Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/02966/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 7 December 2017	**On 15 February 2018**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

MR S P
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Jegarajah
For the Respondent: Mr Nath

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka born in 1984. He is a Tamil.

2. In summary, his immigration history is that he entered the UK in November 2010 in possession of a Tier 4 student visa, which was subsequently extended to November 2015 but curtailed in September 2013. He made an asylum claim in November 2013 which was refused on 4 February 2015.

3. The basis of his claim is that he worked for the LTTE in Colombo and in Trincomalee, gathering intelligence. He was arrested in April 2008 during a round up, detained for one night but not questioned and was then released. He was told by the LTTE that he could leave the organisation in

January 2009 and he then went to Malaysia for one year, returning to Sri Lanka in June 2010. He was questioned upon his return but allowed to leave the airport. He was arrested three days later from home, interrogated, tortured and escaped on 28 June 2010 by payment of a bribe.

4. The crux of the refusal was that although the April 2008 detention was accepted, the other aspects of his claim including the 2010 detention and release by payment of a bribe were not believed. Considerable emphasis was placed on inconsistencies in his interview answers.

5. He appealed.

6. The case was first heard by a judge of the First-Tier who in a decision promulgated on 30 July 2015 dismissed the appeal. That decision was subsequently found to contain material error of law such that it was set aside to be reheard in the First-Tier.

7. In a decision promulgated on 29 September 2016 a different judge of the First-Tier again dismissed the appeal. That decision, too, was subsequently found to contain material error of law and it was again set aside and remitted to be reheard in the First-Tier.

First tier hearing

8. It came, the third time, before Judge of the First-Tier MA Khan who in a decision promulgated on 18 April 2017 dismissed the appeal. The appellant did not give oral evidence.

9. The judge's findings are at paragraphs 31ff. In summary he did not believe the appellant's historical account.

10. He found against the appellant that he was '*extremely vague*' about his intelligence activities [31]; that the LTTE would have let him leave the organisation '*at their hour of need*' [32]; that having been allowed to leave the LTTE he would have rejoined in Malaysia [35]; that if on return to Sri Lanka from Malaysia he would as a wanted man have been able to get to the British High Commission to provide fingerprints and to have exited via the airport on his own passport albeit with the help of an agent [34].

11. The judge then noted significant delay in the appellant claiming asylum in 2013 having arrived in 2010 [35].

12. The judge went on to place no weight on a letter from a Sri Lankan lawyer, Mr de Silva, mainly because he did not mention it at interview [36]; also, a letter from another Sri Lankan lawyer Mr Kalupahana, supporting the claim that there is an arrest warrant for the appellant. Again, he did not mention an arrest warrant at interview. Also, he would have been got by the authorities. Again, no weight was placed on that letter [37].

13. The judge, further, dismissed as self-serving a letter from the appellant's father stating that the authorities were looking for him. The judge questioned why the authorities would not have acted on the warrant, issued in 2010, until 2013.

14. Finally, the judge, who had noted that the appellant did not give evidence because of significant mental health issues, noted several medical reports about his psychiatric condition [44-48]. He attached '*due weight'* to these considering that they gave '*little or no information as to when and what caused the appellant's condition to get so bad, they paint rather a subjective picture with regard to his fear in Sri Lanka … (they) do not venture to mention any other causes that may be responsible for his medical condition.*' Also the approach is '*with a narrow point of view, which comes from information provided by the appellant or his family members.'*

Error of law hearing

15. The appellant sought permission to appeal which was granted on 29 September 2017.

16. At the error of law hearing before me Ms Jegarajah made the following main points. First, the starting point in assessing the appellant's credibility should have been his mental health especially where it is so poor as it is in this case. Such infected the judge's whole findings including his failure to mention aspects of his claim at interview. Second, his approach to the evidence from the two Sri Lankan lawyers was inadequate. The evidence submitted was on all fours with ***PJ (Sri Lanka)*** [2014] EWCA Civ 1011. No adequate explanation had been given as to why the lawyer's evidence should not be believed. The judge also failed to have regard to the evidence relating to his mental health in particular its likely cause or the risk he would face on return given his overall mental health.

17. Mr Nath's position was that the grounds amount to a mere disagreement. His findings on credibility were open to him for the reasons he gave. He had dealt adequately with the medical evidence.

Decision on error of law

18. In considering this matter I concluded that the judge's decision showed material error of law. The core problem was his approach to the appellant's mental state and its relevance in the assessment of his account. The judge merely noted (at [8]) '*The appellant did not give evidence because of his mental condition*.' And at [29] he states '*In coming to my conclusions on the appellant's credibility, I am have (sic) taken into account the appellant's claim that he has a mental problem, his medical evidence including reports*'. He then moves to his assessment of the historical account and the criticisms of it noted above.

19. The problem is that neither the respondent nor the judge appeared to dispute that the appellant has significant mental health problems. Compelling evidence in support of that was before the judge. For example, there is evidence from Springfield University Hospital (p S31-89 – appellant's supplementary bundle) which confirmed that the appellant has PTSD and psychosis (S53); Dr Mansfield 'A Highly Specialised Clinical Psychologist' confirms that he suffers from PTSD to such a severe extent that '*he is unable to track conversation*'; his medical records which track the deterioration in his mental health date back to 2014 where the provisional diagnosis following his first psychotic episode was schizophrenia; a report by Dr Fahmy which states that as at 2016 he was still suffering from PTSD and suicidal ideation.

20. The judge did not refer to the medical evidence other than in the most perfunctory way (at [29]), when considering credibility and making findings of fact. I am satisfied that must amount to a material error of law. The appellant's mental state was crucial to his ability to provide clear and consistent information in response to questions in interview. The medical evidence is potentially supportive of the appellant's case in the absence of any alternative explanation for his symptoms. The absence of any analysis of the medical evidence in the context of credibility is fatal to the decision.

21. I would add that in terms of the Joint Presidential Guidance Note (No 2) of 2010: 'Child, vulnerable adult and sensitive appellant guidance' the appellant is a 'vulnerable adult'. Unfortunately, there is no indication in the decision that the judge was alert to that matter and the possible consequences in respect of the carrying out of the credibility assessment (see para [13] – [15] of the Guidance) and ***AM (Afghanistan) v SSHD*** [2017] EWCA Civ 1123 (particularly at [30]).

22. I find for these reasons that the judge's decision shows material error of law such that the decision be set aside to be remade.

Resumed hearing

23. Ms Jegarajah, having noted that the appellant's case had been three times to the First-Tier Tribunal and three times to the Upper Tribunal said that the appellant continued to be unfit to give evidence and she wished the matter to be dealt with by submissions which I proceeded to hear. Mr Nath had nothing to add.

24. I refer to the submissions as necessary in the course of my analysis. Before me were the two appellant's bundles (main and supplementary) that had been before the First tier judge. They included short statements by the appellant and his brother who is in the UK. Most of the rest of the material was medical evidence and background material.

25. I consider it appropriate to look first in more detail at the medical evidence. It is extensive. The following, in roughly chronological order, suffices. The first reference is a referral to Enfield and Haringey Care Services by a GP dated August 2013. The reason given is that '*this patient*

was tortured in Sri Lanka 2 years ago. His brother was recently arrested and tortured too. He is in permanent fear and depressed' (S73). A report (January 2014) from Dr Ashraph, Consultant Psychiatrist, Wandsworth Early Intervention in Psychosis Service make the diagnosis 'First Episode psychosis, most likely schizophrenia'.

26. A report by Dr Fahmy, Consultant Psychiatrist (January 2015) (S45) notes a diagnosis of 'unspecified non-organic psychosis (in remission) and PTSD.' Under 'Impression' the doctor writes: '*Deterioration in mental state in context of recent detailed interview at Home Office. This is consistent with a diagnosis of PTSD and the experience of having had to relive the traumatic events through the interview … of note there are no clear symptoms of psychosis at today's review and the paranoid ideation he experiences would be consistent with the PTSD*.'

27. I note a report from Dr Ferguson, Springfield University Hospital (21 July 2015). He had known the appellant for over a year. He stated that the appellant was suffering persecutory delusions of being followed by the Sri Lankan army and suffered psychotic sensations in 2013 after receiving a letter from his father stating that the Sri Lankan army had abducted his brother. He was paranoid with acute psychotic symptoms including experiences of being tortured by the Sri Lankan army. He had multiple reviews but showed symptoms of PTSD. His condition worsened after the first asylum interview and in early 2015 he felt that the Metropolitan Police were the Sri Lankan army. Dr Ferguson first met the appellant in early 2015 and then on three subsequent occasions. He did not recognise Dr Ferguson and lacked insight and capacity into his mental state. He could not make a decision or instruct a lawyer. He was at high risk of suicide and relapse.

28. Finally, further reviews by Dr Fahmy in 2015 (S51) and January 2016 (S34) state the same diagnosis as he gave in January 2015, the latter indicating some improvement due to his medication. A further review (May 2016) (S39) maintains the diagnosis and states that despite improvement he '*remains significantly functionally impaired'*. A letter (September 2016) from a psychiatric nurse shows that his '*presentation is in keeping with PTSD'* and gives the opinion that the appellant is not able to instruct a solicitor or give evidence as such would *'significantly impact on his mental health'* (S3).

29. I was not referred to an up to date medical report, however, I conclude from the mass of medical evidence that the appellant is a vulnerable adult and in assessing his account particularly in respect of discrepancies and lack of clarity, paragraphs 14 and 15 of the Presidential Guidance apply.

30. As indicated much of the respondent's concern was what were considered to be vague and inconsistent answers given at interview about his involvement with the LTTE (paragraphs 42-45 of refusal letter), who paid the bribe to get him released [55], who helped him exit the country [56], whether he was in hiding when he went to get the visa [65], and the

circumstances surrounding the claimed arrest of his father and brother [63, 64].

31. The appellant attended for a substantive interview on 4 February 2014. It is recorded in the SEF form (respondent's bundle B1) that he attended with a community nurse, a care coordinator from Wandsworth Early Intervention Centre in Psychosis.' Although he answered the first few introductory questions concerns regarding his fitness to be interviewed were identified at an early stage and the interview was suspended. The interviewer's comments are recorded '*applicant answered questions slowly and often appeared unresponsive/"zoned out*". *May be due to medication being taken*.'

32. I note the following from the reconvened interview record (24 December 2014). At the start, '*Applicant looks a little distracted and providing responses very slowly. He has very slurred speech and stuttering. Keeps looking around does not make eye contact. He has his carer – relative with him'* (main bundle p137); at Q43 '*applicant looks a bit drowsy and closing eyes';* Q61 '*very slurred speech*'; Q65 '*applicant looking around'*; Q87 '*applicant looks very tired given water to drink*'; Q97 '*applicant finding it very difficult to speak-very slurred speech'*; Q100 *'applicant holding his face'*; Q103 '*applicant not responding just rubbing his hands'*; Q107 *'applicant very upset'*.

33. Of course, no criticism is made of the respondent for seeking to get the appellant to give his account and many of the appellant's answers appear to be detailed and coherent. However, it is patently clear that at that time and subsequently he was suffering serious mental ill health for which he was receiving treatment. In light of the clear difficulties experienced by the appellant (and of sufficient concern to be noted by the respondent), I do not find it appropriate to hold against the appellant the various inconsistencies and lack of clarity and detail in the interview answers referred to in the refusal letter. As paragraph 14 of the Guidance states:

    'Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those who are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.'

34. In this case the appellant did not give oral evidence nor did any witnesses. However, I see no reason not to apply the Guidance in the context of the evidence given at interview.

35. As indicated the Guidance advises that in assessing the evidence of vulnerable applicants the claim should be examined in the context of the background information. In this case, for example, 'The Hindu' newspaper reports that Malaysia was being used by the LTTE 'as a transit point, hideout and new base of operation' (p99). Whilst that report is

dated some time after the appellant says he was in Malaysia I consider it gives a measure of support for his claim of LTTE activities there.

36. Further, the criticism at [53] of the refusal letter that had he been of interest to the authorities he would not have been allowed to leave the airport only to be arrested days later is addressed in ***GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319*** where the Tribunal held, inter alia, that there are no detention facilities at the airport. Only those whose names appear on a 'stop' list will be detained from the airport. Any risk for those in whom the Sri Lankan authorities are or become interested exists not at the airport, but after arrival in their home area, where their arrival will be verified by the CID or police within a few days. Such is thus consistent with the appellant's account. By his account he returned to Sri Lanka from Malaysia in June 2010 (witness statement para 14) moving to the family house. He was detained a few days later. The arrest warrant was not issued until August 2010 (p12). Again, his account is consistent with the background material.

37. I would add that his claim to have been able to escape from the detention in 2010 and exit the airport with the help of an agent is consistent with the background material which indicates that bribery and corruption are endemic in Sri Lanka (see ***GJ*** at eg [424]).

38. A further point taken by the respondent was that there was no court order or warrant against the appellant. There is now a considerable amount in that regard. It purports to be presented by two Sri Lankan attorneys.

39. The first, an item from Mr De Silva is a one page letter dated July 2015. It states he was instructed by the appellant's uncle to represent him after he was arrested in June 2010. He states that he made representations but as the appellant was detained under the Prevention of Terrorism Act the officers were not obliged to provide any information or to produce him in court.

40. He states that having made further enquiries, '*the authorities records show that (he) is an absconder from the custody and he will be arrested on return from Sri Lanka'*. He also understood that *'a summons has been issued against him to surrender at the TID office*'. He had been unable to obtain a copy of the summons. He states that if he returns to Sri Lanka the appellant will be taken into custody under the Criminal Procedure Act 1979.

41. In itself the assessment of the reliability of such a brief letter commissioned by the family is likely to be approached with caution.

