



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10649/2016

THE IMMIGRATION ACTS

Heard at Field House
On October 23, 2018

Decision & Reasons Promulgated
On November 20, 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

[A F]

~~(NO ANONYMITY DIRECTION MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Seehra, Counsel, instructed by Nag Solicitors
For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer
Interpreter: Ms Jeyaraja

DECISION AND REASONS

1. No anonymity direction is made.
2. The appellant, a national of Sri Lanka, travelled to the United Kingdom as a dependant on his wife's student visa and they entered the United Kingdom on March 3, 2011.

3. On June 6, 2014 the appellant's wife applied to extend her leave to remain as a Tier 4 student and the appellant applied to extend his leave as her dependant but their applications were refused.
4. On April 25, 2015 the appellant's wife and the appellant applied for leave to remain on family and private life grounds but both applications were refused. The appellant's wife appealed her decision and her appeal was due to be heard on February 24, 2016 but her appeal was withdrawn on February 18, 2016 after the appellant indicated he intended to claim asylum.
5. The appellant attended a screening interview on March 23, 2016 and his substantive interview took place on September 15, 2016. The respondent refused his application on September 21, 2016.
6. The appellant lodged grounds of appeal on October 3, 2016. His appeal came before the First-tier Tribunal on November 8, 2016 and in a decision promulgated on December 12, 2016 the Tribunal dismissed his appeal. That decision was appealed and was subsequently set aside by Upper Tribunal Judge Williams on May 15, 2017 who directed that the matter be reheard in the First-tier Tribunal.
7. The appellant's appeal was dismissed by Judge of the First-tier Tribunal Fox (hereinafter called "the Judge") in a decision promulgated on February 16, 2018.
8. The appellant appealed this decision on March 2, 2018 arguing the Judge had erred by failing to consider background evidence and placing too much weight on a perceived inconsistency in the evidence. Upper Tribunal Judge Finch granted permission to appeal on June 28, 2018 finding it arguable the Judge had failed to give appropriate weight to all the evidence before reaching his findings in relation to the basis on which the appellant feared persecution in Sri Lanka.
9. The matter came before me on August 17, 2018 and after hearing submissions I found that whilst the findings were potentially open to be Judge they had been made independently of any assessment of the documentary evidence and the Judge therefore fell into error.
10. I considered whether to remit the matter back to the First-tier Tribunal but was satisfied that the error in law was due to the way the Judge had assessed the evidence. In other words, I was satisfied this was a not case where all the evidence needed to be reheard and the appellant could, at the resumed hearing, address any issues that concerned him by way of further written or oral evidence.

PRELIMINARY ISSUES

11. At the resumed hearing Ms Seehra invited me to re-consider my decision to retain the appeal and referred me to the Presidential Guidance. Mr Whitwell opposed the application pointing out that a decision as to venue had previously been addressed and that this was effectively the third time this case would have been heard in the First-tier Tribunal. Whilst he noted that Ms Seehra felt a fair hearing could only be

achieved if the matter was returned to the First-tier Tribunal he argued that as there had been no further witness statement and Ms Seehra's recent skeleton argument focused on the issue of article 8 he submitted that this case could be properly dealt with in the Upper Tribunal especially as the error in law centred around the failure by the Judge to consider all the evidence before making findings.

12. The Presidential Guidance made it clear that most cases should be retained in the Upper Tribunal and whilst cases involving fresh oral evidence usually would be remitted back to the First-tier Tribunal the Guidance made clear that this was ultimately a matter for the Tribunal.
13. Having considered the submissions on this issue I agreed with Mr Whitwell's submission which mirrored my previous decision on August 17, 2018 and concluded that the Upper Tribunal was best placed to deal with this matter.
14. The matter then proceeded with oral evidence being given by both the appellant and his wife, Marianne Rodrigo.
15. At the conclusion of the hearing I agreed, with the consent of both representatives, to delay promulgation of this decision pending the handing down by the Supreme Court of the case KO (Nigeria) and others v The Secretary of State for the Home Department [2018] UKSC 53. I did so on the basis that this authority may affect the approach I took to article 8 and in particular section 117B(6) of the 2002 Act.
16. Both Mr Whitwell and Ms Seehra have provided written representations and I have recorded those in my decision and had regard to them.

