Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02388/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 2nd December 2013	**On 2nd June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR PRATHEES THARMALINHAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Lewis (Counsel)
For the Respondent: Mr G Jack (Senior Home Office Presenting Officer)

REASONS FOR FINDING THAT THE DECISION OF THE FIRST-TIER TRIBUNAL CONTAINS AN ERROR OF LAW SUCH THAT IT FALLS TO BE SET ASIDE

1. The appellant's appeal against a decision to remove him from the United Kingdom was dismissed by First-tier Tribunal Judge Lucas ("the judge") in a determination promulgated on 11th September 2013. The appellant is a citizen of Sri Lanka who claimed to be at risk on return as a person of adverse interest to the authorities of that country.

2. The judge heard evidence from the appellant and from the appellant's partner. It was claimed that the couple were living together in a durable relationship. The appellant's partner is an EEA national working in the United Kingdom.

3. The judge found the appellant's core claims regarding ill-treatment in Sri Lanka were without any foundation. He would not be at risk on return. So far as the relationship with his partner was concerned, the judge gave no weight to the claims that a marriage was intended and that the appellant could rely upon the 2006 Regulations or Article 8 of the Human Rights Convention, as an "extended family member". The judge did not accept the core claim in this context that the appellant was in a durable relationship and went on to find that the appellant's removal to Sri Lanka would be a proportionate response.

4. In the grounds in support of the application for permission to appeal, it was contended that the judge erred in several respects. First, in failing to address the explanation given by the appellant regarding his failure to claim asylum at an early opportunity. Second, in finding that the appellant's ability to leave Sri Lanka in the manner claimed showed that he was not a person of adverse interest. The judge failed to have regard to country evidence and to the guidance given in GJ (Sri Lanka), regarding a person being able to leave the airport at Colombo without difficulty, notwithstanding a serious interest in him on the part of the authorities. Third, in failing to explain his conclusion that the presence of scarring on the appellant's back and documents corroborating his claims when arrested by the United Kingdom authorities were consistent with someone prepared to lodge an unfounded claim.

5. It was also contended that the judge erred in his approach to the evidence. Having found that the appellant's account of detention by reason of his activities for the LTTE fell to be disbelieved, he went on to find that "it follows" that no weight could be placed upon the documents relied upon. This approach was flawed. The judge was required to assess all the evidence in the round and failed to do so. The Secretary of State had claimed that the documents were not genuine without producing supporting evidence and the First-tier Tribunal Judge simply adopted that finding.

6. In a further ground, it was contended that the judge's risk assessment was flawed. Notwithstanding rejection of the appellant's account, it remained the case that he was a Tamil, present in the United Kingdom for four years, with scarring on his back. The judge was required to assess risk on this basis but failed to do so.

7. Finally, it was contended that the judge also erred in his assessment of the relationship between the appellant and his French partner. The judge noted that he only had evidence of co-habitation since May 2013, in the

form of a tenancy agreement and that there was no evidence showing a durable relationship. This overlooked the core evidence of the appellant's partner. At the very least, findings were required on that evidence. Further, the judge's comment at paragraph 71 of the determination that the proposition that the relationship between them should prevent removal "is simply not credible" was inappropriate and incorrect. If a durable relationship were shown, it would be for the Secretary of State to consider the exercise of discretion regarding whether or not to issue a residence card. The judge appeared to accept (at paragraph 72) that there was a relationship "of some sort".

8. Permission to appeal was granted on 2nd October 2013. The judge granting permission considered that it was arguable that the judge failed to deal with the oral evidence given by the appellant's EEA national partner, regarding the relationship. The determination showed that she attended the hearing and gave evidence but it was not clear what weight, if any, the judge gave to her evidence. Although the other grounds appeared to have less merit, they too were arguable and permission was granted on all grounds.

9. In a brief rule 24 response made on 31st October 2013, the Secretary of State informed the Upper Tribunal that the respondent would submit that the judge directed himself appropriately and considered the appellant's Article 8 and EEA rights, in the light of the relationship with his partner. He considered these matters at paragraphs 69 to 71 of the determination.

Submissions on Error of Law

10. Mr Lewis adopted the written grounds. Dealing first with the appellant's relationship with an EEA national, oral evidence was given by both the appellant and his partner. She provided a statement which included a claim that they were living together. This did not appear to have been challenged by the Secretary of State. This undermined the conclusion reached by the judge at paragraph 71. Moreover, the judge appeared to give weight to the fact that the relationship was entered into in the knowledge that the appellant's visa expired in 2011.

