Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA044582014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 April 2016	**On 23 May 2016**

Before

THE HONOURABLE MR JUSTICE TURNER
and
DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

SUHIRTHAN KAMELESWARAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Coleman, Counsel instructed by Linga and Co Solicitors
For the Respondent: Ms A Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka. He arrived in this country on 10 October 2010 and is now 24 years old. Nearly four years later, on 24 June

2014, he claimed asylum. His claim was refused by a decision of the Secretary of State on 30 June 2014. That decision was appealed to the First-tier Tribunal and the judge handed down his decision on 23 April 2015. This was a late claim for asylum. Initially the appellant had arrived on a student visa following which he overstayed. Subsequently he claimed marriage to an EEA national. That claim was found not to be genuine. No appeal was lodged against that finding.

2. The First-tier Tribunal found against the appellant in his application to challenge the decision of the Secretary of State in relation to his status as an asylum seeker and it is useful to set out the basis upon which that decision was reached by quoting at least some of the reasons given by the First-tier Tribunal Judge. Beginning at paragraph 74 of his decision he found the following:

> "Against this background, it is of course easy enough to suggest (as the respondent has done) that the whole history has been invented; that the appellant was never involved with the LTTE and never held in custody or ill-treated. The appellant himself has invited such a perspective of his case by the circumstances in which his claim finally came to be made that I have described above. I am certainly however prepared to take a broader view of the case put forward and I do not decide the case on the basis of the somewhat trivial and confusing discrepancies said to exist. I look at the case also against the particular background of what was happening in Sri Lanka in 2009."

I pause there to observe that the background referred to by the First-tier Tribunal Judge was that relating to events between 2010 and 2014 when finally the appellant made his application for asylum:

> "The appellant was living in an LTTE dominated area while the war was going on and there was no reason not to believe that he might well have been involved in the activities he says he was even at quite a young age. Whatever he was doing, it was undetected until the occasion in May 2009 when he says that those in command in his area instructed surrender to the Sri Lankan Army because the LTTE had been overwhelmingly defeated. Incidentally I am far from convinced that the appellant was actually a member of the LTTE as opposed to someone just supporting them as he was only a child at the time. It matters little to my final decision. I do not give any probative weight to the mysterious letters supplied by a named person who the appellant does not even know and transported to him, apparently, by an unidentified friend. It is undated, refers to Boosa as a prison (which it is not) and is written in terms which appear entirely contrived and to be what can properly be described as a 'self serving' document. The simple fact of the matter is that there were many thousands of individuals surrendering to the authorities in the early months of 2009 and particularly from May onwards when the war was over. Many were detained or held in camps of various kinds and their

> numbers actually included many people who were not combatants at all including many women and children. It took a significant period of time for the circumstances to be normalised and for many people to be released and allowed to return to their home areas. It was a chaotic period of time generally and particularly given the circumstances of his claimed surrender it would be far from impossible for this appellant to be held for an extended period of time at an army camp and indeed to be significantly ill-treated whilst he was there. It is not possible to put the matter any more strongly than that because there is no independent evidence of any value as to what occurred and one is left with the bare evidence of the appellant himself coupled of course with a significant medical report (the latter of course was not available to the respondent when this application was refused)."

The judge goes on to deal with the contents of the medical report which he records accurately and having identified the contents of the medical report he goes on to say at paragraph 80 of his decision:

> "This finding is however what one might describe as the high point of the appellant's case; as for the reasons I now set out I do not consider him to be at any real risk of further harm on return."

3. At this point in his decision the judge identifies the background to the hostilities in Sri Lanka which ended in May 2009 which he says:

> "... led to a somewhat traumatic period of months for many thousands of Tamils who had surrendered and who had to have their backgrounds and circumstances resolved (and in many cases documented) before sensible dispersal to home areas could take place. It was of course right in the middle of this period of time that the appellant claims to have been ill-treated. He was still a child at the time and without in any way wishing to be unkind, he was always a person of minimal interest to the authorities and I certainly doubt whether he was an LTTE member. He was not arrested (or looked for) in relation to his actual activities but he along with others was simply trying to surrender at the end of the war. Almost by very definition of his age he could not even then been regarded as anyone of any significance at all and if he was released easily on payment of a bribe, he might well have been released in any event before long.
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> He had no family LTTE connections and remained in Sri Lanka for almost a year after his release before leaving the country without any difficulty using his own passport. There is more reason to doubt his second brief detention as it was not mentioned in his screening interview and it took a long time to emerge in his full interview; even then he did not claim ill-treatment at that time although in fairness to him he did refer to being 'abused in bad language' when he reported after his first release; it was suggested to him at the hearing that he

had never mentioned this before but he clearly did at his answer to question 97.