DOCUMENTARY EVIDENCE

17. The Tribunal has the following documents:
 - (a) A respondent's bundle consisting of the appellant's screening and substantive interview records, correction letter dated September 19, 2016, the appellant's visa application form, supporting documents, the respondent's decision and the grounds of appeal.
 - (b) The decision of Judge of the First-tier Tribunal Fox.
 - (c) The appellant's original bundle consisting of witness statements from the appellant, his wife, an affidavit from the appellant dated May 28, 2010, a photo, letter and school report in relation to the appellant's son, an article from TamilNet dated May 2, 2010, letters from Rev Nethasingher and Gnanasingham Thanushan and counsel's original chronology and skeleton argument from 2016.
 - (d) The appellant adduced additional evidence consisting of a Guardian newspaper article dated July 23, 2018, the report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism dated July 23, 2018, the original statement of Ben Emmerson, UN special rapporteur on human rights and counterterrorism dated July 14, 2017, US State Department

report 2017, extract from the July 2011 COIS report on exit procedures and case law in relation to article 8 ECHR.

THE EVIDENCE

The Appellant's Evidence

18. The appellant adopted his witness statement dated November 4, 2016 and affidavit from May 28, 2010 and gave oral evidence.
19. The appellant decided to visit the church called Our Lady of Shrine of Madhu as this was a place of pilgrimage for all faiths. In order to go there from where he lived (approximately 4 ½ hours drive from where he lived in Negombo) he had to pass through the checkpoint at Chettikulam. The document at page 25 of the original bundle confirmed the appellant and Gnanasingham Thanushan were known to each other.
20. They set off on April 30, 2010 and were stopped at the Chettikulam checkpoint but allowed to pass by the army. Approximately 1-2 km down the road a white van approached them and blocked their path before causing the appellant and his friend to fall off the bike.
21. The men in the van verbally abused them and then three of the males, dressed in camouflage trousers and T-shirts, alighted from the back of the van. Two of the men wore army caps and one wore a black scarf across his face and they had either a long gun or a pistol. A fourth man drove the vehicle. One of the soldiers kicked the appellant in his "balls" and as he bent forward another soldier struck him with his gun to his shoulder area. When the appellant tried to get up one of the males kicked him in his face and he fell back.
22. The male with the pistol held the gun against his friend's head. One of the soldiers stated that 'this was the person we wanted "Sir"' whilst pointing the pistol at his friend. At the hearing before me the appellant reiterated that the male called "Sir" was from the van and not him. His friend was then taken into the van and driven away.
23. Shortly after a tractor, driven by another soldier, passed him and took him back to the checkpoint where he explained to the officer what had happened. He was asked if he wished to make a complaint and he stated he did not, but he was told that he should report the incident to the police.
24. The men at the checkpoint stopped a passing van and the driver took the appellant to the local police station where police officers took his complaint on a small notebook.
25. From the police station other friends, from Negombo, took him to a private hospital where he saw Dr Ranjan. His mother had requested the appellant's medical records, but the doctor had informed her he would not release them without positively identifying the appellant personally. At the hearing before me he confirmed that he

had been unable to obtain information about his injuries from the doctor because the doctor had been too busy to speak to him.

