



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/04888/2014

**THE IMMIGRATION ACTS**

Heard at Bennett House, Stoke-on-Trent  
On 5<sup>th</sup> January 2015

Decision & Reasons Promulgated  
On 7<sup>th</sup> January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE COATES

Between

DULANJ BRIAN WIJEMANNE  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr T Mahmood  
For the Respondent: Miss C Johnstone, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Sri Lanka born on 16<sup>th</sup> June 1992. The Appellant appealed against the Respondent's decision dated 30<sup>th</sup> June 2014 to remove him from the United Kingdom following refusal of his claim for asylum.

2. His appeal was dismissed by Judge of the First-tier Tribunal Pooler in a determination promulgated on 29<sup>th</sup> August 2014.
3. Permission to appeal to the Upper Tribunal was granted by a Designated Judge of the First-tier Tribunal on 15<sup>th</sup> September 2014.
4. The Appellant's immigration history shows that he entered the United Kingdom on 13<sup>th</sup> July 2008 with a visa which allowed him to visit his mother who was then studying in the UK. The Appellant's father claimed asylum on 17<sup>th</sup> October 2008 and the Appellant was one of his dependants. The father's application was refused and an appeal against that refusal was dismissed by Judge Pooler in the First-tier Tribunal on 28<sup>th</sup> February 2010. Permission to appeal was refused and the father's appeal rights were subsequently exhausted.
5. Thereafter the Appellant made his own claim for asylum. His claim was essentially based on the same facts as the claim by his father which had been refused as mentioned above.
6. The Designated Judge who gave permission to appeal on 15<sup>th</sup> September 2014 considered that the issue was one of perception. There was a real risk that Judge Pooler could be seen to be defending his own earlier findings. The issue was not whether the judge would be biased but whether the reasonable bystander would perceive a risk. Although the First Tier judge appeared to have directed himself appropriately it was considered arguable that he reached the wrong decision on the application (to recuse himself and adjourn the appeal) amounting to an error of law.
7. Thus the matter came before me in the Upper Tribunal on 5<sup>th</sup> January 2015. The Appellant was present at the hearing. Representation was as mentioned above.
8. In submissions, Mr Mahmood relied upon the written grounds which he had submitted in support of the application for permission to appeal. In summary, he argued that the First-tier Judge should have granted an adjournment because he had previously heard the appeal of the Appellant's father and dismissed that appeal. Both appeals had the same factual basis, the central reason being that the Appellant could not return to Sri Lanka on account of his perceived support for the LTTE. The grounds also submitted that the reasons given by the First-tier Judge in respect of his findings under Article 8 were inadequate and insufficient. A proper balancing exercise had not been carried out.
9. Mr Mahmood confirmed that the main ground was not that the First-tier Judge was actually biased but there was a risk of a perception of unfairness arising from the fact that he had previously dismissed the appeal by the Appellant's father.
10. This issue was carefully addressed by Judge Pooler beginning at paragraph 10 of his determination. He states –

“Mr Mahmood applied for an adjournment because I was the judge who had heard and dismissed the appeal by the appellant's father in February 2011. The father's claim had the same factual basis as that made more recently by the appellant. Mr Mahmood submitted that an adjournment was required in the interests of justice; that findings which I had made in respect of the father's credibility might 'have some impact' in the present appeal; and that there was 'a question of impartiality'. Mr Mahmood did not submit 'that impartiality would not exist' but

submitted that it would be beneficial if the matter was heard by another judge who had not made findings on the father's claim”.

11. At this point I remind myself that following the dismissal of the Appellant's father's appeal an application for permission to appeal was refused and his appeal rights became exhausted. Therefore, the findings made by Judge Pooler in his determination of the father's appeal remain undisturbed. They should be the starting point for further consideration of the same or similar issues in accordance with the Devaseelan principles.

12. At paragraph 12 of the determination Judge Pooler has explained why he decided to refuse Mr Mahmood's application for an adjournment so that the appeal could be heard by a different judge:

“I declined to adjourn because I had not heard in Mr Mahmood's application any basis on which I could find that a fair-minded and informed observer could conclude that there was a real possibility of bias. In my judgment it was not sufficient that I had heard an appeal by the appellant's father (who was to give evidence in the present appeal) or that I had reached findings in an appeal which had essentially the same factual basis.”

