IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07942/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 February 2015	**On 8 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR MOHAMED HAROON CASSIM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Kumudsena
For the Respondent: Miss J Isherwood, a Home Office Presenting Officer

DECISION AND REASONS FOR FINDING NO MATERIAL ERROR OF LAW

Introduction

1. The appellant is a Sri Lankan national who was born on 9 September 1984.

2. The appellant originally came to the UK as the dependent of his wife, who had a student visa to travel to the UK, on 27 March 2011. He made an application for asylum in his own right on 16 July 2013 but on 7 August 2013 the respondent refused his application for asylum on the basis that she was not satisfied that the appellant was at risk on return. The appellant appealed the refusal to the First-tier Tribunal (FTT). His appeal

came before Judge Colvin who dismissed the appeal which had been supported by medical and other evidence. Deputy Upper Tribunal Judge Rimmington found that the appellant's grounds of appeal against that decision of the FTT was at least arguable on the basis that Judge Colvin had not attached proper weight to documents that had been produced. On 1 August 2014 First-tier Tribunal Judge Scott-Baker found in the appellant's favour because she was satisfied he was a credible witness. The respondent then sought permission to appeal that decision to the Upper Tribunal on 27 August 2014. On 12 November 2014 I heard submissions from both representatives and decided that the decision of the First-tier Tribunal contained a material error of law but it was necessary to hear further evidence in relation to the arrest warrants and other issues before a final decision was reached by the Upper Tribunal. Accordingly, a hearing was convened on 26 February 2015 in order for this to be done.

Reasons for the Error of Law Finding

3. Errors identified at the first hearing before the Upper Tribunal on 12 November 2014 are summarised in paragraph 12-13 of the determination by that tribunal. In summary, I questioned whether the appellant would have been able to produce a copy of his own arrest warrant and thought the timing of the production of that document was suspicious. I also considered that his account of supplying uniforms to the LTTE required closer consideration, given the background evidence. Having regard to those apparently material errors it appeared necessary to consider the evidence as a whole to see whether the decision was sustainable.

The Hearing

4. At the hearing I heard submissions by both representatives as well as additional oral evidence from the appellant. At the earlier hearing I gave permission for the appellant to provide any updating evidence provided it was supplied in accordance with the timetable and notice was given of that intention. Such evidence was filed in compliance with directions or, at least there was no objection to its omission. On 28 February 2015 that evidence was subject to cross-examination by the respondent. By way of opening remarks I was referred to the following cases:

   - **MP [2014] EWCA Civ 829 (IAC)**
   - **GJ [2013] UKUT 00319 (IAC)**
   - **KK [2013] UKUT 00512 (IAC)**

5. I was told that those cases should give me a "complete picture" of the risk a Tamil would face if forcibly returned to Sri Lanka.

6. The appellant said that his first witness statement consisting of two pages as well as the 40 page bundle which accompanied it were correct. There was a certain amount of argument as to what should, or should not, have been placed in the bundle before the Upper Tribunal and it is unfortunate that the parties appear not to have agreed these documents in advance.

Nevertheless I proceeded to hear the oral evidence of the appellant. He confirmed that both his witness statements were true, including the supplementary witness statement dated 28 February 2015. That statement refers to the difficulty in finding a lawyer who was "trustworthy" to secure his "confidentiality." The lawyer eventually instructed had been able to obtain the court file from Sri Lanka and provide the copies of the relevant pages to the appellant. In the circumstances outlined in those documents the appellant was seeking asylum and international protection.

7. The appellant was cross-examined.

8. The appellant relied on the evidence given before the First-tier Tribunal as supplemented by the witness statement filed before the Upper Tribunal, which he confirmed was true. The appellant was asked whether he had anything further to add. He said that he had two children in this country. It appears that the basis of their presence within the UK was that their mother, the appellant's former wife, had been in the UK on a student visa but she had returned to Sri Lanka. The appellant believed that the children remained in the UK. They were therefore expected to return to Sri Lanka, their mother's country of nationality, on expiry of the visa. The appellant no longer has anything to do with them. However, I understood the appellant's evidence to be that they had not in fact done so.

9. The appellant was then cross-examined by Miss J Isherwood, a Home Office Presenting Officer. The appellant said that he had recently had contact with his brother in Sri Lanka. This had been the day before the hearing by mobile telephone. He said that his brother was presently residing in Ratumalana "doing a small job." The appellant was asked how his brother was able to conduct his work and his private life. The appellant said that his brother had a visit from the "CAB" which, as far as he knew, had not resulted in any untoward consequences. However, the appellant said that if he returned to Sri Lanka the appellant's brother was required to tell the authorities of this. The appellant was asked whether this would result in him being "stopped at the airport." The appellant could only say that he believed that to be so.

