Country Guidance and that he could reasonably relocate to (what I can reasonably infer is meant to be) Colombo - albeit the Judge has unfortunately stated Colombia: §52.
9. In respect of Article 8 ECHR the Judge concluded that there would not be very significant obstacles to his reintegration in Sri Lanka and in considering exceptional circumstances rejected the Appellant's argument that the delay in decision-making meant that the decision was a disproportionate one: §56.

The error of law hearing

10. In his submissions Mr Turner initially dealt with my preliminary question as to whether the Appellant's third ground of appeal, which he properly described as a R v Secretary of State for the Home Department ex parte Robinson [1998] QB 929 ("*Robinson obvious*") point at paragraph 24 of the grounds of appeal, could be advanced in light of the Court of Appeal's decision in Secretary of State for the Home Department v George [2024] EWCA Civ 1192.

11. Mr Turner submitted that he accepted that the point was purely an Article 8 human rights argument and that he would say no more about that ground.
12. In respect of ground 1, Mr Turner emphasised that the Appellant had been the victim of a very serious assault in the United Kingdom which had resulted in the Appellant experiencing memory problems - he took the Tribunal to the Appellant's GP medical records (page 498 of the composite bundle) in which the doctor had expressed significant concern about the Appellant's memory. Mr Turner criticised the Judge for referring to the entry dated 3 April 2024 which recorded swelling and pain (and being unable to remember Arabic words) but not the entry from 4 April 2024 which indicated a referral to neurology on the basis of significant concern about the Appellant's forgetfulness.
13. Overall Mr Turner submitted that the Judge had materially erred in giving insufficient attention to the Appellant's documented memory issues and the impact of imperfect recall on his evidence at the hearing.
14. In respect of the evidence relating to the Appellant's sexuality, Mr Turner contended that there was a wealth of corroboratory evidence (including photos, texts and the oral evidence of Mr N) and therefore the Appellant had a strong prima facie case.
15. Mr Turner asserted that the inconsistencies in the evidence of the Appellant compared to that of Mr N were merely "small errors" and that the Judge had failed to consider the difficulties with the evidence about dates through the prism of the Appellant's memory problems.
16. Furthermore, Mr Turner criticised the Judge for being overly forensic in respect of the Appellant's evidence to be a drag queen. He argued that the Appellant had never claimed to be a drag queen in public. Mr Turner contended that the Appellant's evidence had been credible that he would dress up at parties but did not want to be identified as a drag queen.
17. In respect of the absence of Mr J from the hearing, Mr Turner asserted that it was not reasonable for the Judge to take this point against the Appellant because Mr J was the Appellant's ex-partner whom the Appellant was not in contact with and this was a neutral point at best.
18. In respect of the evidence of Mr N, Mr Turner advanced that there were not many inconsistencies and that more attention should have been given to the Appellant's recorded memory issues.
19. Mr Turner also contended that Mr N had in fact corrected himself in his evidence as to when the parties had first met which was not a discrepancy.
20. Mr Turner lastly asserted that the Judge had erred by ignoring the Respondent's representative's concession about risk on return to Sri Lanka as a gay man and had acted unlawfully by looking at the caselaw herself.
21. In response Ms McKenzie opposed the Appellant's appeal and relied upon the rule 24 response. She encouraged the Tribunal to read the judgment as a whole and reiterated some of the more prominent adverse findings made by the Judge in the decision. In respect of the Respondent's representative's concession, Ms McKenzie submitted that it was unclear why this submission had been made as it was not

conceded in the refusal letter and it was not the Respondent's published policy position.

22. In response Mr Turner reiterated the concession made by counsel on behalf of the Respondent but also acknowledged that Appellant's counsel at the First-tier hearing had not made an application for the Appellant to be treated as a vulnerable witness. He submitted that it was not relevant whether the Appellant had received a diagnosis for his memory issues as the record was clear that he had been given an urgent referral in April 2024, and the Judge had not properly considered the impact of his memory loss.
23. Furthermore, Mr Turner contended that the Judge had entered into the arena when noting for herself the length of time it would take to walk from the Appellant's postcode to Mr J's postcode with reference to paragraph 37 of the judgment.
24. Mr Turner also contended that the Judge's assessment of the corroboratory evidence (including letters of support) entered into the territory of irrationality and again referred to the Judge's assessment of the Appellant's claim to be an open drag queen. Mr Turner encouraged the Tribunal to aggregate these points together and conclude that there was a material error.

