



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02574/2018

THE IMMIGRATION ACTS

Heard at Field House
Heard on 9th of August 2018
Prepared on 10th of August 2018

Decision & Reasons Promulgated
On 23 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

BUDDHIKA [P]
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Lee of Counsel

For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Sri Lanka born on 27th of October 1987. He appeals against the decision of Judge of the First-tier Tribunal Freer sitting at Taylor House on 27th of April 2018. The Judge dismissed the Appellant's appeal against a decision of the Respondent dated 8th of February 2018 which was to refuse the Appellant's application for asylum and humanitarian protection.

2. The Appellant arrived in the United Kingdom on 13th of June 2012 and began a course of study in business management at Glyndwr University. On 27th of July 2015 his student visa was curtailed because he had not adhered to the attendance policy on the course and so had lost his sponsorship. His leave to remain expired on 29th of September 2015 but he did not leave the country thereafter. On 2nd of October 2015 the Appellant claimed asylum and some 2 ½ years later on 8th of February 2018 the Respondent made the decision to refuse the application which has given rise to the present proceedings.

The Appellant's Case

3. The Appellant's case was that before he could leave Sri Lanka to start his course of study he was suspected in May 2012 of vehicle hire dealings back in 2009 with a Tamil separatist. The Appellant had worked on the marketing side of a company which leased cars. He was arrested on 27th of May 2012 by four CID officers and tortured for 15 days by the authorities. He was helped to leave his detention by bribery and left Sri Lanka through the airport by bribery coordinated by a Buddhist monk. He left Sri Lanka on his own passport. After arriving in the United Kingdom and taking up his course of study he began to experience concentration problems which led to the curtailment of his visa. Since his arrival in the United Kingdom his mother had been asked, by persons in authority, as to the Appellant's whereabouts.

The Decision at First Instance

4. The Appellant produced one medical report at the hearing which, somewhat ambiguously, said that the Appellant's interview with the doctor was "consistent with [the Appellant's] outcome". The Judge commented that the report seemed to assist the Respondent as much as the Appellant. The Judge noted at [33] that there was "no full-blown complete syndrome of PTSD" at the time of the report but there was anxiety and depression.
5. In closing submissions to the Judge, the Presenting Officer noted that the main focus of the Sri Lankan government was on the Tamil population whereas the Appellant was Sinhalese. If the Appellant did require care in Sri Lanka, there were medical facilities available. For the Appellant, counsel submitted that if there was vagueness or inconsistencies in the Appellant's evidence it might be the result of poor mental health. The Appellant did not claim to be a suicide risk but there was a real risk of persecution at the airport.
6. In his determination the Judge did not find the Appellant to be a credible witness. Whereas the Appellant had claimed he had two scars he had also claimed that there had been a number of wounds inflicted all over his body which if correct the Judge believed would have left more scars than just two. No expert scarring report had been produced to confirm any of this. The Appellant did not live in a Tamil area and there was little background evidence of separatist activity in the Western region of

Sri Lanka where the Appellant had lived. The only evidence of the Appellant's arrest and detention was that given by the Appellant himself. The medical report did not refer to any psychological testing or treatment for the Appellant prior to November 2015 whereas the Appellant had arrived in United Kingdom and started his course in 2012. It was possible that the trigger for the Appellant's subsequent mental ill-health may have taken place after his arrival in the United Kingdom in which case the protection claim would fall away.

