Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/09802/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Sent**
on 6th August 2013	**On 23rd September 2013**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

RAJASINGHAM BRAD HARRIS
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ficklin instructed by Parker Rhodes Hickmotts Solicitors (Leeds)
For the Respondent: Ms R Pettersen – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Kelly, promulgated following a hearing at Bradford in February 2013, in which he dismissed the appellant's appeal against the direction of his removal to Sri Lanka following the rejection of his claim for asylum or any other form of international protection.

2. Permission to appeal was initially refused by a Designated Judge of the First-tier Tribunal but thereafter renewed and granted by Upper Tribunal Judge Dawson on 22nd April 2013.

Background

3. The appellant was born on the 21st February 1976 and it is accepted that he is a citizen of Sri Lanka. Having examined the evidence Judge Kelly set out his findings from paragraph 23 of the determination which may be summarised as follows:

   i. Whilst the appellant has provided documentary evidence of events that are said to have occurred in Sri Lanka during July and August 2012, 18 months after his departure in January 2011, the evidence linking those events to the alleged association by the appellant with LTTE between 2004 and 2008 is tenuous [23].

   ii. There is no eyewitness account of Fresly's (the appellant's brother) alleged arrested on 2nd July 2012, such as a written statement from his mother and the appellants account of what was reported to him is extremely vague. There is thus no evidence that if Fresley was arrested it had anything to do with the appellant's supposed involvement in printing materials for the LTTE many years earlier. The documentary evidence did not indicate why his other brother may have been arrested at sea on 19th July 2012 [24].

   iii. The letter from the Sri Lankan lawyer stating the appellant's wife was granted bail on 8th August 2012 is silent with regard to the charges she faces. Judge Kelly was not satisfied his wife's arrest had anything to do with the appellant's supposed activities in Sri Lanka [25].

   iv. There is documentary and photographic evidence suggesting that the family printing press may have been closed by court order on 23rd July 2003 although the reasons for this are obscure [26].

   v. Given the significant period of time that has elapsed between the events at the core of the appellants claim and the alleged recent interest of the Sri Lankan authorities in the family and their printing press, it is highly unlikely there would be any connection between them [27].

   vi. It is very likely that the recent interest occurred as a result of suspected recent criminal activity in Sri Lanka for which the appellant has a cast-iron alibi for due to his presence in the United Kingdom. Any suggested link between the two would be inconsistent with the explanation the appellant himself gave on 12th March 2012 for why the family printing shop had been permitted to remain operational for as long as it had [27].

   vii. The only other significant event that is said to have occurred since the appellant left Sri Lanka is the arrest of his wife on 15th January 2011, a week after he had left the country in order to study in the United

Kingdom. If the incident occurred, evidence linking it to the appellant's supposed activities in Sri Lanka is "extremely nebulous". It is limited to the appellant's claim his wife was questioned about him during her brief but traumatic detention. There is no witness statement from his wife in order to clarify the matter. He said his wife has been safely residing in Dubai for six months at the date of the appeal hearing. The appellant claimed to be in telephone contact with her and it was therefore not considered unreasonable to expect that such evidence would have been forthcoming if it was truly relevant to the appellant's claim [28].

viii. Three most striking features of the account of events prior to his departure from Sri Lanka are (a) nobody appears to have shown any interest in him until some two years after he had ceased to print material for the LTTE, (b) he was not apprehended during the eight months that he remained in the country after the Karuna Group first supposedly attended at his house in order to kill him and (c) he was able to leave Sri Lanka without hindrance using his own passport [29].

xi. It was found improbable that if the appellant was been sought by pro-government forces for suspected involvement with the LTTE that they would have been unable to trace his whereabouts during the eight-month period prior to his departure. The alleged failure to apprehend him during this period contrasts markedly with the evidence of their apparent success in arresting his wife (twice), his father, and both brothers during the period of 18 months that followed his departure from Sri Lanka [31].

xii. The appellant does not have an explanation for how he was able to leave Sri Lanka using his own passport without falling foul of the numerous checkpoints which are described in the background country information recited at paragraph 22 of the refusal letter [32].

xiii. The evidence, when considered in the round, is highly inconsistent with the claim of adverse interest being taken in the appellant in Sri Lanka [33].

xiv. Notwithstanding the claim that he came to the United Kingdom because he feared for his life, he only sought leave to enter in order to study, undertook those studies in the United Kingdom for five or six months, and did not claim asylum until he was forced to do so having been returned to the United Kingdom by the Swiss authorities. Such behaviour is inconsistent with his claimed reasons for not wishing to return to Sri Lanka and damages his general credibility [34].

xv. It is accepted that in 2005 the appellant was stopped by members of the Sri Lankan task force as he was riding his motorcycle. He was asked about the whereabouts of a particular individual whom they were seeking and when he denied knowledge of the matter they beat him up. This is a

discrete aspect of the account and other than this none of the appellant's account of events preceding his departure from Sri Lanka in 2011 and what may have occurred following his departure are accepted [35].

4. The Judge then assessed risk on return in light of the findings made.

Discussion

5. The grounds on which permission to appeal was granted allege the Judge fundamentally erred by requiring corroboration when he refers to the need for an eyewitness account of his brother's arrest as this was, in effect, asking the appellant to prove his case to a much higher standard than that which was required. It is also alleged the Judge repeats this error by holding against the appellant the requirement to provide a statement from his wife. It is alleged that in addition to requiring corroboration the appellant has never been given the opportunity of explaining why such evidence was not sought. These issues should have been raised giving the appellant the opportunity to comment.