26. The appellant explained that the bruises, skin damage and knee injury were caused by him falling off the bike. The injuries he suffered to his shoulder area and groin were as a result of being assaulted. He was left with sore testicles, a split lip and pain to his shoulder and the back of his neck as a result of being hit by the gun butt. The swelling caused by him falling off the bike lasted 4-5 days and the other swellings lasted between 3-4 days.
27. The following day the police station called him and asked him to attend at Vavuniya hospital as they had located an unidentified body in an abandoned well. The appellant, his friend's partner and two other persons accompanied him and he identified the person as his friend.
28. His friend's body was on a trolley. His friend was wearing trousers and a torn T-shirt. When questioned in the First-tier Tribunal how he had been able to observe his friend's injuries to the buttocks, despite being covered with trousers, he replied that he meant the back of his friend's shoulders and not his backside as he had stated at paragraph 13 of his witness statement. The appellant accepted that he had no way of knowing whether the injury sustained by his friend was as a result of the motorcycle accident.
29. At the instigation of Rev Nethasinghe he reported his friend's death to the Human Rights Commission and the appellant provided a copy of his affidavit dated May 28, 2010. The original letter acknowledging receipt of his complaint by the Commission has been produced. The appellant was unaware whether any further action had been taken on his complaint as he now resided in the United Kingdom but to the best of his knowledge no action had been taken although he had not personally chased it up.
30. When questioned why his wife had said this incident had occurred in either 2008 or 2009 he suggested that she must have been confused. He explained that she had never attended court prior to this case and that her attendance at court may have led her to becoming confused.
31. He accepted there was no evidence his friend was associated to the LTTE but he believed he was targeted because he was a Tamil.
32. After making his report to the Commission he began receiving threatening phone calls telling him to withdraw his complaint and he was told that what had happened to his friend would also happen to him. These calls continued up until the time he left Sri Lanka on March 3, 2011.
33. On September 4, 2010, 6-7 people in a jeep attended at his family home and threatened his family. He stated his mother was pushed and his wife was held by her neck and they were questioned as to his whereabouts. The appellant stated his wife was shown a document and told it was a warrant, but it was not handed to her. He

did not report this incident to the police as he feared he would become a victim like his friend.

34. The appellant confirmed that he had left Sri Lanka through normal channels and had entered the United Kingdom on March 3, 2011 as his wife's dependent.
35. The appellant's mother has never disclosed his whereabouts to the authorities although the authorities had visited her home on September 4, 2010, January 17, 2014 and on November 21, 2015 when they questioned and threatened her.
36. He explained that he only became aware about claiming asylum at the beginning of 2016. He denied having spoken to other Sri Lankan asylum seekers about claiming asylum prior to that time.
37. At today's hearing the appellant confirmed that having arrived in the United Kingdom in 2011 his eldest child had been attending either nursery or school. He was due to start Secondary School in September 2019.
38. He confirmed that his son spoke English and if he spoke to his son in Sinhalese his son answered in English. Under cross-examination he disputed that his son spoke Sinhalese although he accepted he understood the basics. He explained that neither he nor his wife could speak English properly.
39. The appellant stated that his son had not spoken to his paternal grandmother in Sri Lanka since being in the United Kingdom. He accepted that both he and his wife tried to ensure that he knew about his heritage and country of origin.

The Appellant's Wife's Evidence

40. The appellant's wife adopted her witness statement dated October 31, 2016 and gave oral evidence to both the First-tier Tribunal and the Upper Tribunal.
41. In her witness statement at paragraph 5 she stated that her husband first had problems with the army on April 30, 2010 and she described how her husband told her that his friend had been taken away by Sri Lankan soldiers. During the First-tier Tribunal hearing she could not specifically recall when the appellant's problems first began but stated that his problems began in either 2008 or 2009 although she stated that her memory was affected by both her mental health and the fact she had been breastfeeding. She accepted this contradicted her witness statement in which she stated the incident occurred on April 30, 2010.
42. Before me, she stated that the reason she had been unable to give the correct date was because she had been distracted and uncomfortable giving evidence about matters she had tried to forget and she had said the first thing that came into her mind. She accepted there was no medical evidence supporting her claim to have any medical problems.

43. At the hearing before the First-tier Tribunal she stated that the appellant had told her that he had suffered all his injuries from the motorcycle accident and she made no reference to him suffering his injuries from a beating.
44. When describing the incident that occurred on September 4, 2010 the appellant stated in her witness statement that her mother-in-law had opened the door and when they stated they want to search the home she asked them for the warrant and they showed her a piece of paper. Neither she nor her mother-in-law were able to read the paper properly and the men told them that they would return again. She accepted when giving evidence that she had not mentioned anything about the soldiers grabbing hold of her neck or assaulting her but she now believed that she may have given the First-tier Judge the wrong answer and now supported the account provided by her husband.
45. The appellant's wife agreed, contrary to what her husband had stated, that her son kept in contact with both sets of grandparents. He would speak to her parents approximately twice a month by telephone and his paternal grandmother once a month. She maintained that he spoke to them in English and she translated for him.

