Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/07096/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th January 2016	**On 12th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

GA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Olley, Counsel instructed by Kanaga Solicitors, London
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

ANONYMITY

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 an anonymity order is made in respect of each of the Appellants. Unless the Upper Tribunal or other competent Court orders otherwise, no report of any of the proceedings herein or any form of publication thereof shall, directly or indirectly, identify any of the Appellants. This prohibition applies to, amongst others, all parties.

DECISION AND REASONS

1. The Appellant is a citizen of Sri Lanka whose date of birth is recorded as 16 September 1980. He made application for international protection as a refugee on 15 October 2014 and on 8 April 2015 a decision was made to refuse the application. He appealed and on 20 October 2015 his appeal was heard by Judge of the First-tier Tribunal Colvin sitting at Taylor House.

2. The Appellant's case in short was that he had inadvertently come to assist the LTTE. The Terrorist Investigation Department of the Sri Lankan authorities became aware of this and in August 2009 the Appellant was arrested and detained, during which time he was tortured. The police also arrested another, S, who was associated with the Appellant and who under torture admitted to certain weapons being hidden at the Appellant's premises. On 28 August 2009 the Appellant was taken to prison in Colombo and detained until 9 October 2010 when he was released on bail on condition of reporting to the police station. He was also to inform on the whereabouts of his brother-in-law, B, whom it was who had introduced the Appellant to S.

3. The Appellant was advised to leave Sri Lanka, which he did in October 2009. The advice of the agent was that the Appellant should not claim asylum in the United Kingdom as his claim might be rejected and he would be returned. Subsequently in April 2010 the Appellant's wife joined the Appellant in the United Kingdom. The Appellant then discovered that B had been arrested by the "TID" in relation to the same activities. B was detained for three years and released in April/May 2013 after the Appellant's sister negotiated with the help of an agent.

4. On the basis that there was to be a bail hearing the Appellant booked tickets to return to Sri Lanka although in fact it is accepted that he actually booked those tickets prior to the bail hearing having taken place in circumstances in which there was always the possibility that B would not be granted bail. Be that as it may the tickets were booked and were non-refundable. On 6 May 2913 B was released but on 2 June 2013 the Appellant's sister informed the Appellant that B had been abducted and so the Appellant determined not to return to Sri Lanka.

5. The above is a summary of the Appellant's case. Whether in fact it is what occurred will need to be resolved on another occasion for the reasons which are set out below.

6. The appeal was dismissed on all grounds.

7. Not content with that decision by notice dated 3 December 2015 the Appellant made application for permission to appeal to the Upper Tribunal and on 15 December 2015 First-tier Tribunal Judge Cox granted permission. He clearly thought that the grounds were of significant merit because he said:

> *"The grounds are lengthy and detailed, appropriately so in this case, and it is impossible to cover them all here. In essence the decision is impugned for lack of adequate reasoning and irrationality. The*

grounds in my view make out an arguable case for those contentions and I would grant permission on all of them."

8. The initial position of the Secretary of State as set out in the 'Rule 24 Notice' was that the decision of the judge was one that was open to her based upon the evidence.

9. The grounds drafted by Counsel run to 39 paragraphs. I was grateful to Ms Olley and to Ms Everett both for the assistance which they gave to me and for the realistic approach that they both took to the appeal. It was not necessary for me to consider all of the grounds because in taking the first two points Ms Olley satisfied me that the matter ought to be remitted to the First-tier Tribunal and Ms Everett agreed without making any concession, quite properly, in relation to the other grounds upon which I heard no submissions. I should say also that Ms Olley was content for me to determine the matter based on the first two points that she raised without more.

10. I was referred to the asylum decision of 8 April 2015 and more particularly Annex A which are the detailed reasons. At paragraph 25 it reads as follows:

> *"In light of the fact you were unable to give any details of the court proceedings or to submit original evidence of the investigation and your bail conditions it has not been accepted you were detained and bailed as claimed. In light of the fact you have submitted nothing from your GP or other healthcare professional it is not accepted you are suffering any complaints as a result of your arrest and detention in Sri Lanka."*

The fact that the Secretary of State did not accept that the Appellant was detained and bailed as claimed is not to be taken to mean that it was accepted that the Appellant was detained and bailed in some other way but that the Appellant was not detained and/or bailed at all. However, at paragraph 43 the Secretary of State said:

