



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/11315/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 23 September 2019**

**Decision & Reasons Promulgated  
On 17 October 2019**

**Before**

**UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**M S T  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Chakmakjian, Counsel, instructed by AASK Solicitors  
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, who is a national of Sri Lanka, appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 11 September 2018 refusing to grant asylum or humanitarian protection.
2. The appellant claimed to have been arrested in Sri Lanka on 15 July 2009 and held for three days during which time he was questioned and tortured including being sexually abused. His account was that he had handed a bag or parcel containing gun powder and guns to people who were believed to be members of or involved in the LTTE.

3. He spent one day in hospital after the period of detention and his father spoke to a senior officer at the hospital who allowed him to go. There were no conditions for his release. He went to his uncle's home and stayed there until he left the United Kingdom later in 2009.
4. He claims that since he had left for the United Kingdom the police had been to his home on a number of occasions. He had not claimed asylum until 2018 because he thought that after his problems were over in Sri Lanka he could return.
5. The appellant did not give evidence at the hearing. According to medical evidence he was fit to attend the hearing though regular breaks in cross-examination were advised. Subsequently the doctor advised that the appellant was unfit to attend a court hearing or give evidence. The hearing therefore proceeded on the basis of submissions only.
6. The judge accepted that the appellant had been detained and ill-treated by the authorities in Sri Lanka sometime prior to his departure for the United Kingdom. The judge did not, however, accept the appellant's evidence that the authorities had visited his home after his departure for the United Kingdom. He concluded that the appellant had not been prosecuted, was not sent to a rehabilitation camp and was not subject to any condition when he was released. The judge considered that manifestly even with his history he would not be taken to be active in the diaspora abroad. The submission that there was probably a warrant for his arrest was rejected as being based on no evidence.
7. The judge also considered that there was a discrepancy in the appellant's evidence in that he said he was released on bail and taken to a hospital, according to his statement, and yet in interview he said that the police officer allowed him to go free from the hospital and he was given no conditions of release. The judge concluded that the authorities were satisfied that his answers that he was not involved with the LTTE and had acted under coercion were the truth.
8. The judge noted the medical evidence including the finding of Dr Dhumad that the appellant was at moderate risk of suicide and there was a risk of deterioration. The judge considered the authorities in J [2005] EWCA Civ 6239 and Y & Z and found factual distinctions, in particular between Y & Z and the instant case where there had been no example of any attempt at self-harm and there was an absence of the aggravating factors that existed in Y & Z. The judge did not accept that there were insurmountable obstacles to the appellant's return to Sri Lanka in the form of his health. He had family there, had previously worked there and spoke the language and was not of interest to the authorities. The appeal was dismissed on all grounds.
9. The appellant sought and was granted permission, ultimately on all grounds, which included the contention that the judge had failed to apply properly the guidance in Y & Z, employed the incorrect standard of proof in dealing with the asylum claim, had failed to take into account the appellant's vulnerability in assessing his evidence and had failed to give

adequate reasons or consider material evidence with regard to his release from detention.

10. In his submissions Mr Chakmakjian adopted and developed the points made in the grounds. He argued that the mental health concerns were a direct consequence of the actions of the Sri Lankan authorities and the judge had accepted that the appellant was a victim of torture. It was clear from the guidance quoted in the grounds from Y & Z at paragraph 36 that because it had been decided that there was objectively no real risk of repetition of ill-treatment all such fears would evaporate in the light of day and the subjective reality of fear had to be given its full weight.
11. With regard to ground 2, although the finding in respect of which the wrong standard of proof had been employed favoured the appellant, it was argued that there was a real danger that the judge had erroneously assessed the claim elsewhere on the balance of probabilities rather than the correct standard.
12. Ground 3 concerned the failure of the judge to take into account the appellant's vulnerability, which was a matter that had been argued in the skeleton argument and before the judge.
13. Ground 4 was in respect of the judge's failure to acknowledge the reasons given for ongoing interest if the appellant was released as claimed. He had said he had been released on payment of a bribe and the judge had not accepted coercion, but a bribe had been a constant element of his claim. He had referred to a visit to his home when he was staying with his uncle. If the judge accepted that the appellant was a victim of torture then he would come to the adverse attention of the authorities because of transporting weapons for the LTTE and there was a real risk of him being seen as high profile. He faced continuing risk. Bribery and the nature of the gun-running had not been considered and this was a central factor of ongoing risk.
14. In his submissions Mr Tufan argued that KH (Afghanistan) [2009] EWCA Civ 1354 was relevant. It was a question of whether this was a very exceptional case. It was difficult for the judge to treat the appellant as a vulnerable witness, given that he had not given evidence, and though it could be factored into the discrepancies, there was such a clear difference in the issue considered at paragraph 29 that it was unclear how vulnerability could explain that. Giving the appellant the benefit of the doubt as in effect the judge had done at paragraph 27 in saying that it was more likely than not that the appellant was in fact detained and ill-treated by the authorities did not go against the appellant. There was no materiality in that ground. He was not a person who was in the GJ risk categories. There was a serious delay in claiming asylum. The medical evidence had all been considered. There was no material error of law.
15. By way of reply Mr Chakmakjian argued that KH was irrelevant as there was no reference to Y & Z as KH was not a suicide risk case. The health concerns were a consequence of the actions of the authorities. The lack of live evidence was irrelevant to vulnerability. It was a question of the consistency of the appellant's accounts across interviews and witness

statements. Paragraph 29 emphasised the errors set out in ground 4 of the failure to refer to release on the basis of bribery and the need to consider the consistencies as well. Of particular relevance were the answers to questions 88, 107, 108, 110, 111 and 114. It showed that the judge had looked at question 88 and made adverse findings but failed to consider this in the context of the interview as a whole. Therefore, there was an argument that there was a likely continuing adverse interest in him.

16. I reserved my decision.
17. The main point of concern, as it seems to me, is that raised in ground 3. It is clear from the skeleton argument that was before the judge that the appellant's vulnerability was raised as an issue, and the judge nevertheless failed to take into account that vulnerability in the adverse credibility findings, perhaps in particular with regard to the point considered at paragraph 29 concerning the appellant's release from custody. It was necessary for the judge to factor that into his findings in order to come to proper conclusions on credibility. With regard to ground 2, although the judge applied the incorrect standard of proof at this particular point, paragraph 27, that was a point which favoured the appellant, the correct standard of proof was set out at paragraph 15 of the judge's decision, and there is no indication that anywhere else did he apply that correct standard. Ground 4 is essentially covered by ground 2, and I consider that there is a proper issue raised there as to the judge's findings concerning the appellant's release from detention in light of his failure to factor into his assessment of credibility the vulnerability of the appellant. Ground 1 I consider also to have some merit in that the judge appears to have focused excessively on the facts in Y & Z rather than considering the relevant legal principles and in particular the need to take proper account of the subjective fear of the appellant in this case rather than in effect concluding that because there was no well-founded risk on return therefore the suicide risk fell away.
18. Accordingly, there must be a reconsideration of the issues in this case and unfortunately the extent of the remaking of the judge's decision that will have to take place in light of the flawed credibility findings is such that that rehearing will have to take place in the First-tier Tribunal, at Hatton Cross.

### **Notice of Decision**

The appeal is allowed to the extent set out above.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

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 his 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.

A handwritten signature in black ink, appearing to be 'Allen', written in a cursive style.

Signed

Date 11 October 2019

Upper Tribunal Judge Allen