DOCUMENTARY EVIDENCE

46. A report in the Guardian dated July 28, 2018 summarised the content of the UN rapporteur. The Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, dated July 23, 2018, was based on discussions he had with the Attorney general, the Chief Justice, High Court judges in Colombo, Anuradhapura and Vavuniya, detainees in New Magazine Prison in Colombo and Anuradhapura, lawyers and family members of those detained and the Chairperson and one of the Commissioners of the National Human Rights Commission as well as representatives of civil society. He concluded that in 2015 Sri Lanka appeared to have turned a corner with a coalition government running the country. The Human Rights Council set out key goals for reconciliation, transitional justice, accountability and reform of the security sector but none of the measures so far adopted by the coalition government were adequate to ensure real progress. The Prevention of Terrorism Act remained on the statute book and individuals were still held in detention with the Tamil community remaining stigmatised and disenfranchised whilst the trust of other minority communities was being steadily eroded. He encouraged Sri Lanka to urgently implement previous commitments to address the legacy of widespread and serious human rights violations.
47. The US Country Report on Human Rights Practices the 2017 confirmed that the civilian authorities generally maintained control over the security forces although there were significant human rights issues involving Tamils and non-denominational Christian groups. There was evidence that where the police acted unlawfully police officers were arrested. Reports of torture continued with there being evidence of police officers allegedly "roughing up" suspects to extract a confession. The use of torture continued for those arrested and detained on national security grounds and the authorities used the legislation disproportionately against the Tamil community.

48. In the 2011 Country Information Report, the British High Commission advised that anyone leaving the country had to produce their passport and boarding card at the Department of Immigration and Emigration area. All passengers completed a departure card and had to pass through immigration control who swiped the passport against the Border Control System database. The Department are notified when a court decides to impound a suspect's passport or an arrest warrant has been issued. The details of such persons would be placed on the alert or wanted list but there was no other mechanism to ensure that the Immigration Officers are aware of such instances. Immigration Officers had no other power to prevent people leaving the country unless the State Intelligence Service had informed them of persons suspected of terrorist activity.
49. An article dated May 2, 2010 from TamilNet confirmed that the body of a Tamil youth had been recovered from an abandoned well in Chettikulam and had been identified as Gnanasingham Thanushan.

SUBMISSIONS

50. Mr Whitwell adopted the decision letter and submitted that the appellant's protection claim lacked credibility due to discrepancies between the accounts provided by the appellant and his wife. He summarised these discrepancies as follows:
- (a) At the first hearing before the First-tier Tribunal his wife had stated that the event involving the "white van" occurred in either 2008 or 2009 whereas the appellant stated it was April 2010.
 - (b) The appellant's wife had failed to mention either in her witness statement or at the original hearing that the authorities had grabbed her around her neck in September 2010 whereas now she supported the account that had been put forward by her husband.
 - (c) The appellant's wife failed to mention prior to this hearing that her husband's injuries came from him being assaulted and had previously stated they came from the motorbike incident.
51. Today both the appellant and his wife blamed the discrepancies on her mental health condition but there was no medical evidence that she suffered any difficulties giving evidence in a formal setting and he pointed out that in her evidence to this Tribunal she stated that she said the first thing that came into her head.
52. Mr Whitwell further submitted it lacked credibility:
- (a) If they had been attacked by the army and his friend had been abducted by the army that the appellant would return to the army checkpoint and report the incident to the officers manning the checkpoint and thereafter attend at the police station.

