Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: AA/08680/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 1st October 2014

Determination Promulgated
On 23rd January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

CHARITH PRABASH CHATURANGA DE SILVA WALIMUNI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Paramjorthy, Counsel, Renaissance Chambers
For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Sri Lanka date of birth 11th June 1983. He appeals with permission the decision of the First-tier Tribunal (Judge Cohen) dated 22nd July 2014 to dismiss his appeal against a decision to remove him from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999. That decision followed from the Respondent's rejection of the Appellant's claim to international protection.

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Background and Matters in Issue

2. The basis of claim was that the Appellant had a history of political involvement with the United National Party (UNP) and had suffered persecution as a result, including assault, threats to his life and that of his family, detention and torture. The Appellant avers that he did not receive any protection from the Sri Lankan state and that his attempt to register his complaints with the Human Rights Commission were withdrawn under duress. He claimed to have a currently well-founded fear of persecution in Sri Lanka for reasons of his political opinion. He submitted a number of documents in support of his claim, including a doctors report said to relate to injuries caused when assaulted, correspondence with the Human Rights Commission and affidavits from witnesses.

3. The Respondent did not accept that the Appellant's claim was true and refused to grant asylum.

4. On appeal the First-tier Tribunal found that the Appellant had fabricated his entire asylum claim. The reasons given for this finding were that he had not given detailed evidence about the party, which was inconsistent with his claimed level of involvement (paragraph 22), he had given inconsistent evidence about whether the man who was orchestrating the persecution against him was the vice-chair or chair of the opposing faction (24), his doctor has recorded that he was attacked by unknown assailants whereas the Appellant told the interviewing officer that in fact it was eight men who included this leader of the opposition faction (25), the medical report was vague about when the alleged assault had taken place (26) and the Appellant delayed in two years in claiming asylum (27). The Tribunal accepted the Respondent's evidence that the emblem shown on the letter purporting to be from the Human Rights Commission was not as it should be, and found the Appellant's legal exit from Sri Lanka to be indicative of the fact that he has no problems with the authorities there.

5. The grounds of appeal are lengthy. It is alleged that the First-tier Tribunal erred in the following respects:

   i) The reasoning in the determination is unclear (words appear to be missing from the narrative);
   ii) In finding the Appellant's evidence about his political involvement "vague" the Tribunal appears to have overlooked the very detailed evidence given in statements and interview;
   iii) Matters were taken against the Appellant which had not been put to him, including the allegation that the medical report by Dr Jagoda was fabricated;
   iv) There is an error of fact in that the Tribunal appears to believe that the Appellant is afraid of someone called Pralona where in

fact the man named was Prasanna, leading to the erroneous finding of inconsistency in the evidence;

v) There is a failure to take into account the Appellant's explanation as to why he did not wish to tell the doctor who assaulted him;
vi) There is a failure to take into account the Appellant's explanation, given in oral evidence, about who was orchestrating the attacks against him and when;
vii) Made irrational findings as to whether the Appellant's Sinhalese sister, in the UK as a working holidaymaker, would have been in a position to advise him about claiming asylum;
viii) Accepting the Respondent's allegation that that letter from the Human Rights Commission of Sri Lanka was false when no evidence had been submitted to substantiate that allegation;
ix) Failure to properly engage with the evidence of an expert;
x) Making the "troubling" finding that the Appellant "smiled" when cross examination became difficult for him;
xi) Making the "troubling" finding that the evidence of the Appellant's wife was "self-serving";
xii) Misapplying the country guidance: insofar as the Tribunal relied on the case of GJ it was wrong to do so since that case concerned Tamils and the Appellant is not a Tamil. He is Sinhalese and his fear does not relate to Tamil separatism.

6. Mr Tarlow submitted that all of the findings of the First-tier Tribunal were open to it on the evidence. He conceded that the First-tier Tribunal did make an error of fact in respect of the name of the individual said to be persecuting the Appellant, but taken in the round the Respondent does not consider this to be material.

Discussion

7. The grounds can be broken down into five legal challenges. The alleged errors, and my findings on them, are as follows.

Failing to take relevant evidence into account

8. The Appellant had relied upon an Opinion by Dr Chris Smith, a research associate at Chatham House. Dr Smith produced a very detailed report, directly engaging with the account given by the Appellant, and aiming to set it in the context of the country background material. Having done that Dr Smith – in summary – considers the account given to be plausible. If it is true, Dr Smith considers that the Appellant would be at considerable risk if returned to Sri Lanka today. That report is dealt with at paragraph 31 of the determination. This reads:

> "Whilst I acknowledge that the appellant has produced an expert report in support of his claim, the same is largely generic. In respect of the questions which are answered and

> which were posed by the appellant's representatives, the expert takes the appellant's credibility as face value and found that the appellant's claims are consistent with the objective evidence and his knowledge of the way the authorities worked in Sri Lanka. I have found the appellant is totally lacking in credibility and in the circumstances find that the expert report does not advance the appellant's claim in any way".

