



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/07034/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25th August 2015**

**Decision & Reasons Promulgated
On 8th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

**RM
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss. A Nizami; Instructed by Lawland Solicitors
For the Respondent: Mr. D Clarke; Senior Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Burns promulgated on 29th April 2015, in which she dismissed an appeal against a decision made by the Secretary of State to refuse an application for asylum.
2. The appellant is a citizen of Sri Lanka, born on 19th February 1979. He arrived in the UK on 17th December 2008 with valid entry clearance as a student. He claimed asylum on 16th April 2014 after his visa had expired, and following his arrest on suspicion of fraud on 15th April 2014.

3. The respondent refused the appellant's asylum claim on 28th August 2014 for the reasons that are set out in the 'Detailed Reasons for Refusal' that are attached to a letter of the same date.
4. The appeal to the First-tier Tribunal was heard on 14th April 2015.
5. The appellant appeals with permission, against the decision of the First-tier Tribunal (hereinafter "*the Tribunal*"), which dismissed his appeal against the decision of the respondent, dated 28th August 2014. Permission to appeal was granted by Designated First-tier Tribunal Judge MacDonald on 22nd May 2015, and in doing so he noted;

"The grounds of application contend that there was a fundamental procedural failing by the judge in that the appeal was dismissed on matters not put to the appellant in evidence. [2]

As the grounds point out the judge found that the appellant had not provided an adequate explanation for the delay in providing a copy of the deed but the issue of the delay was not raised by either the judge or the presenting officer in the hearing. Other similar points were made. [3]

The grounds of application do not make clear whether the points taken against the appellant by the judge were points made by the Secretary of State in the reasons for refusal letter as points taken there, would not necessarily have to be put to the appellant at the hearing. However it seems to me that the points taken may not be contained in the refusal letter. As such the grounds do present a case of possible procedural unfairness and permission to appeal is therefore granted. [4]
6. A written response was submitted on behalf of the respondent under the Tribunal Procedure (Upper Tribunal) Rules 2008. The respondent opposes the appellant's appeal and in summary the respondent contends that the Tribunal directed itself appropriately to the evidence, and that the decision letter issued by the respondent on 28th August 2014, raised the concerns that the judge found lacked explanation, by the appellant.
7. The matter comes before me to consider whether or not the decision of the Tribunal involved the making of a material error of law.
8. The appellant contends that the decision of the Tribunal is vitiated by a procedural irregularity that is capable of making a material difference to the outcome, or the fairness of the proceedings. Broadly stated, the appellant submits that the Tribunal reached a number of crucial conclusions that were not put to the appellant by the First-tier Tribunal Judge or the presenting officer during the hearing and furthermore, they had not been raised by the respondent in the refusal letter. The appellant submits that he therefore had no opportunity to respond to the matters that were of concern to the First-tier Tribunal Judge and there was thus a procedural irregularity, or impropriety that constitutes an error of law.

Background

9. A brief summary of the basis of the appellant's claim for asylum is to be found at [13] to [20] of the decision of the Tribunal. Before I turn to the findings made by the Tribunal and the matters set out in the grounds of appeal, it is appropriate to set out what was said by the respondent in the detailed reasons for refusal (Annex A) that accompanied the respondent's asylum decision dated 28th August 2014.
10. A summary of the appellant's claim and his fear upon return together with a chronology of his immigration history is set out at paragraphs [1] to [12] of Annex A. The respondent accepted the identity and nationality of the appellant and then went on to consider the material facts of his claim in the following way;

"Consideration of the Material Facts of your claim"

21. The material facts of your claim have been examined and either rejected, accepted or they remain unsubstantiated. If any aspects of your claim are left in doubt these have been considered in conjunction with Section 8 of the 2004 Treatment of claimants Act, 339L and 339N of the immigration rules.
22. The material facts of your claim are considered to be:
- You owned an annex in Sri Lanka which was raided causing an arrest warrant to be issued;
 - Your father was arrested in Sri Lanka.

Not accepted - you owned an annex in Sri Lanka which was raided causing an arrest warrant to be issued.