13. Plainly, Judge Pooler had regard to a possible perception of unfairness, as relied upon by Mr Mahmood.

14. Judge Pooler proceeded to give careful consideration to the relevant case law including the guidance given by the Upper Tribunal in TK (Consideration of prior determination – directions) Georgia [2004] UKIAT 00149. Reference was also made to the guidance given by the Court of Appeal in AH and AA [2007] EWCA Civ 1040 and Ocampo v SSHD [2006] EWCA Civ 1276.

15. Judge Pooler then set out in detail the precise findings which he had made in the context of the Appellant's father's appeal. He then states as follows at paragraph 20:

“The appellant in the present appeal has given substantially the same account as was given by his father in 2011, when the appellant had also given evidence; and his father has given broadly similar evidence in the present appeal to that which he gave in his own appeal. I asked Mr Mahmood to identify specifically for me any evidence which was not before the Tribunal in 2011. He directed me to photographs at pages 179 to 181 of the appellant's bundle which showed broken windows in the house of the appellant's maternal grandparents, caused by an attack on the house, and three police reports dated respectively 10 January 2011, 22 August 2011 and 12 October 2011.

Under the Devaseelan guidelines, evidence which could have been before the earlier Tribunal but was not adduced may require to be treated with a degree of circumspection. It appears that the first of these three reports relates to an incident on 16 April 2010; and it appears from my earlier determination at paragraph 11 that I was provided with a translation of a police report made on 16 April 2010 by the appellant's grandmother. Accordingly this evidence had previously been considered.”

16. Judge Pooler has correctly taken his earlier findings as the appropriate starting point for his consideration. This is confirmed at paragraph 27. Clear and cogent reasons have been given in support of the judge's conclusion that he was not satisfied to the lower standard of proof that the Appellant would be at real risk from the authorities in Sri Lanka.

17. The judge proceeded to deal with the Appellant's private and family life claim under Article 8. The determination records that it was not the Appellant's pleaded case that he met the requirements of the Rules relating to private life. At the date of the appeal hearing he was aged 22, had been in the United Kingdom for a little over six years and had retained ties with Sri Lanka having been educated there to the age of 16 and having relatives still living in Sri Lanka. The judge concluded that no arguably good case was advanced for a grant of leave outside the Immigration Rules and it was noted that Mr Mahmood did not advance the Appellant's case on that basis.
18. I am satisfied that this determination discloses no error of law. Judge Pooler was obviously alert to the possibility of a perception of unfairness or bias because this was raised by Mr Mahmood as a preliminary issue. Judge Pooler's analysis of the situation is, in my estimation, scrupulously fair and procedurally correct. I am not satisfied that there is any basis on which a fair-minded and informed observer could conclude that there was any real possibility of bias leading to unfairness arising from the manner in which the hearing was conducted.
19. So far as the appeal under Article 8 is concerned, this was not seriously pursued by Mr Mahmood at the hearing before me. In any event, I am satisfied that Judge Pooler dealt fully and fairly with the Appellant's appeal under Article 8 at paragraph 34 onwards.
20. Miss Johnstone's submission on behalf of the Respondent was brief. She relied upon a Rule 24 response dated 25<sup>th</sup> September 2014 and upon the recent guidance given by the Upper Tribunal in MM (Unfairness; E and R) Sudan [2014] UKUT 00105 (IAC). The head note to that decision states that where there is a defect or impropriety of the procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-tier Tribunal to be set aside. For the reasons which I have already given, I am satisfied that there was no such defect or impropriety in the proceedings at first instance.

### **NOTICE OF DECISION**

I uphold the First-tier Tribunal's determination and dismiss the appeal.

No anonymity direction is made.

Signed

Date 6<sup>th</sup> January 2015

Deputy Upper Tribunal Judge Coates

**TO THE RESPONDENT**  
**FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed

Date 6<sup>th</sup> January 2015

Deputy Upper Tribunal Judge Coates