> *"Taking all of the above into account, it has been accepted that you assisted LTTE members between 2008 and 2009. It has been accepted that you were arrested and detained in 2009. ..."*

11. What exactly the Secretary of State was conceding therefore was not clear but given the lower standard and given the concession that appeared at paragraph 43, at the very least the judge should have sought clarification of that concession because although it is always open to the Secretary of State to withdraw a concession, if the concession is not withdrawn then the judge ought not to have gone behind it and certainly ought not to have gone behind it without giving the opportunity to the parties to be heard: NR (Jamaica) v SSHD [2009] EWCA Civ 856

12. The concession goes to the core of the Appellant's case. It was part of his case that he was detained and that he then breached his bail conditions.

The judge on the other hand in her Decision and Reasons appears to have gone behind the concession notwithstanding the fact that she recognised this had been made. At paragraph 26 of her Decision and Reasons she says:

> *"In this case it is accepted by the Respondent that the Appellant assisted LTTE members in Sri Lanka for twenty months during 2008 and 2009."*

Indeed she goes on to deal with the circumstances in which that assistance was given but then at paragraph 38 in her conclusions she says:

> *"I have given careful consideration to all the evidence and the matters raised above. I have also taken account of the need to be cautious before reaching an adverse credibility finding in an asylum case. However, I have concluded that even to the lower standard of proof applicable in an asylum case, I am not satisfied that the Appellant has shown that he came to the adverse attention on the Sri Lankan authorities before he left in 2009 or that he was arrested or detained and ill-treated. …"*

Not only is that inconsistent with what appears to have been the concession of the Secretary of State. It appears to have led to the decision that there were no outstanding warrants for the arrest.

13. The second point raised by Ms Olley relates to the treatment of the psychiatric evidence and I refer to paragraph 30 of the Decision and Reasons, which reads:

> *"It is to be noted that the Appellant who arrived in the UK in 2002 does not appear to have made any complaint about his mental state to a doctor until after he registered with a medical practice in November 2013. This is confirmed in the psychiatric report at paragraph 10.1 which states that the Appellant said his mental health deteriorated after the disappearance of his brother-in-law in June 2013 when he started to feel panic and that this condition worsened further after the arrest warrant against him in July 2014 when he also dropped out of his studies. He said he visited his GP in 2014 when he was put on antidepressant medication. And, again, at paragraph 10.4, the report states that the Appellant reported that his mental health deteriorated after the asylum refusal in April 2015. There is no explanation for this significant delay of some five years before the Appellant either makes a complaint or seeks some assistance. This, in my opinion, is an omission that necessarily undermines the diagnosis of PTSD being directly related to the alleged ill-treatment."*

14. If the explanation for the significant delay being referred to by the judge is in respect of seeking help for his mental health then the judge has referred herself to the explanation which was the disappearance of the brother-in-law in June 2013. To say that there was no explanation appears irrational and perverse. This amounts to an error of law in itself, but taken

together with the first point in my view means that the decision simply cannot stand.

15. A very clear finding needs to be made in this case as to whether or not the Appellant was arrested and if he were arrested whether he was detained. A finding should be made as to how long the detention was and whether he was subjected to ill-treatment during that period of detention. Findings need also to be made on the basis upon which he was arrested, in other words, what was being alleged against him? Were bail conditions set? If so, what were they? Did the Appellant breach them? Are there grounds for believing that the Appellant continues to be of interest to the authorities such that there are now outstanding warrants?

16. The First-tier Tribunal will be assisted in my view by a medical report dealing with any physical injuries upon the Appellant's person. If he has, for example, cigarette burns or other scars which can be dated back to the material time such might support his claim. If the Appellant chooses not to produce such a report then that would be a matter which the judge in the First-tier Tribunal might be entitled to take into account especially now that it has been flagged up: TK (Burundi) v Secretary of State for the Home Department [2009] EWCA Civ 40

17. I also take the view that the Tribunal may well be assisted by a witness statement from the Appellant's wife. It is said that she cannot give any evidence relating to any of the substantive events. That may be true but she can in my judgment be expected to give evidence about whether or not the Appellant was detained and she might also speak to the state that the Appellant was in when he came back from that detention if she is able to say that he was detained.

Notice of Decision

The decision of the First-tier Tribunal contained material errors of law and is set aside to be remade in the First-tier Tribunal by a judge other than Judge Colvin.

Signed **Date**

Deputy Upper Tribunal Judge Zucker