Findings and reasons

25. In respect of ground 3, I have already recorded that Mr Turner did not seek to make an oral submission as to whether the Tribunal could in fact consider the Appellant's Robinson obvious point in respect of the Judge's assessment of Article 8 ECHR.
26. In the absence of any particular argument from the Appellant I find that the Upper Tribunal is not able to consider ground 3 on the basis that the Court of Appeal has clarified the limited extent to which the principle applies in George:

"75. Second, the principle in Robinson No 1 is limited to points of refugee law which favour a person who claims to be a refugee, and which are 'obvious' and arguable with 'strong prospects of success' (see paragraph 17 above). The reason for that principle is that it is necessary to enable the United Kingdom to comply with its obligations under the Refugee Convention. This is not a case to which that principle applies. I am only aware of one case in which this principle has been extended in favour of the Secretary of State, also in a refugee case, where it was obvious that the Appellant was excluded from the protection of the Refugee Convention, as a self-confessed torturer, by article 1F (A (Iraq) v Secretary of State for the Home Department [2005] EWCA Civ 1438). Counsel did not refer us to any other relevant cases. There are obvious policy reasons why this principle should not be extended any further in favour of the Secretary of State."

27. In any event I find that the point is not an obvious one in the sense that there would not be a strong prospect of success were permission to be granted: AZ (error of law: jurisdiction; PTA practice) [2018] UKUT 245 (IAC) at §63.
28. In ground 3 the Appellant contends that he was the victim of a violent attack which resulted in a prosecution brought by the CPS and a trial listed for the end of November/start of December 2024. The Appellant points to documentary evidence provided in the Appellant's bundle that the Appellant was crucial to the upcoming trial and is being supported by Kent police. The written grounds argue that justice

and criminal accountability cannot be achieved if the Appellant (as the key witness) is removed from the United Kingdom before he is able to give evidence and that this amounts to exceptional circumstances under Article 8 ECHR.

29. I should firstly note that the evidence referred to by Mr Turner as “AB/66-67” does not appear to be in any of the bundles before the Upper Tribunal. Nonetheless I can quickly deal with the point taken at its highest. I remind myself that the Appellant was represented by experienced counsel at the First-tier proceedings who did not seek to argue that the Appellant’s attendance for the upcoming criminal trial was in any way relevant to the assessment of proportionality under Article 8(2) ECHR.

30. I further note that there was no documentary evidence before the First-tier Tribunal (or any related submission) as to whether the Appellant could in fact give his evidence from overseas in the criminal proceedings.

Grounds 1 & 2

31. In respect of the Appellant’s overall assertion that the Judge gave insufficient regard to the medical evidence in respect of his memory loss when finding against some of his evidence relating to his sexuality, I find there is no material error.

32. The Appellant’s challenge to the Judge’s reasoning centres around the ‘comment’ entry in his medical records dated 4 April 2024 (at pages 497 and 498 of the composite bundle) in which the doctor explained that the memory test results were significant and that the Appellant would be urgently referred to a neurologist given his symptoms and age. The note goes on to record that the Appellant requested a report regarding his illness and that he had been advised to send an email request to a different doctor.

33. I should also note that the entry of 26 March 2024 which states that the Appellant did not remember when he had his operation after his head injury and could not remember his friend’s name and that he recently had trouble reading Arabic letters despite being fluent before.

34. It is also important to note that there was no further medical evidence by way of, for instance, an expert report as to the Appellant’s cognitive abilities and there was no request from counsel for the Appellant for him to be treated as a vulnerable witness.

35. In my judgment it is vital to view the Judge’s findings in their entirety. Mr Turner accepted that the Appellant had not sought to challenge any of the Judge’s adverse credibility findings in respect of the Appellant’s claim to have been associated with the LTTE, detained and sexually brutalised. This is not obviously determinative of the credibility of the Appellant’s account to identify as a gay man as the Judge correctly self-directed at §48, but it is nonetheless relevant to the Judge’s duty to consider the evidence in the round.

36. It is therefore self-evident that the Judge had serious concerns about the Appellant’s claim to have been persecuted and seriously mistreated in Sri Lanka prior to his departure.