11. The judge found that there was no other evidence of co-habitation but that overlooked the oral evidence given by the two witnesses. The judge was obliged to engage with the evidence and manifestly did not do so. This amounted to a material error.

12. The approach to the asylum claim and removal decision was also flawed. In rejecting the appellant's account, the judge relied in part upon the appellant's exit from Sri Lanka, without difficulty, with a valid student visa. This point had been conceded by the Secretary of State in GJ. The judge's emphasis in the present appeal on the absence of difficulty in exiting Sri Lanka had no regard to GJ although the judge did mention the case (recorded as "CJ") in paragraph 52 of the determination). So far as delay

in claiming asylum was concerned, the appellant worried that he would be returned if he made his claim. He remained here and assumed that he would be safe. He hoped that things would evolve.

13. The appellant had scarring and although the medical report before the Tribunal, from Sri Lanka, did not go into much detail, it was insufficient for the judge to make the brief adverse finding in paragraph 60.

14. Overall, the judge's reliance on exit through the airport, as undermining the reliability of the arrest warrant in the appellant's name, rendered the decision unsafe. In this context, the appellant obtained his passport and visa before he came to the attention of the authorities.

15. The Court of Appeal had now given judgment in GJ. The appellant was an individual from London and this factor fell to be taken into account in the assessment of risk, should an error of law be found.

16. Mr Jack said that the judge did not materially err. So far as the EEA aspect was concerned, the Secretary of State's decision letter included a finding that she was not satisfied that there was a durable relationship (paragraph 54 of her letter). It was on that basis that the judge dealt with the case. He referred to the tenancy agreement produced by the appellant, at paragraph 29, and recorded the partner's evidence, at paragraph 41. She had provided a letter (page C7 in the respondent's bundle) which was very brief. There was no detailed witness statement. Although the judge did not set down the evidence given by the partner, he did note, at paragraph 48, that her evidence was dealt with by the appellant's counsel, in submissions. The judge found that the appellant was an economic migrant. He summarised the EEA case at paragraph 69 of the determination and then made his Article 8 assessment in paragraph 70. The conclusion reached, that the evidence did not show a durable relationship, was open to the judge. There was limited evidence before the Tribunal.

17. So far as the asylum aspect was concerned, the judge properly looked at the documentary evidence in the round. The guidance given in Tanveer Ahmed was properly applied. Mr Jack handed up a copy of the Upper Tribunal decision in MJ [2013] UKUT 00253. The judge had looked at the documents in the round. There were extensive findings in relation to the appellant's credibility. At paragraph 33, the judge noted that the appellant accepted that he gave a false identity and date of birth when arrested in the United Kingdom. Although he was in possession of a student visa, he did not study here. There was a lack of supporting evidence and discrepancies in the appellant's account. When asked questions about the arrest warrant, he stated that he did not know how his mother acquired it. There was little to guide the Tribunal in relation to the weight to be given to this item and the judge did not materially err in approaching the evidence as he did. At paragraphs 56 to 61, the judge

made his assessment and concluded that the appellant was not a person of adverse interest. He found the appellant not to be a witness of truth.

18. Mr Jack submitted that the judge's findings regarding exit from Sri Lanka had to be read in the light of the rest of the findings. Again, the judge did not materially err.

19. In a brief response, Mr Lewis submitted that so far as the relationship with the EEA national partner was concerned, there was no "primary purpose" rule. Their evidence suggested a durable relationship and was not challenged by the Secretary of State. The judge had made an obvious error in failing to take into account this evidence and give weight to it. So far as exit from Sri Lanka was concerned, the judge repeatedly relied on the appellant's ability to leave without difficulty, in order to discount the documents which corroborated his case. The general findings on credibility were relied upon to undermine the reliability of the documents. This too was a clear error. The appellant did not exaggerate his claimed role with the LTTE. He had no detailed knowledge but the account he gave in his evidence was consistent with the limited role he claimed.