7. At [57] the Judge commented: "the omission of probative material evidence of the timing [of the arrested and ill treatment] entitles me to express reasonable doubt as to [the Appellant's] veracity. As I will explain later on, he missed numerous opportunities to verify the claim to date". At [58] the Judge considered a possible alternative explanation that the Appellant was embarrassed by his failure on his academic course and did not wish to return to Sri Lanka as a result. In the Appellant's favour the Judge found at [59] that he would not uphold all of the conclusions in the reasons for refusal letter. These related to the prevalence and effects of bribery when exiting through the airport, the delay by the Appellant in claiming asylum and the likely after-effects upon the Appellant of detention and torture over a period of 15 days.
8. Nevertheless, the Judge found, it was remarkable when, as here, a person of Sinhalese ethnicity of the majority Buddhist faith claimed political persecution against himself. The background information quoted by the Judge at [60] stated that the vast majority of the victims of torture and sexual abuse in Sri Lanka were Tamils. The Appellant did not fit that profile. The Appellant had claimed that a particular individual, YN, who was a customer of the leasing company had been suspected of being a Tamil separatist. No confirmation from the employer had been obtained to confirm the existence of such a client. If YN had never been a client of the company the protection case would fail. In any event there was no evidence beyond the Appellant's own assertion to show that YN was indeed a Tamil activist of any interest to the authorities in May 2012.
9. At [62] the Judge concluded that if YN had been a significant Tamil activist it would have been possible for the Appellant to obtain that confirmation, but he had not done so. If the Sri Lankan police had taken an interest in an employee of a large company such as the one the Appellant worked for that would have been "big news" and would have been well-known in Sri Lanka but again there was no confirmation of that. It was implausible that the Appellant's family would not have called for help from the employer to arrange the departure of the Appellant instead of using the services of a monk. On the Appellant's case the company had lost a valuable employee and the Judge doubted that they would have let the Appellant disappear without either enquiry or protest. The Judge was mystified as to why the Appellant had made no contact with his employer to obtain relevant documents. If necessary, such enquiries could have been made by a local solicitor in Sri Lanka. It was implausible that the police would have taken such a keen interest in only one

individual working for a company when the company had leased a car to a person of interest.

10. Although the Appellant claimed to have been unable to concentrate on his studies he had been able to answer 178 questions in one day put to him at the time of his substantive asylum interview. The interview was in 2016 when his symptoms were said to be at their height. There was slight PTSD, but the claim was not fully made out. There were a number of possible causes of the Appellant's psychological problems. If the Appellant's symptoms had arisen from the events in 2012 the Judge did not consider it plausible that the first record of treatment would be in 2015. There was no evidence from the Appellant's university to confirm the sequence of events which led to the Appellant being unable to continue his studies. The existence of mental health problems in the period between 2015 and 2018, confirmed by the medical report, probably showed previous trauma of some kind but needed to be looked at in the round with the other evidence.
11. The Judge did not find the Appellant was of any interest to the authorities, if he was he would have been placed on a stop list. At [75] the Judge set out five examples of evidence that one would have reasonably expected to see in a case of this kind: (i) a scarring report; (ii) a fuller report on the Appellant's PTSD; (iii) evidence from someone in Sri Lanka supporting the Appellant's claim; (iv) documentation such as an arrest warrant relating either to the Appellant or to YN and (v) evidence that YN existed. The Judge did not find the claim that the authorities were continuing to visit the Appellant's mother's house plausible. No warrant for the Appellant's arrest had ever been delivered to the family home. Such a long period had elapsed during which nothing else occurred the claim that the authorities were still interested in the Appellant was undermined. The Judge dismissed the appeal.

The Onward Appeal

12. The Appellant appealed against this decision arguing that the credibility points taken against the Appellant had not been put to the Appellant during the course of the hearing. This represented procedural unfairness. The issues relied upon by the Judge that were never raised before or during the hearing by either the Respondent or the Judge included: the possibility that the Appellant's mental health problems arose because he had struggled with his university course and was embarrassed or that he had had a breakdown in 2015; the absence of evidence from the University that he ceased to study for mental health reasons; the absence of objective evidence that YN was a Tamil activist or of adverse interest of the Sri Lankan authorities; the suspicious absence of evidence from the Appellant's Sri Lankan employer when it was the Judge's belief that it was reasonably open to the Appellant to obtain such evidence; the assumptions that the employer had considerable political clout and that the Sri Lankan police would not want to risk damaging the value of a local commercial enterprise; the assumption that the Appellant would not still be sought at the Sri Lankan family home because the diaspora would by now have made the Appellant's presence in the United Kingdom known to the government of Sri Lanka.

13. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Kelly on 19th of June 2018. In granting permission to appeal he wrote: "given that the Tribunal appears largely to have discounted the Respondent's reasons for concluding that the Appellant's claim was not credible, it is arguable that the Tribunal did not provide the Appellant with a fair opportunity to address the alternative basis upon which it arrived at the same conclusion."

The Hearing Before Me

14. As a result of the grant of permission to appeal the matter came before me to determine in the first place whether there was a material error of law in the Judge's determination such that it fell to be set aside. If there was then the appeal would have to be reheard. If there was not then the decision of the First-tier Tribunal would stand.
15. For the Appellant, counsel submitted that the grounds of onward appeal set the matter out in detail. The Judge had rejected the vast majority of points taken against the Appellant by the Respondent. I queried with counsel the point made in the grounds that the Judge had wrongly assumed that the Appellant's employer had considerable political clout since it appeared to be the Appellant's case that the employer was a substantial company. Counsel replied it was the cumulative effect of the points made in the grounds which engaged the issue of fairness of proceedings citing the case of **AM Sudan [2015] UKUT 656**.
16. In reply the Presenting Officer indicated that the Judge had taken a large number of points against the Appellant and some were stronger than others. It seemed quite clear that the point taken by the Judge against the Appellant on the issue of scarring arose from the Appellant's oral testimony on the matter. No medical evidence had been adduced on the scarring issue and it was therefore open to the Judge to draw a conclusion from the Appellant's oral evidence.
17. The Presenting Officer argued that the other points taken by the Judge against the Appellant were not so much based on the Appellant's evidence as the lack of it. It was an unusual Sri Lankan case because the Appellant was not of Tamil ethnicity therefore it was reasonable for the Judge to have expected the Appellant to put forward as much evidence as possible to show the particular profile of the Appellant that would put him at risk. The conclusions of the Judge related to the failure by the Appellant to supply appropriate supporting evidence. The Judge had legitimately posed the question: why would the authorities take such a direct and adverse interest in the Appellant when it was a case of the company conducting its normal business of leasing cars?
18. At [91] the Judge had set out the key points for the Appellant to reflect on, so he would understand why his claim had been dismissed. These included the point that the mental health issues which were noticed in 2015 to 2018 had not been caused by persecution but could have had other possible causes. If the Appellant's account was

true it was reasonable to expect that mental health treatment would have started in 2012/13 not 2015. Given how efficient the Sri Lankan authorities were, it was not credible that the authorities would continue to call at his mother's home. They had stopped being interested in the Appellant in any event since they had not issued a warrant for his arrest. There was no proof that the Appellant was ever more than of low-level interest. The Appellant failed to show a future risk in Sri Lanka. If YN had existed, the authorities would by now know about him and would be in a position to decide whether the Appellant was still of interest to them. The Respondent's reasoning in the refusal letter was not complete perhaps due to resources problems. This was an unusual claim and to prove his case the Appellant ought to be in a position to provide more evidence.

19. In conclusion, counsel argued that the determination could not be saved even if there were credibility issues other than those objected to in the grounds of onward appeal since all of the credibility findings were infected by the Judge's error in not ventilating matters at the hearing such that the Appellant had an opportunity to address them.

Findings

20. In the case of **MA** the Upper Tribunal reminded Judges that where there were concerns or reservations about the evidence adduced which had not been ventilated by the parties or their representatives these may require to be ventilated to ensure that each party had a reasonable opportunity to put its case fully. There must however be some finality to litigation. The Judge had received the evidence of the Appellant which contained a number of serious gaps. The Appellant claimed to have suffered injuries over his body and yet he produced no satisfactory scarring evidence to confirm that. The burden of proof was on the Appellant to make his case. If he was going to allege that he had wounds inflicted on him which had left scars it was reasonable to have expected him to produce some evidence to support that contention. Instead the Judge was left with an unsatisfactory state of affairs whereby the Appellant made an assertion which could not be verified.
21. The Judge was entitled to comment on the Appellant's evidence that the authorities had taken no further action against the Appellant and look at that along with the other evidence in the round. It was open to the Judge to conclude that the authorities had no real interest in the Appellant and to draw from that that the credibility of the claim was undermined. There was certainly no requirement that the Judge should send some form of draft judgment out to the parties and invite them to comment on the Judge's conclusions.
22. Whilst the determination might be criticised for speculating on why the Appellant had made a late claim for asylum (that the Appellant might be ashamed to return to Sri Lanka in circumstances where he had failed in his course), there was still a serious gap in the Appellant's evidence relating to the timing of the Appellant's medical treatment. The Appellant claimed that he had suffered a traumatic event in May 2012