37. I also take into account that the significant majority of the adverse credibility points decided by the Judge in respect of the Appellant’s sexuality do not depend on the claimed limitations with the Appellant’s memory. I have summarised in detail the

core adverse credibility findings above but for completeness reiterate that the letter from Mr J was not signed or dated (and it was certainly not a witness statement as asserted by Mr Turner at paragraph 11 of the grounds), many of the messages said to be between the Appellant and Mr J from 2019 to 2020 were generic and there was nothing to corroborate where the printouts came from. The Judge also found that the partially censored messages were not shown to be from the Appellant himself either from his phone or related social media account (§38). These findings were perfectly open to the Judge and are clearly relevant to core issue of the Appellant's sexuality.

38. For completeness I do not accept that the Judge "*entered into the arena*" when assessing the distance between the Appellant's address and that of Mr J as evidenced in the documents before the Tribunal. The Judge was required to assess the credibility of the Appellant's claim to have been in a relationship with a past partner who was not an attending witness. I find that the Judge did not assume the role of an advocate or otherwise act unfairly applying the principles detailed in Hossain v Secretary of State for the Home Department [2024] EWCA Civ 608.
39. Where the adverse credibility findings did partly turn upon the Appellant's oral evidence in the hearing, I find that the Judge gave sufficient weight to the extremely limited medical evidence before her, as per §35.
40. Firstly, I find that there is no evidence before the Upper Tribunal to show that Counsel at the First-tier hearing made any particular submission about the medical evidence or its impact upon the Appellant's oral evidence; there was equally no request for the Appellant to be treated as a vulnerable witness. It is therefore not clear if Counsel even referred the Judge to the GP note of 4 April 2024; I also reflect on the fact that Mr Turner did not refer me to the medical note dated 26 March 2024 which I have summarised above.
41. Secondly the substance of the extremely brief medical notes before the Judge suggested that he had failed to remember Arabic words albeit with no problem remembering the Tamil or English languages. Even taking into account the note of 4 April and 26 March I find that, at its highest, the evidence suggested that the Appellant struggled to recall certain things during the neurological test, albeit that there was no further evidence about this before the Tribunal.
42. Turning to the relevant discrepancies, the Judge noted that the Appellant and Mr N gave different names for their alleged flatmate rather than the Appellant being unable to recall the name. It was plainly open to the Appellant to produce further medical evidence about his memory issues and I reflect on the reference in the 4 April note that he had asked about a letter from the doctor, but he did not provide any such letter to the Tribunal. I therefore conclude that the Judge gave sufficient weight to the medical evidence.
43. In respect of the Judge's finding that the Appellant's oral evidence as to when he first met Mr N was "hazy" (§40) I again find that the medical evidence in respect of the Appellant's memory issues was extremely limited and so, even if the Judge did err by not expressly engaging with the memory issue in this paragraph, she nonetheless gave a number of clear and powerful reasons why the evidence of both parties was not credible. This included that Mr N appeared to know very little about the Appellant despite the relationship apparently starting about a year before the hearing. The Judge was also entitled to draw a negative inference from the absence of a witness statement from the flatmate (who could speak to their

knowledge of the relationship) in the circumstances where it was said by the witnesses that he could not attend due to work commitments. I therefore conclude that any error, if there is one, is not material in that it could not have made a difference to the outcome.

44. In respect of the Appellant's assertion that the Judge erred in the assessment of whether he lived openly as a drag queen (§39) I find that there is no material error.
45. Mr Turner repeated the Appellant's claim that he will sometimes dress up as a drag queen at parties but would not do so in public and would not allow pictures of him to be taken. In my view the Judge did not err in finding that the Appellant had reined back on his evidence as laid out at paragraph 31 of his witness statement. I find that it was permissible for the Judge to conclude that the Appellant had stated in his statement that he lived openly as a drag queen and that this was discrepant with his oral evidence in which he stated that this was not the case, but he would like to do this openly.
46. Overall then I find that the Judge did not materially err in her findings in respect of the Appellant's sexuality and was entitled to reach the conclusion that she did.
47. For completeness I can see no relevance in the Judge's departure from the Respondent's representative's concession about the risk to the Appellant as a gay man (recorded at §8). The finding made by the Judge was purely in the alternative (§52) and I have already explained why the substance of the Judge's adverse credibility findings are lawful.

Notice of Decision

There is no material error in the decision of the Judge; the appeal is dismissed.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 January 2025