- (b) The appellant would have been able to leave the country without any difficulties despite there being a suggestion there was an arrest warrant out for his arrest in September 2010.
53. The appellant had failed to claim asylum until 2016 despite the fact his initial leave had expired and applications to extend his stay both as a Tier 4 dependent and on family and private life grounds had both been refused and his wife's appeal against those decisions was withdrawn on February 18, 2016.
54. With regard to the Article 8 claim he submitted there were credibility issues regarding both language and the level of contact that the appellant's son had with his grandparents. The appellant and his wife gave inconsistent evidence about the level of contact that their son had with his grandparents and he invited the Tribunal to treat with caution the account given regarding language spoken especially as the appellant and his wife both claimed their English language was limited and he submitted it lacked credibility that their son would speak to them in English when they admitted speaking to him in Sinhalese.
55. With regard to section 117B(6) of the 2002 Act he submitted the appellant's son was not at a critical stage of his education and had demonstrated that at the very least he understood Sinhalese and there was familiarity with his grandparents in Sri Lanka. The appellant and his wife both admitted that they taught him about his origins and culture and in the event the appellant and his wife had no other basis to remain in this country he submitted that their immigration history was particularly poor and it would not be unreasonable to require the child to accompany his parents back to Sri Lanka assuming his best interests remained with his parents.
56. He accepted that when considering "reasonableness" under section 117B(6) of the 2002 Act, or indeed paragraph 276ADE(1)(iv) of the Rules, that the Appellant's "qualifying" child cannot be held responsible for the conduct of the parents and so criminality, overstaying or other breaches of immigration law on the part of the parents is not relevant to the question of whether it is reasonable to expect the child to leave the UK, except in so far as the assessment must have regard to the "real world" context which will be that the parents are to be removed.
57. The Appellant has no right to remain in the UK, and so it is submitted that his "qualifying" child will normally be expected to leave with him. This is a natural expectation.
58. It is further submitted that on the particular facts of this case and after taking into account factors including the absence of any adverse factors in respect of the child's health, limited family ties in the UK and the ability to integrate into life in Sri Lanka with the assistance of their parents who will be returning with them, it is reasonable for the qualifying child to leave the United Kingdom.
59. In KO the facts in one of the adjoined appeals of NS is illustrative. In NS the factual matrix was that one child had been in the UK for over ten years and neither child had

experience of life outside the UK. The Supreme Court upheld the decision dismissing the appeal at paragraph 52 finding:

“The parents’ conduct was relevant in that it meant that they had to leave the country. As I have explained (para 18 above), it was in that context that it had to be considered whether it was reasonable for the children to leave with them. Their best interests would have been for the whole family to remain here. But in a context where the parents had to leave, the natural expectation would be that the children would go with them, and there was nothing in the evidence reviewed by the judge to suggest that that would be other than reasonable.”

60. Ms Seehra adopted the content of her skeleton arguments dated November 8, 2016 and October 21, 2018. She submitted that the appellant had a well-founded fear of persecution from the Sri Lankan authorities because of his imputed political opinion as an LTTE member. She submitted that key aspects of the appellant’s claim had been supported by a news article confirming his death, an article confirming the existence of the Church, the acknowledgement letter from the Commission, a letter from Rev Nethasingher requesting accommodation for the appellant and Gnanasingham Thanushan. This letter demonstrated a connection between the appellant and Gnanasingham Thanushan.
61. She submitted that the appellant had provided a consistent account and that any inconsistencies between his and his wife’s evidence should be treated as confusion on her behalf due to the fact she was breastfeeding at the time of the alleged incident and suffering from mental health issues.
62. There was background evidence confirming the ongoing persecution of Tamils and previous incidents involving white vans supported the appellant’s claim that he had been confronted by males in a white van who were from the army. The incident had been reported to the police at the suggestion of the authorities at the checkpoint.
63. The background evidence also confirmed that when the appellant and his family left the country there was few procedures in place to prevent them leaving and she submitted that he would not have been flagged up on any database.
64. Ms Seehra referred to the current objective evidence which suggested that disappearances continued.
65. Applying the Country Guidance in GJ and Others [2013] UKUT 00319 and the Court of Appeal decision of MP and Others [2014] EWCA Civ 829 she submitted that the appellant would be at risk not only because of what had happened to him but because he had provided evidence to the Commission which potentially implicated the army in his friend’s murder. The latest background evidence suggested that the situation had deteriorated since GJ and that even those viewed as supervisors were subject to harassment.
66. She submitted that no adverse finding should be made under section 8 of the 2004 Act through the appellant’s failure to claim asylum until 2016, despite arriving in this

country in 2011, because they had entered with leave and had no reason to seek asylum.