and yet the medical evidence showed that he had only received treatment in the United Kingdom from 2015 onwards. This was an obvious gap which the Appellant could reasonably be expected to have addressed. He was represented throughout the proceedings and the late start of the Appellant's medical treatment called for some explanation. None was forthcoming.

23. Instead what the Judge was faced with was a very vague claim that for some reason, not properly explained, the Appellant had been picked on by the authorities because his employer (not simply the Appellant) had in the ordinary course of business leased a car to a man of interest to the Sri Lankan police. The employer had apparently held the Appellant's job open for the Appellant while he went to United Kingdom to study, indicating that it would have been possible for the Appellant to revert to the employer for supporting evidence, yet the Appellant produced nothing from the employer to confirm any of the events described.
24. If the Appellant was working in the marketing department as he claimed his arrest would have been well known to his employers. It would have been a relatively easy matter for the Appellant to have obtained confirmation from the employer of what had happened. The authority of TK Burundi [2008] EWCA Civ 228 is to the effect that where evidence can reasonably be expected to be obtained but is not, it is open to a Judge to form an adverse view of the credibility of the claim. Asylum appeals do not require corroboration but where supporting evidence can be easily obtained but is not obtained, it is open to a Judge to form an adverse view of the Appellant's credibility as Judge Freer did. The instant case was not one where there were a large number of complex points that the Judge was making which could and should have been put to the Appellant during the course of the hearing. This was a case where the Appellant came forward with an inherently implausible account (as the Judge found) but was saying to the Tribunal in effect: "this is my account you must accept it".
25. It is correct, as the Judge noted, that asylum claims have only to be proved to the lower standard of proof that is to say the Appellant must show that there is a reasonable chance or likelihood that the events he describes did in fact occur and that there is a corresponding risk upon return. In this case however the Appellant rather than obtain supporting evidence which it should have been obvious would be needed appeared to sit back and say to the Tribunal the case should be accepted in its entirety. It is not surprising in those circumstances that the Judge was not prepared to accept the Appellant's claim.
26. What the Judge did do was to explain in some detail why the claim failed. The Appellant could have been left with no doubt that it was the inherent implausibility of the claim which had led to the appeal being dismissed. This was not a Sri Lankan claim of a sort frequently seen in the Tribunal. The Appellant was of the same ethnicity as the majority of the population. For him to be suspected of assisting Tamil separatists was thus such an unusual claim that the Appellant and his representatives would have been put on notice of the need to obtain supporting evidence to confirm the Appellant's profile. The burden of proof rested upon the Appellant.

27. Whilst I appreciate that the hearing before me was to determine whether there was a material error of law in the First-tier Tribunal's decision, it is important to point out that I have not been given any proper explanation why the Appellant did not provide the basic supporting evidence which the Judge highlighted needed to be produced to substantiate the claim. I do not accept the argument that the Appellant could not have known that such evidence would be required, for the reasons which I have set out at some length above. The Judge was not told what if any enquiries had been made by the Appellant or his representatives to establish the existence of YN? If no enquiries had been made, why not? Rather than look for supporting evidence the Appellant simply takes a procedural point in his onward appeal against the determination but does not address the issues in the case. The Judge's findings were not infected by procedural error.
28. I do not find that there has been any procedural error or any failure to afford the Appellant a fair hearing. The burden of proof is on the Appellant and he did not discharge that burden for the reasons given by the Judge. In those circumstances I dismiss the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 15th of August 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge