



IAC-HW-AM-V1

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

Appeal Number: AA/07864/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 1st September 2015**

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

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**PP
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms B Jones, Counsel instructed on behalf of Sriharans Solicitors

For the Respondent: Mr S Whitwell, Senior Presenting Officer

DECISION AND REASONS

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure
(Upper Tribunal) Rules 2008**

1. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies

both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

2. The First-tier Tribunal had made an anonymity direction and neither party sought for this to be discharged therefore I make the anonymity direction as above.
3. The Appellant seeks permission to appeal against the decision of the First-tier Tribunal (Judge Aujla) who, in a determination promulgated on 2nd June 2015 dismissed his appeal against the decision of the Respondent made on 24th September 2014 to refuse his claim for asylum/humanitarian protection or on human rights grounds and to issue a decision to remove.
4. The immigration history of the Appellant can be shortly stated. He entered the United Kingdom on 5th September 2012 on his passport and in possession of a visit visa issued in Oman valid from 7th July 2012 until 7th January 2013. The Appellant is a citizen of Sri Lanka. He had claimed asylum by attending at the Home Office on 25th September 2012.
5. The Secretary of State refused his claim for asylum for the reasons set out in the refusal letter dated 18th September 2014. As a result, the Appellant sought to appeal that decision and the matter came before the First-tier Tribunal (Judge Aujla) on 19th May 2015. It is right to observe that prior to the hearing there had been a further hearing before the First-tier Tribunal which had been adjourned for the reasons set out at paragraphs [11]-[16] of the determination; a matter I will return to in due course.
6. The basis of the Appellant's claim was set out by the Judge at paragraphs [22]-[24] and related to events that had occurred previously in Sri Lanka relating to his family members including his brother and his father both of whom were refugees having been granted refugee status in the United Kingdom respectively in 2009. The Appellant had lived in Oman but after returning to Sri Lanka in August 2012 was arrested by the Sri Lankan authorities on 2nd September 2012, was detained, ill-treated but was able to escape from custody it having been arranged by his father-in-law who had paid for his release by way of a bribe. He left Sri Lanka on 5th September 2012 and arrived in the United Kingdom on the same day. The Appellant made reference to further interest being shown in him at the family home and as a result of his connections to his family members. A further issue that arose after the Secretary of State refused his asylum claim related to an interview that had taken place with officials from the Sri Lankan High Commission to obtain an emergency travel document (ETD) for the Appellant. The Appellant gave evidence as to what had happened at that interview and that the questions asked and the conduct of the authorities following this interview also demonstrated a risk on return to Sri Lanka.
7. The judge dismissed his appeal having set out his findings of credibility and fact from paragraph [37]-[53] of the determination. He set out the main issues to be decided at [40] and having considered the Appellant's

account he reached the conclusion that the Appellant had not given a credible account as to why the authorities would have any continuing interest in him arising out of his brother's past history or otherwise. In respect of the interview held on 11th November 2014 at [52], whilst he did not have any independent evidence as to what questions had been asked of the Appellant at that interview the Respondent having not produced the interview notes and the judge having refused an adjournment for that purpose, considered the Appellant's account of what had transpired but reached the conclusion that whatever questions he had been asked, the answers would not have generated any adverse interest in the Appellant as they had no interest in him on any account. The judge reached the conclusion that whilst the authorities were aware of his relationship to his brother that that had not caused them any concern in the past and there would be no reason why that would happen on return to Sri Lanka.

8. The Appellant sought permission to appeal that decision and permission was granted by the First-tier Tribunal (Judge Shimmin) on 25th June 2015. A Rule 24 response was filed thereafter on 9th July 2015.
9. Thus the appeal came before the Upper Tribunal. Ms Jones, who did not appear for the Appellant in the court below relied upon the grounds that were before the Tribunal which asserted that the judge had erred in law by not assessing the intervention of the Sri Lankan authorities separately and also that the judge had failed to make findings in respect of the Appellant's evidence as to what had happened as a result of the questions that had been asked in that interview which the judge had set out at [33] but had not reached findings of fact on at [52] when he considered the issue. Ms Jones submitted that the judge had made findings unsustainable on the evidence at [45] relating to the family history and the judge's consideration that there had been no new activities that would trigger interest in the Appellant three and a half years later which was inconsistent with the evidence but also with the judge's own finding that the authorities would have been aware that the Appellant had a UK visa when they inspected his passport at the airport and the Appellant's brother's activities in the UK.
10. She also relied upon the ground in which it was submitted that the judge wrongly found the Appellant's case to be implausible at paragraphs [45] and [46]. She submitted that he made those findings based on his own views and background and that the judge failed to take into account the cultural context in which findings should have been considered and in particular why the Appellant did not make enquiry of his father-in-law as to how he had arranged his escape. Ms Jones also relied upon the ground in which it was said that the finding at [49] that his failure to return to Oman when he could have sought protection rather than come to the UK had not been brought to the Appellant in the hearing and that that was procedural irregularity and that furthermore the findings that were made were not in accordance with the country guidance decision of **JG and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319**.