The civil war in Sri Lanka has now been over for close to six years; it is little more than fanciful to suggest that there could possibly still be any interest in the appellant on his return to Sri Lanka; his history was of no more than a few months claimed activity on behalf of the LTTE as the war was coming to a close and when the appellant himself was a child. If he was detained and ill-treated then quite frankly so were many thousands of others during that tumultuous time and there would be nothing to suggest that the case of the appellant would stand out in any way or that the circumstances of his activities or detention would lead to him being in any sense a wanted person. Even if he had failed to report as required to the army camp, it is in my view a matter now effectively lost in the midst of history and I repeat my overall conclusion that I do not consider the appellant will be of the slightest interest to anyone other than his own family on return to Sri Lanka.

The Tribunal decision has to be made on the basis of known facts and the law applicable."

4. Then the judge goes on to consider the case of **GJ and Others (post civil war returnees) Sri Lanka CG [2013] UKUT 00319**:

"It is clear, said the judge that from **GJ** that real risk of harm on return to Sri Lanka now only embraces a very limited category of individuals; in the main those who 'are or are perceived to be a threat to the integrity of Sri Lanka as a single state because they are or are perceived to have a significant role in relation to the post conflict Tamil separatism within the diaspora and/or a renewal of hostilities in Sri Lanka'. Anyone further from meeting this description than the appellant it would be difficult to imagine both in terms of age, history of activity in Sri Lanka, passage of time since he was last in the country as a child, and his lack of any significant activity since. I am afraid that even if he did attend a few demonstrations in London along with hundreds of others he was simply 'one of the crowd' with no status or position of authority at all and even if he attended genuinely and not simply in an attempt to bolster his asylum claim, his presence at such activities is close to irrelevant.

Particularly having read the medical report, I must not of course rule out the fact that the appellant himself may feel very different about returning to Sri Lanka; he may well consider that his life is both safer and better here. However the Tribunal assessment has to be an objective one; whether there is a real likelihood of significant harm coming to the appellant on his return to Sri Lanka. Using that criterion, my finding is that there is no such risk and that therefore his claim must inevitably fail, as indeed must the claims under Articles 2 and 3."

5. The decision of the First-tier Tribunal Judge was challenged by way of an application for permission to appeal directed to the First-tier Tribunal and that permission was refused on 27 May 2015:

> "The grounds of the application asserted that the Judge committed errors of law in assessing the risk on return and the application of caselaw, did not apply GJ and Others correctly, had not found the appellant credible despite the plethora of evidence submitted, his highly credible oral evidence and proof of his suffering in Sri Lanka, his medical and psychological evidence of torture and that the IJ made arbitrary findings of credibility, on a narrow application of the facts, without considering the evidence or applying weight to it, and the case had not received the minute consideration it deserved. It was asserted that the objective country evidence showed that the detention of the appellant would be recorded and he would be at risk on return, or of having to bribe officials."

6. On the substantive representations made on behalf of the appellant to me this morning the focus has been entirely on the issue as to consistency of the decision of the First-tier Judge and **GJ** relying only peripherally upon the medical evidence and the question of the credibility of the appellant.

7. The First-tier Tribunal Judge went on in giving reasons in respect of refusal to grant permission to appeal as follows:

> "The determination shows that all the evidence was recorded, assessed and taken into account, including the appellant's late asylum claim, false student visa application, rejected EEA spouse application and objective country evidence from 2009 to date. The IJ was far from satisfied that the appellant was a member or supporter of the LTTE, he could not give any weight to mysterious documents submitted by the appellant whose provenance the appellant did not know, whose contents were self serving. The IJ accepted that the medical evidence showed he had been mistreated before coming to the United Kingdom, but not that there was a real risk on return because he had been a child at the time of the events he spoke of and it was not credible that he had come to the adverse interest of the authorities as claimed. The appellant's claim of a second arrest and detention were not credible. The IJ fully considered the risk categories in the caselaw and concluded they were not pertinent to the appellant's case. The IJ proceeded to reach conclusions about the appellant the findings reached were properly open to him. The application amounts to no more than a disagreement on interpretation and emphasis, the grounds disclose no arguable error of law and there are no merits to the application. It is not in the interests of justice to admit the late application following consideration of the merits."

8. At that stage matters took an unusual turn. The fact that an application was made to the Upper Tribunal for permission to appeal was not unusual.

The fact that that permission incorporated reliance on an entirely fresh ground is. The grounds upon which permission was sought to the Upper Tribunal followed, as one might expect those that had been pursued but included the following at number 6:

> "Additionally, with greatest respect to the learned IJ, our advocate, Mr Lingajothy who had represented the appellant at the hearing has observed the learned IJ had fell [sic] asleep, nodding off on few occasions during the hearing [Please refer to Sworn Witness Statement of Mr V P Lingajothy attached herewith]. This observation has also been made by the appellant and the interpreter. This action of the learned IJ casts doubt over whether he had heard the totality of the oral evidence and submissions that was presented before him and made an informed decision. This goes to the heart of interest [sic] of justice and fairness. Justice must not only be done but has to be seen to be done."

9. The basis upon which that assertion was made was a witness statement from Mr Lingajothy dated 15 June 2015 approximately two months after the events to which it refers. That statement which is identified as a sworn statement but is in fact a signed statement with a statement of truth, insofar as is material, provides as follows:

> "I have attended the hearing of the Applicant's appeal and represented him at the hearing on 1 April 2015. The appellant gave oral evidence through the aid of an interpreter. With the greatest respect to the learned IJ during the hearing I had observed him not being attentive and on a few occasions he dozed off. I was wondering whether the learned IJ was paying due attention to the proceedings. The same observations were made by the Applicant and the interpreter and after the hearing we had a brief chat on the matter. In the interest of justice and fairness I feel it is of great importance that this matter be brought to the attention of the court who will be deciding the applicant's grounds for permission to appeal as this action of the learned IJ casts doubt on the whole of Determination and Reasons, is perceived by the Applicant that the learned IJ had given judgment without sufficient regard to the oral evidence and the submissions that were made to the Tribunal. Justice must not only be done but has to be seen to be done."

10. The matter then came for the consideration of the Upper Tribunal Judge on the application for permission on 31 July 2015 and the reasons included the following:

> "The following arguments are put forward: (1) the judge failed to properly consider the case in the light of country guidance; (2) the appellant's oral evidence was credible and established that he had suffered in Sri Lanka; (3) the medical evidence indicated ill-treatment which confirmed his account of his arrest and (4) that the judge fell asleep during the course of the hearing."

The Upper Tribunal Judge considered the application and in refusing to grant permission to appeal it recorded the following:

> "The fourth ground is a serious accusation and yet was not even mentioned in the grounds to the First-tier Tribunal. Had this occurred, I cannot accept that it would not have been raised at the earliest opportunity. In view of its late submission, I do not find that this ground has arguable merit. Moreover I note that the grounds do not point to any part of the evidence that was missed out or overlooked as a result of the alleged conduct on the part of the judge.
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> Grounds 2 and 3 are simply assertions of the appellant's claim. They fail to point to arguable errors of law. The judge assessed the evidence and reached the conclusion that the claim was not credible. He took account of the late asylum claim and the false student application made by the appellant.
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> Contrary to what is argued, GJ was considered but the judge found that the risk categories did not apply to the appellant.
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> The judge's findings and conclusions are sustainable and no arguable error of law has been identified."

11. The matter did not end there. In December of last year the case came before Mrs Justice Cheema-Grubb by way of judicial review. In granting permission she made the following observations:

> "1. The basis for this application is an assertion of procedural unfairness which it is said tainted the hearing before the First-tier Tribunal Judge, Mr Wiseman. The complaint is that Mr Wiseman fell asleep during parts of the hearing. This is a very serious allegation. It is supported by a witness statement from the advocate who represented the claimant at the hearing, Mr V P Lingajothy dated 6 October 2015. [I note that the witness statement that finds it way into my bundle is dated 15 June 2015].
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> 2. Whilst this allegation was not made in the original application for the permission to appeal against the decision of the First-tier Tribunal it was made when an application for permission to appeal was made to the Upper Tribunal and Mr Lingajothy has explained why he failed to ensure that this allegation of procedural unfairness was included within the initial grounds of appeal. In essence he avers that it was a failure of administration in his office.
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> 3. It is to be observed that there is no evidence that a contemporaneous note of the complaint by Mr Lingajothy was made during the course of the hearing and there is no statement from the Claimant or indeed the interpreter who was also

> present. Furthermore, there is no indication in the application for permission that the determination and reasons of the First-tier Tribunal promulgated on 23 April 2015 demonstrate any failure to refer to relevant evidence or submissions. However, in light of the fact that the Claimant's lawyer, an officer of the court, has made this complaint in what was a very important hearing for this Claimant, permission ought to be granted to allow the matter to be considered at a hearing if the Defendants wish."

Ultimately, on 29 February 2016 permission was granted to appeal to the Upper Tribunal on the basis of the decision of Mrs Justice Cheema-Grubb. The matter comes before us in that context.

12. In relation to the substantive grounds of appeal by which I mean all bases upon which this appeal is progressed, save for the allegation that the judge fell asleep and/or was inattentive, it is to be noted that no judge at any stage thought there was any merit in any part of that appeal. The basis upon which it comes before this Tribunal is on misgivings expressed by Mrs Justice Cheema-Grubb as to the suggestion that the judge was asleep. She passed no observations upon the substantive merits of the appeal beyond that and it was through that gateway that the matter appears before us this morning. We appreciate and accept however that that gateway is one that was laid wide open and therefore our jurisdiction is not limited and ought not to be limited simply to the issue of procedural impropriety relating to the sleeping allegation.

13. However, we do find that the reasons given by the First-tier Tribunal Judge in relation to the likely risk or, more appropriately, lack of likely risk to the appellant in the event of his return to Sri Lanka were entirely in accordance with the proper approach. As will be seen from those extracts from his decision which I have quoted in this judgment he made a detailed analysis of the background facts. He weighed up those background facts and came to a conclusion that was fully reasoned and consistent with the building blocks on which it was based. Criticism is made that the judge departed from parts of the guidance in **GJ** to the extent he ought to have concluded that the appellant, having been detained and having bribed his way out of custody in Sri Lanka, would be somewhat likely to be recorded on a stop list and that that gave rise to the sort of risk that fell within **GJ** and ought therefore at any rate to have been considered as such. Looking at the entirety of the context in which the judge refers to **GJ** we are in no doubt whatsoever that the judge had all of these issues firmly in mind and he dealt with the question of detention and the consequences of that. He balanced those issues against the age of the appellant at the time of the troubles in Sri Lanka together with the evidence relating to his somewhat peripheral involvement with the Tamil Tigers. In all the circumstances we consider that the suggestion that the judge ought to have made more of the record which may have been kept of his detention amounted to little more than speculation and failed to persuade either the First-tier Tribunal Judge or us that there was any substantive merit in that and we are substantiating that view by the agreement both of First-tier Tribunal and

Upper Tribunal Judges who considered that there was no arguable merit in the substantive issues on appeal.

14. We now turn to the question of the allegedly sleeping judge. There are a number of authorities relating to the consequences of judges found to be sleeping or inattentive during the course of proceedings. Doubtless, purely coincidentally, many of those relate to the Employment Appeal Tribunal. There are of course authorities also in the context of other jurisdictions and we note that there is a discussion of the matter in the case of the **Crown v Betson & Others [2004] EWCA Criminal 254** and also in the case of **KD v Entry Clearance Officer (KD – inattentive judges) Afghanistan [2010] UKUT 261**. There is absolutely no question that it is entirely inappropriate for any judge or Tribunal member to fall asleep or to give the impression of having fallen asleep during the course of a hearing and all the authorities which we refer to are unanimous in criticising a judge who falls into that category. In the case of **KD**, in accordance with the head note which is an accurate reflection of the substantive judgment, the following was observed:

> "The parties to an appeal are entitled to expect the Judge both to be alert during the hearing and to appear to be so. Consequently, if a Judge actually falls asleep or gives the appearance of not giving the appeal his full attention, there may be grounds for setting aside the determination on the basis that there has not been a fair hearing. It is preferable for any concern about the behaviour or inattention of the Judge to be raised at the hearing. When such a ground of appeal is raised, it is only likely to succeed if there is cogent evidence of the actual or apparent behaviour in question."

15. In the case of **Betson** the Court of Appeal made the following observations:

> "There remains the ground in relation to the judge's falling asleep because the appearance as well as the actuality of justice being done is important. No judge ought in any circumstances to fall asleep during any stage of a criminal trial. It is highly regrettable that this judge did so but because the judge falls asleep or for any other reason allows his or her attention to wander, it does not necessarily follow that the trial is unfair or that any ensuing conviction is unsafe. It is the effect not the fact of such inattention which is crucial. This must in each case depend on all the circumstances including the period of inattention both absolute and as a proportion of the length of the whole trial, the stage of the trial at which the inattention occurs and of primary importance the impact of that inattention, if any, on the course and conduct of the trial. We give two examples by way of illustration. First if a judge is inattentive however briefly during a defendant's evidence-in-chief and in consequence fails to register and in due course sum up to the jury a piece of crucial evidence to the defence the conviction may be regarded as unsafe. The unsafety arises not because the judge slept or was otherwise inattentive but

> because in consequence the summing up was defective in that the defence was not properly put before the jury. Conversely, a conviction is unlikely to be regarded as unsafe if during a lengthy trial a judge is inattentive even for substantial periods. If in consequence he lists no significant point meriting inclusion in this summing up and did not fail properly to control their admissibility of evidence the conduct of Counsel or some other aspect of the proceedings. In the present case the judge as he frankly and properly admits was for a time asleep during the speeches of Counsel for Betson and Ciarrocchi. We are prepared to accept that he was asleep on a few other occasions, sometimes to the extent that he woke himself up by the sound of his snoring. It is however of some significance that at the trial no defendant or no Counsel in the case of whom there were a total of thirteen and no jury were sufficiently concerned to raise the matter with the judge, other Counsel or the court usher. It is of greater significance that before this court it has not been shown that because he slept the judge missed and failed to sum up to the jury any significant feature of the evidence or speeches. On the contrary this summing up extending to approximately 250 pages of transcript and delivered as we have said over four days shows every sign of having been carefully prepared. It was comprehensive and balanced, accurate as to the law and detailed as to the evidence. The defence of each defendant was fully put. Had the judge been awake when he was asleep the appearance of justice would of course been obviously enhanced but the trial would have followed no different course. Furthermore, regrettable though it is that the judge occasionally slept, no objection having been made at the time were unpersuaded that the jury even arguably unfairly prejudiced against any defendant bearing in mind also the length of the trial, the full, fair and accurate summing up, the lengthy period of retirement, the pertinent question asked by the jury and the compelling powerful evidence against the defendants. It was for these reasons that yesterday we refused Betson and Cochrane leave to appeal against conviction."

16. Now against that background we have to address the circumstances arising in this case. First of all, an important and realistic concession was made on behalf of the appellant that he was unable to identify any respect in which the judge had missed out a material primary fact in his decision or had got any primary fact wrong. That would indicate that throughout the duration of the case during when relevant evidence of primary facts was being given, the judge was alert to it and bore it in mind when he reached his decision.

17. The second point is this. It was prayed in aid of the appellant that the judge's alleged errors in substance could be attributable to inattention. There are two difficulties with that submission. The first is that the hearing of evidence took place on 1 April and the decision was promulgated on 23 April. Accordingly the secondary inferences from the primary building blocks of the evidence were considered over a period of

three weeks and were not dependent on any issue as to whether the judge was alert or sleeping during the course of the hearing.

18. More importantly, as this court has found, there was no error in the judge's assessment. On the contrary this was an extremely detailed and considered judgment which followed a logical pattern and reached a logical conclusion. It is also important to note as the courts did in both **KD** and **Betson** that no complaint was made at the time. If it had been considered that any appearance of lack of attention on the part of the judge was significant then one is entitled to expect that advocates would have intervened or, at the very least have raised the issue immediately. Not only was the issue not raised immediately after the hearing, it was not included within the grounds of the application for permission to appeal before the First-tier Tribunal Judge. It is very difficult to understand how if the alleged inattention of the judge had been considered to be so significant it would not have been raised until two months after the hearing. Despite a reference to the appellant and his interpreter chatting about the matter afterwards, no corroborative evidence has been put before this court from the appellant or his interpreter or anyone else in court to support this late contention. In addition, we have been provided with notes from Ms Hunjan who represented the Secretary of State before the First-tier Tribunal and there is nothing in those notes to indicate any concern in relation to the judge being asleep. One could well expect that any such concern would have been recorded.

19. There is no further evidence put before this court apart from the very late uncorroborated evidence of the appellant's representative. We find in the very particular circumstances of this case it is not necessary to reach any conclusion (and in fact it would be inappropriate to reach a conclusion) as to whether or not at some stage the judge fell asleep. It would be wrong on paper to make such a finding in relation to a matter of professional importance such as this. What we do however find is that the evidence from the decision of the First-tier Tribunal demonstrates minute consideration of detailed facts, getting none of them wrong and ensuring that all the material ones are incorporated into what is a long and considered approach makes it absolutely and abundantly clear that any perception of inattentiveness or unconsciousness could have made no difference whatsoever to the result in this case and although it may very well be in less clear cases that an assertion such as this has to be resolved factually and may, if resolved against the judge, result in an overturning of the decision, this case on its particular facts falls far, far short of that and in the circumstances we dismiss this appeal.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed: Sir Mark Turner
Mr Justice Turner

Date: 11th May 2016