67. Alternatively, she submitted that the appellant and his family should be granted discretionary leave to remain under article 8 ECHR. She referred to the fact that the appellant's son had lived in this country for over seven years and whilst he may not have met the requirements of the Immigration Rules at the date of application nevertheless section 117B(6) of the 2002 Act applied and she submitted that it would not be reasonable to expect the child to leave the United Kingdom.
68. Bearing in mind the length of time the child had been in this country she submitted there had to be powerful reasons, as identified in MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT88 and MA (Pakistan) [2016] EWCA Civ 705 as well as the respondent's own policy (Family Migration: Appendix FM Section 1.0b), to find it would be reasonable to require the child to leave the United Kingdom as the child should not be blamed for his parents failings.
69. The narrow issue in KO (as far as it is relevant to the instant appeal) was whether when determining if it was "reasonable to expect" a child to leave the UK (section 117B(6)) the Tribunal was concerned only with the position of the child, and not with the immigration history and conduct of the parents, or any wider public factors in favour of removal.
70. In deciding that issue the Court essentially ruled that in a non-deportation appeal the parents' conduct was irrelevant to the assessment of reasonableness under paragraph 276ADE(1)(iv) or section 117B(6), considering inter alia:
 - (a) Zoumbas [2013] 1 WLR 3690 and the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of the parent".
 - (b) There was no requirement to consider criminality or misconduct of the parent in paragraph 276ADE(1)(iv), and section 117B(6) incorporated the substance of the rule in the context of the right of the parent to remain.
 - (c) Section 117B(6) was a freestanding provision.
 - (d) It was relevant to consider where the parents were expected to be since it would normally be reasonable for the child to be with them. If the parents cease to have a right to remain, and it would not be reasonable for the child to leave, then section 117B(6) may give parents a right to remain.
 - (e) It was right that the issue of "reasonableness" under section 117B(6) was focused on the position of the child.
71. She submitted that KO did not overrule MA Pakistan [2016] EWCA Civ 705 (save for limited disagreement at paragraph 19 of KO referring to paragraph 40 of MA Pakistan). The appeal of NS in KO was considered and dismissed on its own facts.

FINDINGS

ASSESSMENT OF PROTECTION CLAIM

72. The appellant brought an asylum claim based on an incident which is said to have occurred on April 30, 2010. Following that incident, the appellant claims he received threatening calls and visits to the family home including two visits which took place after the appellant and his family had left Sri Lanka and come to the United Kingdom.
73. In considering the appellant's claim about what happened in Sri Lanka I have taken into account not only the written and oral evidence provided by the appellant and his wife before the Upper and the First-tier Tribunal but I have also taken into account the documents and country evidence that have been submitted by the appellant's representatives in this appeal.
74. In support of his claim that something happened he has produced the following evidence:
- (a) An article from TamilNet dated May 2, 2010 which referred to the body of a victim identified as Gnanasingham Thanushan being found from an abandoned well in Chettikulam.
 - (b) An affidavit submitted by the appellant which is a document which the appellant signed on May 28, 2010 in which he described what had happened.
 - (c) A letter dated June 15, 2010 from the Commission of Enquiry on Lessons Learnt and Reconciliation. This letter refers to receiving a complaint from the appellant and advised that they were currently investigating the circumstances and informed him he would hear back from them further.
75. The appellant claimed three men, wearing camouflage trousers and army caps, alighted from the vehicle and attacked him and abducted his friend. The appellant claimed that the van was a white van and historically "white vans" have been linked to abductions by the army in Sri Lanka.
76. The appellant and his wife blame her medical condition for the inconsistencies in the wife's evidence and she even stated in her evidence to me that she often said the first thing that came into her head. This would have been a traumatic incident and the fact the appellant's wife gave contradictory evidence to that given by her husband, in relation to the date and how he received his injuries, undermined the weight that I could attach to those pieces of evidence.
77. The appellant's wife demonstrated a willingness to alter her evidence to match that of her husband in relation to the date of the alleged assault, how her husband received his injuries and how she was attacked in her home by the authorities. They both blamed those inconsistencies on the fact the wife was breastfeeding at the time of the alleged incident and was suffering from mental health problems. There was no medical evidence to support any medical condition or learning difficulty.