10. The appellant was referred to paragraph 5 of his supplementary witness statement where he states that his brother had "tried and managed to instruct a lawyer to obtain my court file." The appellant was asked whether there had been any difficulty in obtaining that file. The appellant thought he it had been difficult to obtain the documents but did not provide any details. The appellant was asked whether he had any further documents to proffer. He said that he had obtained as many documents as he could. The appellant believed that further suspicion may be cast on him if any further enquiries were made as to the whereabouts of documents pertaining to his dealings with the legal system in Sri Lanka.

11. The appellant then went on to say that he was neither a member nor a supporter of the LTTE and he had not suggested that any member of his family had been a member or supporter either. However, he reiterated that "my company" had been implicated with supplying the LTTE with its uniforms. The appellant was asked why the company would have been

thought to have supplied uniforms. He said that he "did not know" why but he believed that the authorities thought that he had supplied such garments. The appellant was asked when he had first become aware of this allegation. He said that it was after he had been arrested. One Silva Kumar had given him orders and told him he had a licence from the army and navy to supply uniforms. The appellant was asked how Silva Kumar had obtained these orders. He said that he ran a garment factory and he had obtained orders through a third party. Garments were usually ordered through a tender process for certain bodies for example football clubs. Mr Silva Kumar had the army and navy order/tender and came to the appellant with a view to him supplying uniforms. The appellant was asked whether he had himself tendered to get to the army contract. He said that he regarded that as a "waste of time." He had a "lot of orders from Silva Kumar" but had not been able to produce any invoices. However, he did provide some orders, which are in bundle C at pages 13-17. The appellant said that his office had been raided by the CID and they had taken all his documents and therefore he was no longer in possession of the invoices.

12. The appellant was then referred to some further documents in "bundle C." Pages 3-12 consist of payroll information. The appellant was asked whether he obtained a salary. He said that in fact he only took profits. The appellant said that he had left documents behind following a CID raid. The appellant said that any documents left behind following the CID raid were retained by his brother. Following his Home Office interview the appellant had asked his brother to produce these documents, which he had done. However, the appellant was asked how his brother had obtained these documents. The appellant was unable to explain this or when the documents were obtained.

13. The appellant was then asked about his relationship with his former wife and her family. He said that he had no longer had a good relationship with her family. However, he had said that his brother had obtained documents from an office in his wife's house. The appellant claimed that he had obtained these documents after he made his claim for asylum, which posed the question: when had the documents arrived? The appellant was unable to say precisely when his brother had sent the documents.

14. Dealing with the separation from his wife and children, the appellant said that this had been in 2012. The appellant was asked why his wife's family had allowed him access to obtain documents given the state of his relationship with his wife. The appellant was unable to explain this.

15. Finally, the appellant was asked about his arrest on 28 April 2010, when he claims to have been taken to a room and beaten up. Torture is alleged to have been used. He is said to have been kept in custody until 25 October 2010 and placed in Weakalidake Prison. He said that the torture always accompanied the asking of questions.

16. There was no re-examination.

17. It was submitted on behalf of the appellant that an adequate explanation had been given as to the court documents and how these had been

obtained. They required careful consideration. I was referred to bundle C page 21 which is a report into an alleged offence by the appellant which refers to him being produced before the High Court in Colombo on 24 May 2010. It was submitted that this document confirmed that the information had been supplied to the magistrates by the Terrorist Investigation Unit. It also confirmed the appellant had been taken into custody on 20 April 2010, it seems, for a 90 day period and corroborated other aspects of the appellant's account. It was suggested that the document was consistent with the appellant's account. This included a reference to Silva Kumar and the nature of the accusation against him in relation to the supply of uniforms and other garments to the LTTE.

18. At this point I was referred to the bundle referred to as "bundle B." According to page 16 of that bundle the lawyer who provided information about the charges against the appellant had confirmed his Bar Association membership. It was suggested that where documents were produced which were *prima facie* valid the burden shifted to the other party to allege that they were forgeries. It was submitted by reference to pages B4-6 that the documents there were at least *prima facie* genuine. I was urged to look at the appellant's statement, his brother's statement, the envelopes produced and the practising certificate for the lawyer in Sri Lanka. These all supported the appellant's case. There was no ambiguity and no clear allegation of forgery. No such allegation could be sustained on the facts of this case.

