



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08017/2017

THE IMMIGRATION ACTS

Heard at Field House
On 26 April 2018

Decision & Reasons Promulgated
On 15 May 2018

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THMN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Ahwad Counsel instructed by Linga & Co, Solicitors

For the Respondent: Mr I Jarvis Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make this order because this is a protection case and there is invariably a risk in cases of this kind that publicity will itself create a risk.

2. This is an appeal by a citizen of Sri Lanka against the decision of the First-tier Tribunal dismissing his appeal against the decision of the Secretary of State refusing him asylum and leave to remain on human rights grounds.
3. The appellant's claim has certain unusual elements. He says that he is at risk because he is seen as a supporter of the LTTE but he was not arrested until March 2012 which, as the First-tier Tribunal Judge has pointed out, was some three years after the defeat of the LTTE.
4. It is a case that does not obviously fit in what might be thought of as the usual pattern of asylum cases. The appellant was disbelieved and a major reason for disbelieving him was the lateness of his claim. He had been in the United Kingdom for some time before prompted to seek asylum and that is something which the judge was entitled to and probably even obliged to take into account and about which the judge formed an adverse view.
5. There were other elements of the case that concerned the judge. One was the failure to produce any supporting evidence at all from an LTTE activist that the appellant claimed to have met in Paris and another was an element in the account of the appellant's mother which did not make sense to the judge. The judge found that if, as was claimed, the mother had delayed telling about the arrest of the father there would have been no reason to have told the appellant at all. None of those are particularly powerful points but they have been made.
6. The challenge is about the approach taken to the credibility finding.
7. Mr Jarvis has reminded me helpfully and properly not to fall into the error of muddling form and content. Judges have to start somewhere and wherever they begin there is a temptation to assume that that is the first time that they give any thought to their findings and the order in which things appear in the decision indicates a poor approach to the evidence.
8. I know from my own experience that whilst that impression can be created it is very often totally wrong and the order in which points appear in the Decision and Reasons may well have no relevance at all to the thinking process of the judge who may well have been giving the matter a great deal of thought from first receiving the papers. We just do not know.
9. It is therefore incumbent upon those of us construing determinations to do so with a degree of sense and caution but also on those writing them to say what they mean.
10. There are two elements in the judge's reasoning that concern me greatly. The first was picked up by the First-tier Judge who gave permission and it occurs at paragraph 12(i) of the Decision and Reasons where the judge says "he went on to make what I find must have been a bogus application for leave as the partner of an EEA national". This is an adverse credibility finding which must have impacted on the rest of the findings and I can find no justification whatsoever for the use of the word "bogus" and Mr Jarvis cannot help me.

11. A person who makes an unsuccessful application has not necessarily made a dishonest one, merely one that was not successful and although it is hard to say that idea that an earlier application was “bogus” features to a great extent of the judge’s reasoning it should not feature at all.
12. The next point that concerns me is the consideration of the medical evidence. The medical evidence has two elements. There is the report of a psychiatrist and the report of a physician. The physician’s report does not say too much. It identifies several scars on the appellant’s body and describes them as consistent with the mechanism given. This is clear evidence of nonaccidental injury but as people go through life they tend to collect marks as the result of nonaccidental injury and the injuries are not of a kind that are highly indicative of torture. The medical practitioner recognised they could have been caused in other ways but their consistency with the claimed mechanism is a point that should be factored firmly in the appellant’s favour. It may be that that has happened here. I am not sure.
13. However I am satisfied that the treatment of the psychiatrist’s evidence at least in the way it is expressed is just wrong. I am concerned about the second part of paragraph 13 which states:

“The psychiatrist does consider whether the appellant could be feigning symptoms of PTSD caused by his experiences in detention and finds in the appellant’s favour. I take nothing away from the professionalism of the report but it does not have the benefit of taking into account numerous credibility points I have found against the appellant. It is based on an uncritical acceptance of the appellant’s account.”
14. I do not find that is a fair assessment at all. A psychiatrist has said that it is very difficult to feign the correct combination of symptoms although individual symptoms can often be feigned very convincingly. It is the combination of symptoms which has impressed the psychiatrist who was also impressed by an episode in the consulting room which in the psychiatrist’s opinion would be very hard to feign. It may be that the First-tier Tribunal Judge meant that the existence of PTSD could be the result of things other than the mechanism identified by the appellant. If that is what he meant it is a great pity it is not what he said because I have to decide the case on the basis of what is in front of me, not on the basis of what I think might have been intended and the wording here does not show a proper appreciation of the psychiatric report.
15. It follows therefore that I am persuaded that the reasons given are not satisfactory.
16. I also find that there is weight in the submission of the appellant that the judge’s approach to credibility was fundamentally wrong, that is instead of looking at the case in the round and starting off with the clear evidence of the appellant having been injured and the clear evidence of the appellant suffering from PTSD, the judge appears to have formed a view before and then wondered if the psychiatric and medical evidence would impact on the view that was already lurking. I am not sure that is what the judge did but if it is what the judge did it was completely wrong and the layout of the decision rather supports the contention that the approach was wrong.

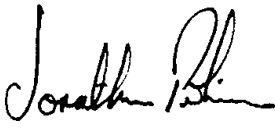
17. However even if the approach was right but not very well expressed the approach to the psychiatrist's evidence was wrong.
18. I am therefore not satisfied that the credibility findings can stand and I set aside the decision of the First-tier Tribunal. I then have to ask myself what to do next.
19. This is not a decision that could be repaired. Both parties considered the point and agree that the only practicable solution if I find an error of law, which I do, is for there to be a rehearing. I think that at the moment would be done more expeditiously by being sent back to the First-tier Tribunal so I send it back to the First-tier Tribunal to be reheard.

Decision

The First-tier Tribunal erred in law. I set aside its decision and direct that the appeal be heard again in the First-tier Tribunal before a different judge.

Signed

Jonathan Perkins, Upper Tribunal Judge



Dated: 11 May 2018