Conclusion on Error of Law

20. I deal first with the appellant's claim that he and his EEA national partner were in a durable relationship which had lasted for over a year and eight months by the time of the hearing. At paragraph 41 of the determination, the judge noted that the appellant's partner attended and gave evidence. He recorded that her evidence included an awareness of the appellant's immigration status. He went on to note that "nothing further" emerged in cross-examination. At paragraph 48, he summarised submissions made by the appellant's counsel, in which the relationship itself featured. Reading those two paragraphs together, the obvious inference is that although he did not refer to it expressly, the oral evidence from the partner included an assertion that the relationship was indeed durable.

21. The judge's assessment of this part of the case appears at paragraphs 69 to 72. Having found that the asylum claim had no foundation, he went on to conclude that the appellant had no basis at all to be in the United Kingdom between 2009 and 2013. He continued:

> "This is the context in which any application under EEA law or indeed under Article 8 of ECHR must be considered."

With great respect to the judge, this is simply not so. As Mr Lewis submitted, the clear basis of the appellant's claim under the 2006 Regulations was the simple existence of the durable relationship with his partner. Even if his asylum claim had no foundation and notwithstanding the fact that the relationship appears to have been established after expiry of the appellant's student visa, the evidence still fell to be weighed in this context.

22. At paragraph 71 of the determination, the judge noted the appellant's own evidence, which included a claim that he met his partner in a nightclub, and observed that any relationship was in the full knowledge of the expiry of the visa. He took into account, properly, the tenancy agreement and went on to find that there was "no other evidence of co-habitation" and "certainly … no evidence" showing that the relationship was sufficient to enable the appellant to qualify as an "extended family member".

23. A conclusion that no durable relationship was shown, falling within scope of the 2006 Regulations, could only properly be reached following an assessment of all the evidence. What was missing from the assessment was the partner's oral evidence, although the judge made brief mention of it earlier in the determination. Findings were required in this context and, with respect, the adverse findings made by the judge in relation to the asylum claim and the appellant's immigration history were incapable, in themselves (although they were relevant factors) to undermine the appellant's reliance upon the 2006 Regulations. The judge materially erred in law in this context.

24. So far as the protection claim is concerned, I accept the submission made in the written grounds (and by Mr Lewis) that the judge erred at paragraph 62 in finding that "it follows" that the documents relied upon should be given no weight, in the light of the judge's earlier finding that the appellant was not a person of adverse interest. All the evidence fell to be weighed in the round and the judge's reliance on adverse credibility findings as substantially diminishing the weight to be given to documentary evidence reflects the error identified by the Court of Appeal in Mibanga [2005] EWCA Civ 367 (the court found an error where medical evidence was assessed only after an adjudicator articulated conclusions that the appellant's central claims were not credible).

25. Moreover, in this context, I accept Mr Lewis's submission that the judge clearly gave substantial weight to the appellant's straightforward exit from Sri Lanka. At paragraph 57, for example, he noted the appellant's claim to have been arrested and tortured in 2009 and asked to report to a local police station. There was a warrant for his arrest. He went on to find that it was difficult to see how exit without difficulty would have been possible. Notwithstanding his mention of the relevant country guidance case, I find that the judge erred in giving the weight he did to this factor, in the light of the Secretary of State's concession in GJ [2013] UKUT 00319.

26. The decision of the First-tier Tribunal contains material errors of law and must be set aside and remade.

27. In a brief discussion with the representatives, the appropriate venue for the remaking of the decision was canvassed. As the errors of law concerned the two key features of the case, the claim to be at risk on return to Sri Lanka and the 2006 Regulations, I conclude that the remaking

of the decision should take place in the First-tier Tribunal, at Taylor House, before a judge other than First-tier Tribunal Judge Lucas. I have taken into account the extent of the fact-finding required and paragraph 7 of the Practice Statement issued in 2010. What is required is a complete rehearing and I remit the case to the First-tier Tribunal under section 12(2)(b)(i) of the Tribunal, Courts and Enforcement Act 2007. The only direction required at this stage is that the appeal should be listed for a Case Management hearing at Taylor House. The appeal will be listed for a substantive hearing thereafter, by a judge other than First-tier Tribunal Judge Lucas.

DECISION

The decision of the First-tier Tribunal contains errors of law such that it falls to be set aside. The decision shall be remade in the First-tier Tribunal, at Taylor House, before a judge other than First-tier Tribunal Lucas.

Anonymity

The judge made no anonymity direction and there has been no application in the Upper Tribunal. In these circumstances, I make no direction on this occasion although it remains open to the parties to make an application should they consider it appropriate.

Signed Date

Deputy Upper Tribunal Judge R C Campbell