9. It is not the function of an expert witness to comment on whether the claimant is credible. That is the preserve of the Tribunal. It is the function of an expert to place the claim in its proper context, drawing on his or her own knowledge; this will very often involve an assessment of whether the claim is plausible. Where a claimant relies upon such a report it is incumbent upon the Tribunal to take that evidence into account. It is able to reject it, or to place little weight upon it, but must give clear reasons for so doing. In this case Dr Smith expressly directed himself that it was not for him to assess credibility (paragraph 14), and I found nothing in the report to support the contention that he has taken the Appellant's claim "at face value". The whole point of the report was that he, with his knowledge of Sri Lankan politics and the *modus operandi* of the security services and other actors, believed this account to be perfectly plausible. That was plainly a matter relevant to this determination, since the Tribunal goes on to reject a number of claims on the grounds that they are "implausible": see for instance paragraph 28 and 32. The failure to consider the expert evidence in the round was therefore an error of law.

10. The grounds further complain that various points, advanced by the Appellant in his evidence, have not been recognised by the determination. For instance the Tribunal rejects the medical evidence of Dr Jagoda *inter alia* because the Appellant did not tell him who his assailants were. The Appellant had explained in his evidence that he did not want to cause himself further trouble by identifying his attackers (and in any case Dr Jagoda would not have wanted to write it down). I would agree that the Appellant's explanation for the discrepancy in the evidence is not considered.

Anxious Scrutiny

11. This determination has clearly not been proof read. There are a number of places where the narrative makes absolutely no sense. That is unfortunate. It clouds the reader's understanding of that the Tribunal is trying to say and it leaves the Appellant with the impression that his case was not properly considered. One example serves to illustrate this point:

> "The appellant was asked why he was not targeted between the 2/2009 and he responded that he was the election and there were increased tensions. The question

> was repeated and he smiled and responded reason they assaulted him in April and if they meet killed him. They would be responsible for this. They planned it out, using their brains leaving from time before attacking him".

Unclear reasoning and a failure to give a claim "the most anxious scrutiny"[1] are both errors of law.

Error of fact amounting to an error of law

12. Throughout the entire determination the Appellant's alleged persecutor is referred to as Pralona, when in fact it was his evidence that this man was called Prasanna. Mr Paramjorthy complains that this was an error of fact that materially affected the Tribunal's understanding of the evidence. Whilst it is apparent from paragraph 24 that the Tribunal was not impressed generally with the evidence about this man, it is less clear that getting his name right would have made any difference to the decision. I am nevertheless satisfied that this is again a matter arguably engaging Lord Bridge's comments in Musisi.

Perversity

13. Mr Paramjorthy's criticism of the approach taken to the evidence of the Appellant's wife is that it was simply irrational to reject her evidence as "self-serving". What the determination actually says is that she had "rehearsed" her evidence. If by that the Tribunal means that her evidence was largely the same as her husband's it is impermissible for the Tribunal to reject it on that ground without considering the other possibility: that their evidence is consistent because it is true.

14. The Tribunal was not impressed that the Appellant waited until his working holidaymaker visa was about to expire and then claimed asylum. The Tribunal notes that the Appellant's sister had been living in the UK for some time and it is suggested that she could have informed him about asylum. The grounds submit that it is unfair and irrational to suppose that a Sinhalese working holidaymaker would have been in a position to advise her brother about the merits or otherwise of seeking asylum. There is nothing in this point. Asylum is a daily point of discussion in the media. Anyone who has lived in this country, Sri Lankan or otherwise, for a period of time is likely to know what it is. The Tribunal was obliged

[1] R v SSHD ex parte Bugdaycay and Ors [1987] 1 AC 514: "The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision calls for the most anxious scrutiny. Where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process."

by s8 of AI(TC)A 2004 to weigh the late claim against the Appellant. There was nothing irrational in the approach taken.

Procedural Impropriety

15. The grounds particularise a number of matters, taken against the Appellant in the determination, which were not put to him at hearing. I am not satisfied that any of these points constitute an error of law such that the decision should be set aside. The Appellant's overall credibility had been squarely challenged by the Respondent. He had been put on notice of that fact in the refusal letter and it was up to him to make out his case. It is not the case that the report of the doctor is rejected as being a fabrication. The Tribunal, applying Tanveer Ahmed, declined to place weight on it. That is a different matter, and it was open to the Tribunal to take that approach.

My Findings

16. I have found that the determination displays a lack of anxious scrutiny, and that there was a flawed approach taken to the evidence. As such the determination cannot stand and I set the decision aside in its entirety. The matter will need to be re-made. It involves the evidence of at least two witnesses and is likely to take up to 3 hours. Against this background the parties invited me to remit the matter to the First-tier Tribunal. I do so in view of the extent of judicial fact-finding required.

Decisions

17. The determination of the First-tier Tribunal contains an error of law and it is set aside.

18. The matter is to be re-made in the First-tier Tribunal.

Deputy Upper Tribunal Judge Bruce
12th November 2014