6. In ST (Corroboration - Kasolo) Ethiopia [2004] UKIAT 00119 the Tribunal said that it was a misdirection to imply that corroboration was *necessary* for a positive credibility finding. However, the fact that corroboration was not required did not mean that an Adjudicator was required to leave out of account the absence of documentary evidence, which could reasonably be expected: the Adjudicator was entitled to comment that it would not have been difficult to provide the relevant documents in this case. In particular, the Adjudicator was entitled to comment that it would not have been difficult for the Appellant to provide a death certificate concerning his brother or some evidence to support his contention that he had received hospital treatment. These were issues of fact for the Adjudicator to assess. The Tribunal noted that the Adjudicator had taken into account the fact that claimants could well have difficulty in presenting documentation and the provisions of the UNHCR handbook on giving claimants the benefit of the doubt. In the circumstances, the Tribunal declined to intervene and said that an appeal must be determined on the basis of the evidence produced but the weight to be attached to oral evidence may be affected by a failure to produce other evidence in support.

7. In TK (Burundi) v SSHD [2009] EWCA Civ 40 the Court of Appeal said that where there were circumstances in which evidence corroborating the appellant's evidence was easily obtainable, the lack of such evidence must affect the assessment of the appellant's credibility. It followed that where a judge in assessing credibility relied on the fact that there was no independent supporting evidence where there should be and there was no credible account for its absence, he committed no error of law when he relied on that fact for rejecting the account of the appellant. In this case the evidence concerned a partner in the UK.

8. A reading of the determination shows Judge Kelly was concern about the lack of evidence supporting alleged events. It is clear the Judge considered that such evidence could be easily obtained, especially from the appellant's wife with whom he is in regular contact, yet it had not been. I do not find it proved that the Judge erred in not placing the weight upon the evidence that he was invited to do only as a result of the lack of corroboration, although this was a factor he was entitled to take into account.

9. I find the allegation of a procedural irregularity in not putting these issues to the appellant, such as to amount to a material error on the basis of a failure to have a fair hearing, has no merit. Following the lodging of the appeal directions were given which made it clear that all evidence the parties intend to rely upon should be provided within a specified period. The appellant provided a bundle which did not include evidence of the type the Judge referred too or an explanation of the absence of that evidence. The above cases make it clear that the burden of proving the case is upon the appellant and the Judge was required to consider the merits of the case on the basis of the material provided. The appellant had ample opportunity to produce the evidence he wished to rely upon yet chose not to do so in this respect. The reasons for refusal letter put the appellant to proof of his claim, which was not accepted, yet he appears not to have taken the chance to present the case fully for which there is no plausible explanation.

10. The grounds seem to have focused on the phrase "eyewitness account" but it is clear from a reading of the determination that this is not all the Judge was seeking, he was commenting in general upon the lack of relevant evidence. Mr Ficklin accepted it would have been possible to get the evidence and that in fact the appellant has now done so, without explaining why it was not available on an earlier occasion. However this evidence was not before the Judge and so it cannot be a material error for him not to have considered it.

11. I do not accept that it has been proved Judge Kelly applied too high a standard of proof when reading the determination as a whole. The Judge did consider the evidence with the degree of care required in an appeal of this nature, that of anxious scrutiny, and gave adequate reasons for findings made.

12. In relation to the submission that there was a responsibility upon the respondent to test the evidence, and that the Judge has discretion in this respect, this is not accepted and I find has no merit. Mr Ficklin was asked whether he was referring to the case Singh in which it was held that evidence that could easily have been obtained by the respondent by a simple enquiry of an UNHCR office in Europe should have been obtained by her. He confirmed he was not saying that the respondent should contact the Attorney in this case in Sri Lanka and accepted that the burden was on the appellant. I find there is no burden on the Secretary of State to gather evidence to prove the appellant's case. It is outside any

obligation that this Tribunal or the law places upon her and I find the attempt to argue that such a burden is separate from her duty to check the evidence is an attempt to merge the two issues, which has no arguable merit. The burden is upon the appellant to provide such evidence as is required to prove the case. If the Secretary of State wishes to check such evidence that is a matter for her, but if she chooses not to this does not reduce the burden upon the appellant. I find no arguable error in this ground or that relating to the challenge of the Judge's treatment of the evidence from the Attorney in Sri Lanka.

13. Mr Ficklin summarised his grounds of challenge as containing three distinct elements being (i) that the Judge applied too high a standard of proof. I find this is not substantiated on the evidence and has no arguable merit. (ii) That the Judge applied inappropriate weight to the evidence. I find no arguable merit in this ground as weight is a matter for the Judge provided it is shown he considered the evidence with the degree of care required in an appeal of this nature and gave adequate reasons for findings made, which he did – see SS (Sri Lanka) [2012] EWCA Civ 155. (iii) The requirement of corroboration. I find no arguable merit in this ground for the reasons set out above.

14. During the course of my deliberations I have reviewed the evidence and submissions made and would find that in light of the current country guidance case of GJ and others [2013] UKUT 00319 the evidence made available to the Judge does not support a claim that the appellant's profile fits within the class of those deemed to be at risk on return to Sri Lanka in any event.

Decision

15. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

16. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order as there was no application made or evidence provided to warrant the same.

Signed…….
Upper Tribunal Judge Hanson

Dated the 20th September 2013