19. At this point I was referred to C47, which is a translation of a document from the "TID" (I assume the Terrorist Investigation Department) at Welikada. This was supposed to be an arrest warrant for the appellant from Sri Lanka. Again, it was consistent with his account.

20. At this point I was referred to the "risk factors" set out at paragraph 355 *et seq* in the case of **GJ** and other relevant paragraphs. That guidance purports to be authoritative. It points out that the Sri Lankan government's present objective is to identify Tamil activists to prevent a resurgence of LTTE activity. Whilst the LTTE was a "spent force" which no longer represented a threat to the Sri Lankan state those that were detained by the security services remained under a real risk of ill-treatment or harm requiring international protection. The categories of individuals concerned included those who had a significant role in post-conflict separatism. Generally speaking, the Sri Lankan authorities' approach was based on intelligence. Past history was only relevant to the extent that it was perceived by the authorities as indicating a present risk to the unitary Sri Lankan state or government. It was submitted that by virtue of the appellant's past detention and documents disclosing the interest that the authorities have in him that he falls within an "at-risk" category.

21. I was also referred to the case of **KK** at paragraph 47, which deals with the working together of the security services with a view to identifying those in relation to whom there are concerns.

22. Miss Isherwood submitted on behalf of the respondent that the appellant's account was incredible. He claims that he ran a business which produced army uniforms but the business fell into the hands of the LTTE. He applied for a visa, but this application was unsuccessful. He left Sri Lanka travelling on his own passport without any problems. It was submitted that he was perfectly capable of applying for a visa as a dependant of his wife in 2010 and it was not until he separated from her in 2012 that he made the present asylum claim. At question 2.1 of the screening interview (page G5 of the respondent's bundle) the appellant was asked about his journey to the UK. He said that he left Sri Lanka on 27 March 2011 with his wife and two children. At page G15 of the screening interview the appellant said that he had not experienced "any problems" with the police looking for him up to the point when he left Sri Lanka (in 2011). At G10 of the same interview the appellant stated that one of his reasons for claiming asylum was that he had "problems with my wife." I was also referred to question 165 in the main interview (at H40). There, the appellant appeared to struggle to answer a question about the clothing factory where he is said to have produced the garments for the army. However, he did reveal that the office was in a "section of my wife's house." He went on to explain how his wife had converted to Islam but they had problems naming one of their children because her family did not want the child to be given a Muslim name. Miss Isherwood commented that there was no reference to the wife's family's house in any of the court documents. It was also pointed out that the Global Solutions documents in bundle C did not show any work being done at the appellant's wife's address.

23. At this point I was referred to the envelopes in bundle B. It was pointed out by Miss Isherwood that the postal address for the appellant did not match the address in his witness statement.

24. The Tribunal was invited to conclude that the documents were not reliable and that the application for asylum seemed to have been stimulated by a disagreement or falling out between the appellant and his wife. The appellant was vague about the source of the documents produced and how and when he came by these documents remained very much in issue. It was submitted the Tribunal could not be satisfied that they were genuine documents. It was accepted that the document at C21 (part of information supplied to a magistrate in Sri Lanka), referred to a period of detention of 90 days. However, this is said to contradict other evidence such as the screening interview (at question 5.1, B12) where the appellant refers to having been detained for "five days" in Vellikadda Prison.

25. It was accepted that I should look at the information "in the round" but matters of weight were matters for the Tribunal. Just because documents have been produced from an "attorney" did not mean that they were "acceptable."

26. The appellant had produced photographs but none of them were demonstrably him. At question 70 in the full interview (page 24) the appellant had pointed out the lack of LTTE activities either in Sri Lanka or in the UK and this contradicted the photographs he produced showing him

attending a demonstration in London since he came to the UK. His answer to the question posed at question 70 in the full interview (at H24): have you ever in Sri Lanka or the UK participated in activities aimed towards raising awareness of or support or money for the diaspora activities in Sri Lanka? The appellant answered "no" to that question.

27. It was also submitted that the appellant had not been entirely consistent in his account of his garment business at page H30 (questions 109 *et seq*).