78. I also do not find it credible that having been attacked by the army the appellant would then return to the army checkpoint and make a complaint to army officers. It lacked credibility that he would have done this especially having claimed to have been assaulted.
79. I find the inconsistencies in the evidence on these important issues undermines the reliability of their evidence and when considering whether the incident at the roadside occurred I must take these inconsistencies into account.
80. The appellant argued that there is further evidence that supports his claim in the form of:
- (a) Letter from the Reverend which demonstrated there as a connection between the appellant and Gnanasingham Thanushan.
 - (b) The letter from the Commission and the affidavit provided by the appellant in support of that complaint.
81. Mr Whitwell argued that little weight should be attached to the affidavit or the letter from the Commission because the appellant failed to produce (a) details of the actual complaint and (b) evidence of what happened to his complaint.
82. In considering the letter from the Commission and the affidavit provided by the appellant in support of that complaint I accept that both Mr Whitwell's submission has some merit. Neither of these documents are recent documents but go back to 2010 but the appellant has been unable to adduce any other evidence about the complaint.
83. Corroboration is not required in protection claims but Lord Justice Thomas in TK (Burundi) v The Secretary of State for the Home Department [2009] EWCA Civ 40 stated, "Where evidence to support an account given by a party is or should readily be available, a Judge is, in my view, plainly entitled to take into account the failure to provide that evidence and any explanations for that failure. "
84. This Tribunal does not have the actual complaint and the mere fact the appellant signed an affidavit does not mean that the content of this affidavit is what was presented to the Commission.
85. I am satisfied that it was reasonable for the appellant to have made further enquiries about his complaint and adduce evidence of what his complaint had been. This is not the first Tribunal to hear his appeal and knowing the issues that had been raised it had been open to the appellant, who has been legally represented throughout these proceedings, to have made further enquiries and attempted to address those issues. His evidence to me was that he had not followed up the complaint at all. These matters undermine the credibility of the claim.
86. Ms Seehra invited me to find a link between the appellant and Gnanasingham Thanushan based on the letter from the Minister and the report on TamilNet.

87. I accept that letter names both the appellant and Gnanasingham Thanushan and the TamilNet article refers to a body being found in an abandoned well as being that of Gnanasingham Thanushan.
88. When considering the appellant' claim I have to balance these pieces of evidence against any inconsistencies that arose from the evidence given by the appellant and his wife and have regard to the letter from the Commission and the affidavit submitted by the appellant.
89. I have already mentioned the events at the family home on September 4, 2010 and the evidence put forward was that the authorities attended intending to arrest him and they had a warrant. There was a discrepancy in the wife's evidence about what happened because she now adopts the account put forward by her husband that she had been grabbed around the neck even though he was not present whereas she had previously made no claim of being assaulted. This undermines their account of events on that day and also brings into question whether there was actually an arrest warrant in place.
90. Having assessed all the evidence, I do not accept the appellant was attacked as claimed. No medical evidence has been adduced despite his claim that he was seen by Dr Ranjan. The appellant's mother continues to live in Sri Lanka and despite the appellant's claim that he contacted the doctor no medical evidence has been produced. Whilst I accept a doctor would not release medical evidence without a patient's authority I am satisfied that it was open to the appellant to obtain such information. He instructed solicitors throughout this matter and it is not unusual for medical evidence to be sent to solicitors and it is not unusual for medical evidence to be obtained after a letter of authority has been adduced. The absence of this medical evidence undermines the credibility of what happened. I note that the hearing before the First-tier Tribunal was adjourned for medical evidence to be obtained. None was adduced before the First-tier Tribunal and no steps have been taken to obtain such evidence to present to this Tribunal.
91. Despite providing a number of documents about what he claimed happened the appellant did not provide any evidence about his own hospital treatment or even evidence of his friend's death certificate.
92. Even if I accept his friend was found in an abandoned well I am not satisfied the appellant was present when his friend was "abducted".
93. The appellant's claim about being attacked by the army also lacks credibility although I accept there is evidence that such attacks have taken place. The appellant stated he went through an army checkpoint and he claimed that after the alleged incident he returned to this checkpoint and the army tried to assist him. It lacks credibility that the army would allow him to pass without incident but then intercept him shortly afterwards.
94. The appellant claimed that the authorities came looking for him with an arrest warrant on September 4, 2010 but there were no further visits to his family home

until after he had left the country. If the authorities had an interest in him to the extent that an arrest warrant had been issued it lacks credibility no further visits would have been made.

95. The 2011 report suggests the Department of Immigration and Emigration are informed when an arrest warrant is issued and the fact the appellant was able to leave without any difficulties suggests that no warrant was issued albeit I note there was no other mechanism to ensure that the Immigration Officers were aware of such instances so I do not attach weight to the fact he was able to leave without being stopped.
96. For the reasons given above I reject his claim that he was attacked as claimed or that his family have been harassed since that date.
97. Ms Seehra argued that I should depart from the country guidance and relied on the new material adduced. I am not persuaded that returning as a failed Tamil asylum seeker would place this appellant at risk in light of my other findings.