42. However, Mr Kalupahana's evidence is later and more substantial. It was not received at the behest of the family but, as Ms Jegarajah emphasised, by the appellant's British solicitors who wrote to Mr Kalupahana in August 2016 (p19) asking him to investigate. That letter was placed in the bundle. His response (p4) sending a copy of the case file from the Magistrates Court in Colombo is at p9ff. From my reading of them they are the

equivalent of records of court proceedings in which the court is asked by the Director of the Terrorist Investigation Department to grant an order to detain the appellant ('Informations to the Magistrate') (p9), and, later, the granting of an arrest warrant by the Magistrate (p11,12) information having been given that the appellant had 'fled away.' The envelope containing the records sent by DHL by the Sri Lankan lawyer is in the bundle. The documents sent from Mr Kalupahana have been certified as true copies by the Court Registrar. The court reference corresponds to the arrest warrant and is internally consistent.

43. In considering these items it is not suggested that Mr Kalupahana and Mr De Silva are anything other than bona fide Sri Lankan attorneys. There is also no suggestion that the lawyers had been involved in any discreditable conduct.

44. It seems to me that the evidence submitted is similar to that of ***PJ (Sri Lanka)*** **[2014] EWCA Civ 1011** which at [38-41] provides where evidence is adduced from Sri Lankan attorneys weight ought to be given to it.

    At [41] ' … *Whilst it is undoubtedly the case that false documents are widely available in Sri Lanka, once it was established that the documents in question originated from a Sri Lankan court, a sufficient justification was required for the conclusion that the appellant does not have a well-founded fear of persecution. Prima facie, this material reveals that the appellant has previously been arrested in connection with a bomb, three members of his family had close LTTE connections and he is wanted for questioning "to decide whether he had been engaged in LTTE terrorist activities". But perhaps of greatest significance, there is a letter from the Magistrate of the relevant court to the Controller of Immigration and Emigration stating that the appellant is in the United Kingdom and that he is to be arrested on his return to Sri Lanka. In the absence of a sufficient reason for concluding otherwise, the inescapable conclusion to be drawn from this material – retrieved independently, it is to be stressed, by two lawyers from the Magistrates' court on separate occasions – is that the appellant will be arrested on his return to Sri Lanka as a result of links with the LTTE and their activities … without an adequate explanation, it is difficult to understand how the appellant could have falsified a letter from the Magistrate of the relevant court to the Controller of Immigration and Emigration ordering the appellant's arrest which he then placed in the court records so that it could later be retrieved by two separate lawyers. At the very least, this feature of the evidence required detailed analysis and explanation.'*

45. Applying that reasoning to the documentary evidence looked at in the round, particularly, that the items submitted by Mr Kalupahana, included certified copies of the Sri Lankan court file and an open arrest warrant, I see no basis for giving anything other than strong weight to that evidence.

46. In summary, to the lower standard the appellant satisfies me as to the truthfulness of the material aspects of his account, namely, that he was

involved to the extent claimed with the LTTE, was detained and severely ill treated by the authorities in 2010 on suspicion of involvement with the LTTE, that he escaped detention by payment of a bribe and the country by using an agent, and that there is a warrant for his arrest.

47. It is held against the appellant that having arrived in the UK in 2010 he did not claim asylum for three years. I find plausible his claim that, as he had leave and hoped to return when, as he said in his statement, the situation returned to normal, there was no need to. And that the trigger for his doing so in 2013 was the arrest of his father, briefly, and of his brother.

48. I would add at this stage that I find persuasive Ms Jegarajah's submission that the appellant's serious mental health problems, primarily PTSD, are reasonably likely to be a consequence not only of his own experiences at the hands of the authorities but also, particularly, of learning of the detention of his brother in 2013. His problems and initial referral date from that time. He referred to it to his doctors (*supra* at [25]). I find, to the lower standard of a reasonable degree of likelihood, that his brother was arrested. There is an absence of any alternative explanation for his symptoms.

49. There remains the issue of risk on return.

50. The documents provide prima facie evidence that go to the issue of risk on return to Sri Lanka in light of [7](d) of the headnote in ***GJ*** which provides inter alia:

'The current categories of persons at real risk of persecution or serious harm in return to Sri Lanka, whether in detention or otherwise, are:

...(d) A person whose name appears on a computerised "stop" list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate authorities, in pursuance of such order or warrant.'

51. It was not suggested that the conclusions of the country guidance should be diverted from.

52. As the appellant satisfies me for the reasons given that he is in that category his appeal succeeds.

Notice of Decision

The decision of the First-Tier Tribunal showed material error of law. It is set aside and remade as follows:-

The appeal is allowed on asylum grounds.

Direction Regarding Anonymity – rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

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 their 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.

Signed Date 12 February 2018

Upper Tribunal Judge Conway