28. It was acknowledged by Miss Isherwood that the appellant had produced medical evidence from Dr Frazer, a GP, but that evidence was not decisive. The appellant had not shown that he was on any "stop list" within the **GJ** decision. He had not had any significant role with the LTTE and the evidence pointed to him coming to the UK to enjoy a new life with his wife for economic reasons. Given his lack of past history with the LTTE it was not reasonably likely that the appellant would be of any interest on return to Sri Lanka. The case of **MP** had concluded that **GJ** was still good law.

29. Mr Kumudsena responded to say that the appellant had travelled to the UK with the benefit of an agent (he dealt with this at question 205 *et seq* in his interview). The fact that the appellant used his own ID did not necessarily mean a bribe had not been paid to facilitate his departure from the country. The court documents (at C21 *et seq*) did not deal with the length of detention. They suggest that an application was made to detain him for a lengthy period but that this was unsuccessful. The appellant was against the government of Sri Lanka in a number of respects and in this connection I was referred to B24 which shows that the appellant is actively opposed to the government. The appellant had produced medical evidence to back up his injuries and question 165 in the main interview was consistent because the company name had been given (presumably earlier in the interview).

30. In all the circumstances I was invited to leave in place the favourable determination of Judge Scott-Baker and her decision that the appeal against the respondent's refusal to grant asylum was unlawful should be allowed to stand.

31. At the end of the hearing I reserved my decision as to what steps needed to be taken to correct the error of law identified at the earlier hearing.

Discussion

32. The appeal proceedings have a chequered history. The appellant has been before the First-tier Tribunal on two occasions. On the most recent occasion the Immigration Judge had concluded that the appellant was a credible witness. But it is not clear to what extent the Immigration Judge reached this conclusion as a result of a flawed analysis of the documents. These included a warrant for the appellant's arrest dated 7 June 2010. Following the hearing before me on 12 November 2014 I concluded that the Immigration Judge did not adequately consider how that document was obtained and when it was obtained. Having further considered the case following the hearing on 26 February 2015 at which full argument

was heard and additional evidence given I am reinforced in the view that the documentary evidence is at the heart of the case but that it must be judged in the round taking into account the favourable medical evidence and the Immigration Judge's favourable impression of the appellant's credibility.

33. I have been referred to the well-known case of **Tanveer Ahmed [2002] UKIAT 00439***. In that case the IAT reminded decision makers of the fact that documentary evidence must be considered in the same way as oral evidence; the burden being on the person producing the evidence to prove its reliability to the relevant standard. In asylum claims and claims under Article 3 of the ECHR the standard is a low one: has the appellant established that his claim is reasonably likely to be true?

Conclusions

34. I have sufficient concerns as to the evidence in this case to conclude that the appellant was not able to establish his claim to the low standard which applied. The appellant did not submit his claim until 16 July 2013, having travelled to the UK with his wife and family on 27 March 2011. It appears that he was separated from his wife in February 2012 although he did not inform the respondent of this until much later. The timing of his asylum/human rights claim is significant because the appellant did not advance this until his leave had expired. It appears to have been an opportunistic claim therefore.

35. I find there to have been a lack of evidence that the appellant actually supplied the Army and Navy with uniforms or that the authorities in Sri Lanka would regard him as having supplied uniforms to the LTTE. The appellant claims to have run a business called "Global Business Solutions", the company that manufactured the garments. However, the appellant was unable to indicate annual turnover in interview and in response to questions from Miss Isherwood said he regarded the tendering for the supply of army uniforms to be a "waste of time." This did not appear to be a comment I would have expected from a person running such a company. There are also discrepancies in the way that the business operated. Different addresses were supplied for the company and even if this was explained by the fact that one of the addresses was his wife's family's address, I am not clear how the appellant was able to retrieve documents from that address given that he had fallen out with his wife's family.

36. I find it incredible that the appellant would come into the possession of important documents pertaining to his own arrest so late in the case. At the date of the appellant's interview he claimed to have no documentary evidence to support his arrest or his imprisonment. Nor did he provide evidence of being summonsed to court (see asylum interview at question 183). However by an undated witness statement incorporated within bundle B the appellant produced a letter from an attorney at law enclosing documents from the High Court in Sri Lanka. The attorney at law's letter dated 8 July 2014 was just three weeks before the hearing took place in front of the Immigration Judge. The documents produced included an arrest warrant which has been translated into English. I find that there no

adequate explanation has been given as to why it took the appellant at least two years to produce this document. The Immigration Judge does not attempt any explanation as to how the lawyer in Sri Lanka came to be instructed at such a late stage nor is she able to explain why such a crucial document was released so late. She says that there is an "air of authenticity" about the warrant and arrest but, with respect, that does not mean it is genuine. In addition, the Immigration Judge does not explain what she means by describing the appellant's account as "unusual." Nor did I find it credible that shortly before the first hearing before the Upper Tribunal , on 10 February 2015, the appellant would be informed by his brother that "two people in civilian clothes" had questioned his brother about the appellant's whereabouts. It is of note that this was no less then five years after the appellant had left Sri Lanka.