23. It is not accepted that you owned an annex in Sri Lanka which was raided causing an arrest warrant to be issued.
24. Firstly, it is considered concerning that you have been unable to submit any documents to support your claim that you owned an annex in Sri Lanka (AIR Q55). This is concerning because during your substantive asylum interview you specifically state that you asked your mother to send your documents (AIR Q55). It is concerning that 2 months has passed since your interview and no documents have been submitted. Your inability to provide the documents which you claim have been requested has damaged the credibility of your claim that you owned an annex in Sri Lanka.
25. In addition, it is noted that your problems began when you let your annex to a Tamil friend (AIR Q40). You state that you have known this friend since 2001 and you describe him as 'a very close friend of mine' (AIR Q42). You described him as family to you, especially because his father, mother and younger brother also lived in the annex (AIR Q43). You said that your friend could have the annex and then he could look after your parents when you travelled to the UK (AIR Q46). Your account that you are close friends with a Tamil is inconsistent with the objective material below:

...

26. It is not considered credible that your family will treat your Tamil friend as family, especially as you state that prior to living in your annex your friend was living in Colombo for more than 10 years (AIR Q96)- Therefore it is not credible that your parents would accept your friend living in the annex without any issues. Your inability to provide a credible account has damaged the credibility of your claim that you owned an annex in Sri Lanka which was raided causing an arrest warrant to be issued.
27. Finally, you state that your mother hired a solicitor to find out whether you have an arrest warrant for you in Sri Lanka, you specifically claim that your solicitor found that there is an arrest warrant for you in Sri Lanka because they believe that as the owner of the property you would have been aware of what was happening in your property (AIR Q84). It is considered concerning that despite knowing that there is an arrest warrant for you, you specifically stated in your screening interview that there are no arrest warrants for you (SCR 5.2). It is reasonable to have expected you to be able to provide a coherent account regarding whether there has been an arrest warrant against you, your inability to provide a consistent account has damaged the credibility of your account that your house was raided and now there is an arrest warrant against you in Sri Lanka.
28. Therefore in light of the above considerations your claim that you owned an annex in Sri Lanka which was raided causing an arrest warrant to be issued has not been accepted.

Not accepted - your father was arrested in Sri Lanka

29. It is not accepted that your father was arrested in Sri Lanka.
30. Firstly, you specifically state that when the annex was raided your mother was not arrested because they knew that she was not involved with the LTTE (AIR Q81). When you were asked to explain why your father was arrested, if the authorities did not think your mother was involved, you stated that they take the male first (AIR Q86). The authorities would think that you would come forward if your father was detained (AIR Q86). However it is not considered credible that your mother would be able to avoid detention, especially after your father had passed away and you had still not handed yourself in to the authorities. When you were asked to explain how your mother was able to avoid detention you stated that they arrested your father because they needed information but they have this now (AIR Q121). However, this is inconsistent with your claim that you are of interest to the authorities. It is not credible that your father would be arrested in the hope that this would make you return to Sri Lanka yet your mother would not be arrested. Your inability to provide a credible account has damaged the credibility of your claim that your father was arrested in Sri Lanka.
31. In addition, you state that when your father was arrested the authorities told your mother that he was going to be taken to the police station and then handed to the CID (AIR Q88). Your mother was able to visit him 2-3 times in detention (AIR Q97). This is inconsistent with the objective material below which states that families are often not informed. Your inability to provide a consistent account has damaged the credibility of your claim that your father was arrested in Sri Lanka.

...

32. Furthermore, you state that when your father was detained he became very sick and he was admitted into hospital (AIR Q98). This is inconsistent with the objective material below.

...

33. It is not considered credible that your father would be detained and tortured by the authorities and then taken to the hospital when he became sick. Your inability to provide a credible account which is consistent with the objective material has damaged the credibility of your claim that your father was arrested in Sri Lanka.

34. Therefore in light of the above considerations your claim that your father was arrested in Sri Lanka has not been accepted.

....

Conclusions

40. As noted above the following material aspects of your claim have been accepted:

- Your nationality and identity.

41. The following aspects of your claim have been rejected:

- You owned an annex in Sri Lanka which was raided causing an arrest warrant to be issued;
- Your father was arrested in Sri Lanka.

...

11. From any proper reading of the detailed reasons for refusal, it is plain that the respondent challenged the credibility of the appellant, and rejected the two core elements of his claim. That is, (i) the appellant owned an annex in Sri Lanka which was raided causing an arrest warrant to be issued; and (ii) the appellant's father was arrested in Sri Lanka.

12. Although not before the respondent as the date of her decision, the appellant did provide a number of documents in support of his claim at the hearing of his appeal. The evidence before the Tribunal is listed at paragraph [7] of its decision. The material documents relied upon by the appellant included a death certificate said to be the death certificate of the appellant's father, the Deeds to the Annexe, and an arrest warrant and summons. The Tribunal was invited by the respondent to consider the documents in light of the decision of the Upper Tribunal in **Tanveer Ahmed [2002] UKIAT 00438**. [25]

13. Insofar as the death certificate is concerned, the Tribunal accepted that it is proof that the Appellant's father died in hospital on 21st December 2012. However, First-tier Tribunal Judge Burns found that it is not proof, to the lower standard, that Mr Siripala died as a result of torture; [29]. As to remaining documents, First-tier Tribunal Judge Burns found that the Deeds to the Annexe, arrest warrant and summons, were not documents upon which reliance should be placed. [30] to [39].

14. The decision of the Tribunal was to the effect that the appellant's account was not credible and the Tribunal did not consider the appellant has a well-founded fear of persecution if he is returned to Sri Lanka. The appellant's humanitarian protection, and ECHR claims were not made out.

The Upper Tribunal Hearing

15. The appellant attended the hearing and was represented by Miss Nizami of Counsel. I first heard submissions from Miss Nizami and then heard submissions from Mr Clarke. Mr Clarke submitted that there is no error of law in the decision of the Tribunal.
16. Attached to the appellant's grounds of appeal, there are Counsels notes of the hearing before the Tribunal. The notes record the questions asked of the appellant, and the answers that he gave. The notes were provided by Miss Nizami to establish that the appellant was not asked about the matters that lead to the findings made by the Tribunal. I have carefully read those notes.

The Grounds of Appeal

17. I then turn to the grounds of appeal. The appellant alleges procedural irregularity and or impropriety such as to constitute an error of law as identified in **R(Iran) [2005] EWCA Civ 982**. Miss Nizami submits that the Tribunal reached a number of crucial conclusions that were not put to the appellant by First-tier Tribunal Judge Burns or the Presenting Officer during the hearing of the appeal, and furthermore they had not been raised in the respondent's refusal letter. It is submitted that the appellant therefore had no opportunity to respond to the matters that were of concern to First-tier Tribunal Judge Burns.
18. It was not in issue between the parties that procedural fairness can constitute an error of law. In **MM -v- SSHD [2014] UKUT 00105**, the Upper Tribunal, comprising of a panel presided over by the President, Mr Justice McCloskey confirmed that where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of First-tier to be set aside.
19. Miss Nizami makes five particular criticisms as to the findings set out in the decision of the Tribunal. The criticisms all concern a procedural irregularity. In each case the appellant submits that he was not given opportunity to answer concerns set out in the decision of the Tribunal, because they were neither put to the appellant at the hearing of the appeal, nor referred to by the respondent in her initial decision. As the first three criticisms also concern the Tribunal's assessment of the documentary evidence relied upon by the appellant, those matters can be taken together.
20. First, Miss Nizami submits that the Tribunal finds that the appellant has not provided an adequate explanation for the delay in providing a copy of

the deed [32] but the issue of the delay was not raised by either First-tier Tribunal Judge Burns or the Presenting Officer at the hearing. She submits that the appellant therefore had no opportunity to address the Judge's concerns about the delay in providing the document which are set out in paragraphs [31] and [32] of the determination.

21. Second, Miss Nizami submits that concerns that First-tier Tribunal Judge Burns raises about the arrest warrant and the arrest summons set out at paragraphs [35] to [38] of his decision, were not raised during the hearing. Again, she submits that the appellant was not given an opportunity to answer the concerns about how the appellant's solicitor managed to obtain a copy of the appellant's arrest warrant.
22. Miss Nizami's third criticism was that First-tier Tribunal Judge Burns finds at paragraph [37] that "I am not provided with an explanation as to the delay in *the arrest warrant* being sent to the appellant", when the appellant was not asked to provide an explanation for the delay.
23. In **Tanveer Ahmed -v- SSHD [2002] UKIAT 00439**, the Upper Tribunal held that in asylum and human rights cases, it is for an individual applicant to show that a document on which he seeks to rely, can be relied on. The decision-maker should consider whether the document is one on which reliance should properly be placed after looking at all the evidence as a whole.
24. It is clear from the extracts from the detailed reasons for refusal (Annex A) that accompanied the respondent's asylum decision dated 28th August 2014 that I have set out at paragraph 10 of this decision, that the respondent rejected the appellant's account that he owned an annex in Sri Lanka which was raided causing an arrest warrant to be issued and that his father was arrested in Sri Lanka. The reasons given by the respondent for rejecting those aspects of the appellant's account are set out in paragraphs [23] to [33] of the decision letter.
25. The respondent considered the appellant's inability to provide the documents which he had claimed to have been requested from his mother, damaged the credibility of his claim that he owned an annex in Sri Lanka. At the hearing before me, Miss Nazami sensibly accepted that the appellant was aware prior to the hearing of his appeal that the delay in providing the documents would require explanation. The only explanation for that delay put forward by the appellant is set out at paragraph 9 of his witness statement. In her decision, First-tier Tribunal Judge Burns states;

"I am concerned by this delay. This is explained by the appellant at paragraph 9 in his statement that there had been a delay on the part of a lawyer in Sri Lanka. The appellant does not elaborate. It is apparent from the face of the deed that it is dated on 27th June 2000 so the appellant cannot be referring to a delay in the deed being executed. The deed is written in English and thus did not require translation. [31]"

The appellant has not provided an adequate explanation as to the delay in providing a copy of the deed, particularly because his evidence at interview

was that the deed was in his mother’s possession prior to leaving for the UK. I cannot conclude that I have been given any reasonable explanation for the delay in the provision of this document. Assessing the evidence in the round with regard to the deed for the Annex I am not satisfied that this is a document on which reliance should be placed. [32]”

26. Put simply, the appellant was aware that there was a concern about the delay in providing a copy of the deed from the outset. He put forward the simplest of explanations, without any elaboration. The Tribunal considered that explanation but it was found to be lacking. It was properly open to First-tier Tribunal Judge Burns to find that she was not satisfied that this is a document on which reliance should be placed. There was no procedural irregularity or impropriety giving rise to any unfairness in reaching that decision.
27. It is equally clear from the extracts from the detailed reasons for refusal (Annex A) that accompanied the respondent’s asylum decision, that the respondent was concerned as to whether there was an arrest warrant for the appellant. The respondent noted that despite knowing that there was an arrest warrant for him, the appellant specifically stated in his screening interview that there was no arrest warrant for him. The respondent considered it reasonable to expect the applicant to be able to provide a coherent account regarding whether there has been an arrest warrant issued against the appellant, and that his inability to provide a consistent account damaged the credibility of his account that there is an arrest warrant against him in Sri Lanka.
28. The appellant had provided an inconsistent account of whether or not there was an arrest warrant for him. During the screening interview completed on 16th April 2014, he was specifically asked “Are you subject to an arrest warrant or wanted by any law enforcement authority for an offence in any country?. He answered “No”; (Q.5.2). During the asylum interview completed on 25th June 2014, the following is recorded;
- Q. 82 so was an arrest warrant given for you?
- A. my mother said she presumed there was an arrest warrant out for me. So I told her to contact a solicitor to find out.
- Q.83 Which Solicitor?
- A. Nihal Fernando Liyanage
- Q.84 did the Solicitor find out if there was an arrest warrant?
- A. Yes
- Q.85 do you have documentary evidence of this arrest warrant
- A. No but I have asked my mother to send all documents to me
29. Miss Nizami submitted that none of the concerns that are set out in paragraphs [35] to [38] of the Tribunal’s decision were ventilated during the hearing of the appeal. She submitted that unless the appellant has had

an opportunity to put his case, it may not be easy to know what case he could or would have put forward, if he had the chance.

30. Mr Clarke on behalf of the respondent submitted that the Tribunal clearly considered the documents and the letter from the Sri Lankan lawyer against the background material and it was open to the Tribunal to find that the warrant of arrest and summons are documents upon which reliance could not be placed. Mr Clarke, conceded that the delay in providing the arrest warrant and summons had not been previously raised by the respondent in her decision letter.

31. Criticism is made that First-tier Tribunal Judge Burns states at paragraph [37] that he was not provided with an explanation for the delay in the arrest warrant being sent to the appellant. It is of course unsurprising that the arrest warrant and summons is not referred to in the respondent's detailed reasons for refusal. The documents were sent to the appellant on 18th of October 2014, almost two months after the respondent's decision. To put matters into context, paragraph [37] of the decision of the Tribunal must be read as a whole. The Tribunal stated;

"Of greater concern are the delays in the appellant obtaining and disclosing these documents. The appellant says at paragraph 13 of his statement (page 4) that he asked his mother subsequent to his asylum interview to enquire whether there was an arrest warrant. However in his asylum interview in response to question 82 he says that he had already asked his mother to contact a solicitor to find out about whether there was an arrest warrant. At paragraph 13 of his statement he says that she found out that there was an arrest warrant "after a few days". If I accept the appellant's evidence given at question 82 that his mother had already been asked to enquire about the arrest warrant before 25th June 2014 and that she found out about it a "few days after" and it is said to be dated 28 August 2012, I am not provided with an explanation as to the delay in this being sent to the appellant (18th October 2014 page 33A). The importance of providing this document as quickly as possible was clear to the appellant who in response to question one of his interview had said that he was getting documents from his mother. The respondent had requested that the documents be submitted within 10 days at the interview on 25 June 2014.

32. It was for the appellant to show that the documents upon which he sought to rely, could be relied on. Whilst the specific concerns that are set out at paragraphs [35] to [38] may not have been put to the appellant, either by First-tier Judge Burns, or by the Presenting Officer in cross-examination, procedural fairness does not require a Judge to put to an appellant, the concerns that the Tribunal has, as to the evidence before it. The appellant was aware from the matters at set out in the reasons for refusal (Annex A) that accompanied the respondent's asylum decision, that there was an issue as to whether or not an arrest warrant had been issued. The Tribunal was obliged to consider whether the documents were ones on which reliance should properly be placed, after looking at all the evidence as a whole and did so, after carefully considering all of the evidence before it. The Tribunal carefully considered the documents relied upon by the appellant against the background material and was plainly

entitled to find that it was not satisfied that the warrant of arrest and summons are documents upon which reliance should be placed. There was no procedural irregularity or impropriety giving rise to any unfairness.

33. The fourth criticism that Miss Nizami makes of the decision of the Tribunal is that at paragraph [41], the Tribunal finds that the “the Appellant does not explain why his parents needed looking after at all. He does not explain why his parents did not need looking after when he first left Sri Lanka but did 12 months thereafter”. She submits that the appellant was not asked for an explanation during the hearing. In the grounds of appeal this extract from the decision of the Tribunal is described as a finding. The sentences relied upon by the appellant are not findings, but concerns that the Tribunal had as to the evidence before it, and form part of the reasoning of the Tribunal. However a careful reading of paragraphs [41] to [43] of the decision make it plain that First-tier Tribunal Judge Burns carefully considered the appellant’s evidence that he was the owner of an annex and the relationship between the appellant and his friend, Karthink. Having considered all of the evidence, the Tribunal found, at paragraph [43] that the evidence that the appellant gave that he rented the annex to Karthik so he could look after his parents is not plausible. Such a finding might be set aside as an error of law on the grounds of perversity, if it is irrational or unreasonable in the *Wednesbury* sense, or one that is wholly unsupported by the evidence. The Tribunal’s finding at [43] was one that was open to it. No part of the reasoning has been undermined in this appeal.
34. Finally, Miss Nizami submitted that it was procedurally unfair for the Appellant not to be given the opportunity to explain why he had not claimed asylum when he spoke to his solicitors in December 2013. The appellant’s claim is misconceived. It is apparent from paragraphs [35] to [39], of the detailed reasons for refusal (Annex A) that accompanied the respondent’s asylum decision dated 28th August 2014 that the respondent considered that the appellant’s failure to make an asylum and human rights claim before being arrested, damaged his credibility under **s8(6) Asylum and Immigration (Treatment of Claimant’s, etc) Act 2004**. At paragraphs [46] to [49] of its decision, the Tribunal considered the delay in claiming asylum, and in the absence of any explanation for the delay in making an asylum claim, it was open to the Tribunal to find, as it did, that the appellant has not made his claim at the earliest possible time and has not demonstrated good reason for not having done so.

Decision:

35. A careful reading of the determination fairly and as a whole makes it plain that the findings reached by the tribunal were properly open to it, on the evidence before it. The findings reached are not vitiated by any procedural unfairness or procedural irregularity. In considering whether any reliance can be placed upon the documents relied upon by the appellant, the Tribunal properly directed itself as to the law and reached findings that were properly open to it.

36. The making of the decision of the First-tier Tribunal did not involve the making of an error of law affecting the outcome of the decision.
37. The appellant's appeal to the Upper Tribunal is dismissed. The determination of the First-tier Tribunal, dismissing his appeal on all grounds, shall stand.
38. The First-tier Tribunal made an anonymity direction and that direction shall continue to stand.

Signed:

Date:

Deputy Upper Tribunal Judge Mandalia