11. In addition she sought to amend the grounds at the outset of the hearing to include a ground that the judge had not made any findings of fact upon the evidence of the Appellant's brother and father both of whom had refugee status and that both had provided witness statements and the Appellant's brother was at court to give evidence. She also sought to introduce a copy of the determination relating to the Appellant's father in which the oral evidence of the Appellant's brother was recorded and findings of fact made by that Judge which she said was relevant to the issue of risk and the findings as a whole. Thus she submitted that there were errors of law which demonstrated that the decision should be set aside.
12. Mr Whitwell on behalf of the Secretary of State relied upon the Rule 24 response in which the Respondent opposed the appeal on the basis that the First-tier Tribunal Judge directed himself appropriately and made findings which were open to him on the evidence. In respect of the ETD interview, Mr Whitwell submitted that at [52] the judge had considered the argument that had been put forward on behalf of the Appellant but was entitled to reject any risk of harm to him having found that the Appellant was not a credible witness and that irrespective of the brother's circumstances the authorities had not shown any interest in the Appellant prior to 2012 and that there was no reason to believe that he would be of interest solely on account of the interview that had taken place. As to the amended ground, he submitted the production of the determination of the Appellant's father had not been couched in terms of the decision of **Ladd v Marshall**. He had looked at the file note made by the previous Presenting Officer and whilst there had been a reference made to the Presenting Officer seeking an adjournment to request the brother's file, that in itself did not lend support to the instructions given to Ms Jones that the Appellant's brother's evidence was not necessary and in any event the judge was aware of both the Appellant's brother and his father's refugee status at [22]. Thus it was submitted there were findings that were open to the judge to make on questions of credibility and the judge had given reasons as to why he had not found the Appellant to have given a credible account relating to both his immigration history and the issue of delay and those facts were not really challenged. As to the arrest warrant at [50], the judge recorded that he had no original document.
13. At the conclusion of the submissions I informed the parties that I had reached the conclusion overall that the grounds were made out and that the decision should be set aside. I therefore give my reasons.
14. It is common ground that the Appellant was subject to an interview on 11th November 2014 undertaken by the Sri Lankan High Commission. The interview was with a view to obtain an emergency travel document ("ETD") for the Appellant as he had claimed he had lost his passport. The determination sets out this background at [12] noting that the Appellant had attended a hearing on 15th December where the Appellant had produced a witness statement dated 11th November 2014 setting out that when he had gone to report at Eaton House he was interviewed by an

Immigration Officer who was accompanied by two officials from the Sri Lankan High Commission. He did not know that they were from there until after the interview and he was asked questions about his employment, the police area that he had lived in, whether his brother was a journalist who was living in the United Kingdom, the address of his brother, how he lost his passport, his immigration history. The hearing was adjourned as it was indicated by the Presenting Officer that the new evidence needed investigation and it was accepted that the Appellant had been interviewed as claimed. At the hearing before the First-tier Tribunal there was no further progress in obtaining the Record of Interview or further information thus an application was made by the Presenting Officer for two reasons; the Respondent needed to investigate the matter and “to reconsider the Appellant’s case” at [14]. There was a note on the file which records that the submission made before the previous Immigration Judge appeared to be on the basis that in view of the interview having taken place that there were grounds for revising the decision. However at [15] the First-tier Tribunal records that the Appellant’s Counsel objected to a further adjournment and therefore at [16] the judge refused the adjournment on the basis that the Respondent had had ample time to investigate the matter and reconsider the Appellant’s case thus he proceeded with the hearing. The judge therefore had no interview notes and the only evidence to what questions he had been asked or in what manner was that of the Appellant.

15. The judge set out the issues at [40] including whether the interview with the officials of the Sri Lankan High Commission would expose the Appellant to risk of harm on return. His findings in this respect are set out at [52]. Mr Whitwell submitted that the judge did consider the issue of risk and having found the Appellant not to be credible earlier in the determination he was entitled to consider his account of what had transpired at the interview against that backdrop. As set out earlier the judge had no interview notes having refused the Presenting Officer’s application for adjournment. He accepted that the Appellant had been asked questions concerning his personal family details and how he lost his passport and whilst he accepted that he may have been asked questions about his father and brother, he did not set out what the nature of those questions were and whether he accepted the account given by the Appellant in his statement. However whilst the judge reached the conclusion that whatever had happened during the interview would not generate an adverse interest in him, even if he was right to conclude that he had not been of interest to the authorities in the past, he had failed to take into account the facts that the authorities had learnt during the interview which would give rise to a risk and in particular that both his brother and father were refugees in the UK as a result of interest shown in them by the authorities, that his father-in-law had assisted him to escape and that he had spent time in the UK with his brother who had provided a witness statement at [48]-[50] in which he had set out the basis of his claim and that he was associated with the British Tamil Forum [6]. The basis of the Appellant’s brother’s claim for refugee status which was

accepted by the Secretary of State was that he had undertaken work as a journalist where he had investigated news footage dealing with human rights abuses of the Sri Lankan Government (see witness statement paragraphs 4-6 at page 49) and that his father had also been the subject of interest of the authorities following him having left Sri Lanka and that his father had also been granted refugee status on that basis (see page 46 father's statement).

16. Furthermore the judge did not deal with the relevant evidence concerning the events that were said to have occurred after the EDT interview which was relevant to the assessment of risk. The judge set out at [33] the Appellant's oral evidence which deals with the events following the ETD interview and postdates his written witness statement of November 2014. His evidence was that since signing the witness statement, the authorities in Sri Lanka had contacted his wife in January 2015, she had been interrogated and they had taken down details. He also made reference to his wife being shown a passport and being asked to confirm that the person shown on the passport was her husband. The Appellant also gave evidence of further harassment by the authorities to other family members including his father-in-law whose employment had been terminated. The judge made no findings on this evidence which occurred post the ETD interview and therefore is absent from his analysis of risk at [52]. Whilst the submission made by Mr Whitwell that he had made general credibility findings, the analysis of risk arising from the ETD interview was incomplete for the reasons given therefore I find that that ground is made out.
17. I am also satisfied that at [45] the judge made a core finding of fact which was based on an erroneous factual basis. The judge considered the Appellant's account of being of interest to the Sri Lankan authorities, and made a finding that after the Appellant's brother had escaped custody in 2009 that there was no interest in the Appellant or any member of his family until September 2012. The judge stated that "however the authorities gave no problems to the Appellant or any member of the family. The Appellant would have me believe that in September 2012, over three and a half years after his brother had escaped custody, the authorities arrested and detained him." The finding was based on an erroneous factual basis. The chronology of the Appellant's claim was set out earlier in the determination at [22] referring to the Appellant's brother having been arrested in 2008, and subsequently escaping from custody in 2009 and being recognised as a refugee. The Appellant's father consequently had problems in 2009 arising from his son's activities in Sri Lanka and was granted asylum in the UK [paragraph 51]. The Appellant was not in Sri Lanka but was in Oman and had returned thereafter in August 2012 although there appear to have been some visits within that time. The finding made at [45] that the authorities had no problem with the Appellant or members of his family after his brother left was not factually correct; the Appellant's father was also the subject of adverse interest by the Sri Lankan authorities which led to him being granted refugee status and also ignores the period in which the Appellant was outside of Sri Lanka

in Oman. Consequently the finding based on the belief that the authorities waited three and a half years before showing any interest was factually incorrect. Consequently I am satisfied that those grounds I have referred to and are pleaded, demonstrate that in reaching the overall credibility finding and the assessment of risk was flawed for the reasons I have given. Whilst there were other credibility findings that were made by the judge, which were not challenged, including the delay in claiming asylum, for the reasons given the overall findings were unsafe.

18. At the outset of the case Ms Jones sought to amend the grounds challenged. No notice was given of this in writing or otherwise prior to the hearing. She submitted that there were no findings of fact made by the judge concerning the Appellant's brother's evidence and his account which would lend weight and corroboration to the Appellant's account of risk on return. She submitted that the Appellant's brother and father were both granted refugee status; the Appellant's brother's account was based on his activities as a journalist exposing human rights abuses and that his father was persecuted after he had left the UK for the reasons set out in the witness statement. She made reference to the witness statement from the Appellant's father (page 45) and the Appellant's brother who had also provided a witness statement setting out his experience (page 46). The basis of the claim was that the interest of the authorities had shifted from the Appellant's brother to the Appellant's father [paragraph 9] and this in turn supported the risk to the Appellant. The Appellant's brother also set out in his witness statement evidence at paragraph 10 concerning the issue of the arrest warrant relevant to the Appellant. She submitted that whilst the Appellant's brother was at court and had provided a witness statement he was not called to give evidence as her instructions were to the effect that it was not felt to be necessary by the judge. Furthermore she provided a copy of the father's determination which had not been provided before which set out the oral evidence of the Appellant's brother and set out the nature of the threats to the family and interest in the family by the authorities.
19. I could find no reference to this matter in the determination and asked Mr Whitwell for any observations that he could provide from his file. He stated that there had been a request for an adjournment by the Presenting Officer to consider the ETD documents which was set out in the determination but also the Presenting Officer had asked for an adjournment to request the Appellant's brother's file. There was no reference of this in the determination.
20. On the evidence before me I am not able to determine what occurred at the hearing relating to the evidence of the Appellant's brother. As Mr Whitwell submitted, the fact that the Presenting Officer was requesting the brother's file did not necessarily provide support either way. I agree. However, what is plain is that the Appellant's brother had provided a witness statement setting out a background of the evidence and evidence concerning the arrest warrant which the judge rejected at [50] having already found the Appellant's credibility was "fundamentally flawed" but

without considering the arrest warrant in the context of the evidence given by the Appellant's brother and also as to how the arrest warrant had come into existence and no findings are made in this respect or on the written evidence of the Appellant's brother. It is right however to observe that the judge was clearly aware of the Appellant's relatives, both brother and father being granted refugee status as there is reference to that within the determination.

21. As set out above, whilst Ms Jones sought amendment at a very late stage in the ordinary course of events I would not necessarily have granted permission to enlarge the grounds at such a late stage. However in view of my conclusions as to the grounds which were pleaded which I find were sufficient in my judgment to demonstrate an error of law in the overall credibility findings and analysis of risk, it is not necessary to make any further consideration of that issue.
22. I have therefore reached the overall decision that the determination should be set aside. Both advocates agreed before the Tribunal that in view of the nature of the error pleaded that the appeal should be remitted to the First-tier Tribunal for a rehearing and to make fresh findings of fact upon the evidence as a whole including the evidence of the Appellant's brother and father. Mr Whitwell was not able to provide any further detail concerning the information that was previously sought therefore it may be necessary for the matter to be set down for a Case Management Review hearing before listing for a final hearing before the First-tier Tribunal.
23. As both advocates agreed that this appeal and the basis upon which it was set aside falls within the Practice Statement (as amended) paragraph 7.2 in the light of the factual nature of the evidence to be given that the appropriate course is for the decision of the First-tier Tribunal to be set aside and for the appeal to be remitted to the First-tier Tribunal for there to be an assessment of all the evidence.
24. Whilst it is not the ordinary practise of the Tribunal to remit cases to the First-tier Tribunal, there are reasons why in this case such a course should be adopted, having given particular regard to the overriding objective and that there are issues of fact and credibility settled to the appeal which require determination. Therefore the decision of the First-tier Tribunal is set aside and the case is to be remitted to the First-tier Tribunal Judge at Taylor House or Hatton Cross for a hearing in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act paragraph 7.2 of the Practice Statement of 10th February 2010 (as amended). None of the findings of fact shall remain.

Notice of Decision

The decision of the Immigration Judge to be set aside and remitted to the First-tier Tribunal for hearing, but not before Judge Aujla, in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act and Practice Statement of 10th February 2010 (as amended).

An anonymity direction is made pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269 as amended).

Signed

Date

Upper Tribunal Judge Reeds