37. The respondent says that such documents are very difficult if not impossible to obtain. No proper explanation was given as to how the appellant was able to obtain them. A great deal of the appellant's evidence depends on what his brother tells him but when asked during the hearing on 26 February about conversations with his brother the appellant said "you would have to ask him." The lawyer's letter gives the documents produced a cloak of authenticity. But it does not of itself alter the basic premise that the appellant has to prove his case whether by oral or documentary evidence. The claim he now advances is generally inconsistent with his screening interview where he stated that "nothing happened" in Sri Lanka.

38. Having heard the appellant give evidence and be cross-examined by Miss Isherwood I am satisfied that his story is incredible. The documents produced cannot have been available from the outset and must have been generated for the purposes of improving his claim.

39. I bear in mind that the appellant has produced apparently credible corroborative evidence in the form of a medical report from Dr Frazer. However, Dr Frazer comments in his report on unusual features present in this case including a long period when the appellant claims to have been blindfolded. Dr Frazer was not able to offer an interpretation of the age of scars on the appellant but was able to say the appearance was "highly consistent" with the account the appellant had given. As far as the psychological sequelae are concerned, there is clearly a connection with the appellant's marriage breakdown. Therefore, having carefully considered the medical evidence I remain of the view that this evidence does not prove the truthfulness of the appellant's account.

40. The photographs the appellant has produced of attending demonstrations in the UK appear opportunistic and there is no evidence that the Sri Lankan authorities are aware of these activities.

41. I have considered recent case law and in particular the case of **MP [2014] EWCA Civ 829**, in which the Court of Appeal endorsed the approach of the Upper Tribunal both in that case and in the earlier case of **GJ**. It was held that the Upper Tribunal had not erred in its treatment of the guidelines issued by failing to take account of UNHCR guidance. The

Upper Tribunal had been entitled to narrow-down the risk categories. Broadly, the Sri Lankan state is interested in those working for Tamil separatism who pose a threat to the existence of the Sri Lankan state. They are not generally concerned with punishing those responsible for Tamil violence in the past. The finding by the Immigration Judge that the appellant was at risk on return to Sri Lanka as playing a "significant role" in relation to post-conflict separatism is highly questionable in the light of the guidance cases. There is no evidence the appellant is on a "stop list" such as would require him to be arrested and detained and questioned. The only evidence would have been the documents produced after his initial claim but those documents appear thoroughly unreliable, for the reasons given above.

42. The appellant also advanced an Article 8 claim but having regard to the breakdown of his relationship with his wife and his lack of contact with his children as well as his short period of residence in the UK . I find that the respondent was entitled to reject the application under Article 8 and it has not been argued that that Article provided an alternative way of finding in the appellant's favour in this case.

Risk on return

43. The appellant arrived in the UK on a visa but later submitted an asylum claim. He travelled here on his own passport experiencing no problems in transit. He only raised asylum in 2013 many months after his arrival and following the expiry of his visa. He claims to have run a business supplying uniforms to the army in Sri Lanka which became implicated with supplying uniforms to the enemy but there are numerous inconsistencies in his description of the business, its premises and his involvement with it. There is no evidence that he is on a stop list. He has never been a supporter of the LTTE and the events he describes took place more than five years ago. In the circumstances I find him not to be a person at risk on return to Sri Lanka.

Notice of Decision

44. Having carefully analysed the findings of fact made by the First-tier Tribunal against the evidence given including the favourable evidence in the medical report I have concluded that the error of law identified at the earlier hearing was fatal to the decision and it is necessary to re-make the decision.

45. It is necessary to set aside the decision of the First-tier Tribunal. I re-make that decision which is to dismiss the appeal against the decision of the respondent made on 7 August 2013 to refuse leave to enter or remain in the UK and to refuse to grant asylum.

No anonymity direction was made by the Tribunal and no fee award was payable.

Signed Date

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

No fee award is payable.

Signed Date

Deputy Upper Tribunal Judge Hanbury