ASSESSMENT OF PRIVATE/FAMILY LIFE CLAIM

98. The appellant seeks to remain in this country primarily on the back of his child's article 8 claim.
99. Both the appellant and his wife have been here with limited leave to remain at all times. They came here as a student and dependant respectively and their immigration status never changed until their applications were refused.
100. I accept that as their eldest child has been here over seven years that this case merits consideration under article 8.
101. Section 117B of the 2002 Act sets out statutory factors which must be taken into account when considering any private or family life claim. Adverse factors in this appeal include:
 - (a) Inability to speak English (both gave evidence through an interpreter and admitted to having limited English language skills).
 - (b) They are not financially independent and there was no evidence of any credible or reliable third party support.
 - (c) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. The Supreme Court in Rhuppiah (Appellant) v Secretary of State for the Home Department [2018] UKSC 58 made clear, "... everyone who, not being a UK citizen, is present in the UK and who has leave to reside here other than to do so indefinitely has a precarious immigration status for the purposes of section 117B(5)."
102. Both the appellant and his wife have family in Sri Lanka and whilst the appellant played down the level of contact, in particular between his eldest child and his

mother, I am satisfied that there is regular contact as evidenced by the appellant's wife's own evidence.

103. The appellant and his wife came to this country to study and that leave has ended. They clearly had both a family and private life in Sri Lanka-a country where they have lived the majority of their lives. I therefore find that if this private or family life appeal was to be decided only having regard to the appellant and his wife then it would be proportionate to remove them.
104. However, as there are two children of the family I must have regard to Section 55 of the Borders, Citizenship and Immigration Act 2009. The eldest was born in Sri Lanka on July 31, 2008 and has lived in the United Kingdom since January 27, 2011. There is a younger child who was born in this country on January 17, 2014.
105. The eldest child lived in Sri Lanka for 2 ½ years before he was brought here and has spent 7 ¾ years living in this country. Section 117B(6) of the 2002 Act must therefore be considered in this appeal and both parties have addressed this section in written submissions. It has already been conceded that at the date of application the appellant could not satisfy either Appendix FM of the Immigration Rules or paragraph 276ADE HC 395.
106. In written submissions, both representatives appear to agree on the correct approach to take when assessing "reasonableness". The Tribunal is concerned only with the position of the child, and not with the immigration history and conduct of the parents, or any wider public factors in favour of removal and the child cannot be held responsible for the conduct of the parents and any criminality, overstaying or other breaches of immigration law on the part of his parents except in so far as the assessment must have regard to the "real world" context which will be that the parents are to be removed.
107. The evidence before me is that the eldest child speaks English well and is doing well at school. I do not accept the parent's evidence that their child's Sinhalese is limited because not only did he live for 2 ½ years in Sri Lanka, when the only language he would have spoken was Sinhalese, but he also has regular contact with both sets of grandparents who I am satisfied do not speak English. I do not accept the appellant's claim that he and his wife acted as interpreter for their child because they both admitted their English was limited.
108. The Supreme Court made clear that the appellant's immigration history was a factor to take into account when having regard to the "real world context". Neither parent had any entitlement or expectation to be allowed to remain in their own right. When they came to this country in 2011 they had no expectation of being allowed to remain because they came here on a student visa. They have attempted to delay their removal by submitting a number of applications and those applications have either been refused or withdrawn. In the "real world" they would be removed.
109. There are not health issues affecting either child. The children's best interests are to remain with their parents.

110. I am satisfied, on the facts of this case, that removal would be proportionate and in particular, it would be reasonable to require the appellant's eldest child to accompany his parents and sibling back to Sri Lanka where they have their whole family.

DECISION

111. I dismiss the protection claim.

112. I dismiss the claim on ECHR grounds.

Signed

Date 17/11/2018



Deputy Upper Tribunal Judge Alis

FEE AWARD
TO THE RESPONDENT

I do not make a fee award as I have dismissed the appeal.

Signed

Date 17/11/2018



Deputy Upper Tribunal Judge Alis