Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **AA 05624-13**

THE IMMIGRATION ACTS

At **Field House** Decision signed: **31.10.2013**
on **31.10.2013** sent out:

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Philip Winslow THILAGARAJAN

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Paul Turner* (counsel instructed by Greater London, solicitors)
For the respondent: Mr Peter Deller

DETERMINATION AND REASONS

1. This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Robert Britton), sitting at Hatton Cross on 12 July, to dismiss an asylum and human rights appeal by a Tamil citizen of Sri Lanka, born 18 May 1990.

2. The grant of permission to appeal in the First-tier Tribunal turned on differences noted by the judge in the history of what happened to him in detention given by the appellant himself, and by a consultant psychiatrist, Dr Gavin McKay. Dr McKay's report was given on an independent basis; but he has a full-time appointment in the National Health Service. The judge alluded to these differences at paragraph 65: the question was on which days of a five-day detention the appellant had been beaten. The permission judge regarded these differences as resolved by a subsequent statement by Dr McKay, and took the view

that this fresh evidence, apparently showed an error of fact capable of amounting to one of law within *E & R* [2004] EWCA Civ 49, and should not be excluded on the basis of *Ladd v, Marshall* [1954] 1 WLR 1489, in view of the speed at which Dr McKay had had to produce his report.

3. Without going into the legal niceties of the permission judge's decision, it is easy to see why he reached it: the discrepancy, such as it was, between Dr McKay's history and the appellant's own seems to have been based on the former counting, and the latter not counting the first evening, on which the appellant had been taken into custody, as a separate day. The hearing judge alluded to the point at paragraph 65 as one against the appellant, but his main reasons for disbelieving him appear at paragraph 66; so it might have been possible to say that the apparent mistake on the history made no material difference to those.

4. However, there are three other grounds, on which the permission judge did not refuse permission, though he said they had relatively little merit. On two of those I agree with him: the judge was not drawing a general conclusion on the likelihood or otherwise of bribery at paragraph 66, but reaching a particular finding about whether or not it was likely in the rather unusual circumstances of this case, where the appellant said he had been accused of involvement in a plot to kidnap the President's son: this he was well entitled to do. The other point involves the appellant's family history of migration, where the facts put forward in support of it if anything reinforce the judge's own conclusions.

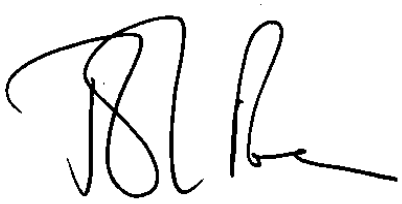
5. The ground which causes me more trouble refers to the way in which the judge dealt with Dr McKay's report in terms of the appellant's credibility or otherwise. Apart from the passages relating to the history point, the judge did refer to the report at paragraph 4, but only to introduce it; and again at paragraph 41. There he notes the length of Dr McKay's interview with the appellant (2½ hours), and his reporting the lack of any history of mental illness in his family, of any past medical history based on what he said had happened to him in Sri Lanka, and of his current treatment, by way of a low-dose anti-depressant. At paragraph 67 the judge goes on to say this "I find the appellant's medical/mental condition is nothing to do with what had happened during the conflict in Sri Lanka".

6. Dr McKay concluded at paragraph 153 of his report that "The Appellant has a clinical picture of PTSD typical of his account of arrest, beating and the stress of a potential return to Sri Lanka". He had already made it clear at paragraphs 103 – 104, with reference to the Istanbul Protocol, that "typical" would be the highest level of consistency the nature of his own expertise would allow him to find in an asylum case.

7. This point was taken at paragraph 25 of the grounds of appeal, though without the reference to Dr McKay's report which might have helped to bring it to the permission judge's attention. Quite clearly, as Mr Deller accepts, the judge needed to deal with Dr McKay's opinion on it, before reaching the conclusion he did at paragraph 67, or his credibility findings. Whether he had ended by agreeing with it would of course have been for him.

8. I have considered whether, even so, the judge's conclusions on the bribery point are enough to validate his decision as a whole. It is a strong enough one for it to be very tempting to say so. On the other hand, it is hard to say that this appellant had a fair hearing before the judge, when the judge's decision, whether he meant to do so or not, makes it look as if he picked out the points in Dr McKay's report which went against him, without dealing with its strong conclusions in his favour. Judges are most certainly not required to accept without question even strong conclusions expressed by a respectable expert witness; but they do need to deal with them, if justice is to be seen to be done. For this reason, there will be a fresh hearing before another judge in the First-tier Tribunal.

Appeal allowed: decision to be re-made
Fresh hearing in First-tier Tribunal at Hatton Cross, not before Judge Britton



(a judge of the Upper Tribunal)