Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: PA/11610/2017
PA/11612/2017
PA/11613/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 January 2019	**On 13 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

T K (FIRST APPELLANT)
N D (SECOND APPELLANT)
V K (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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 their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellants: Mr R Spurling, Counsel, instructed by Nag Law Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the three Appellants against the decision of First-tier Tribunal Judge Hussain (the judge), promulgated on 18 December 2018, in which he dismissed their appeals against the Respondent's refusal of their protection and human rights claims, dated 1 November 2017.

2. Put briefly, the first Appellant's claim was that in 2009 he had been travelling back from work with a Tamil colleague when they were both stopped at an army checkpoint. They were briefly detained and then allowed to go. Subsequently, the first Appellant was visited by the authorities at home and taken for questioning about his work colleague. He was released on the same day. Following this incident the Appellant made a complaint to the Human Rights Commission and then to the Lessons Learned and Reconciliation Commission (LLRC). Having taken this step the Appellant received threatening phone calls and was attacked by individuals on the street. He came to the United Kingdom in February 2011 but did not make his claim to the Respondent until May 2017. He asserted that his complaint to the LLRC resulted in an arrest warrant being issued against him in Sri Lanka. These circumstances would place him at risk, in particular within the category set out at paragraph 356(7)(c) of GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC).

The judge's decision

3. At [30] the judge identified what he saw as the core issue in the appeal, namely whether or not the Appellant had given evidence to the "Truth and Reconciliation Commission", and whether he was the subject of an arrest warrant. The judge's findings and reasons are set out in [31]–[40].

4. In summary, the judge did not accept the core elements of the Appellant's account. On that basis the first Appellant's appeal was dismissed and it followed that the appeals of his wife and their young child also failed.

The grounds of appeal and grant of permission

5. There are three grounds of appeal and they may be summarised as follows. First, the judge's credibility assessment was flawed on the basis that he found certain aspects of the evidence to be implausible without full

regard to the evidence before him, and that he overlooked material evidence in the form of a letter by Ms KS. Second, that the judge misstated the evidence from the Appellant, particularly in relation to the finding at [39] that the authorities knew that he was not in Sri Lanka from February 2011 onwards. Third, the judge entered into impermissible speculation when relying on what appeared to be his own experiences in cases from Sri Lanka.

6. Permission to appeal was refused by the First-tier Tribunal, but then granted by Upper Tribunal Judge Kamara on 19 December 2018.

The hearing before me

7. Mr Spurling relied on the grounds of appeal. As a preliminary point he submitted that the phrase "given evidence to the Truth and Reconciliation Commission" was sufficiently broad to encompass the Appellant making his complaint to that body in July 2010 even if he did not subsequently give a more detailed statement. Mr Spurling then pointed out the number of alleged errors committed by the judge, located at various points in the decision. He submitted that it could not have properly been said that aspects of the Appellant's case were "wholly implausible" in light of the evidence before him, that the judge was wrong to have believed that the Appellant himself said that the neighbours knew that he had left Sri Lanka, that the failure to take account of Ms KS's letter was important as she had gone to the LLRC together with the Appellant in 2010, and that there were also numerous uses of words which related more to the balance of probabilities as opposed to the lower standard applicable in protection cases.

8. Having heard Mr Spurling's submissions, Mr Wilding took what I consider to be a fair and realistic position. Whilst taken in isolation, the challenges may not have been enough to disclose material errors of law, he accepted that on a cumulative basis it was likely that the decision as a whole was unsafe.

Decision on error of law

9. Whilst in the course of my preparatory reading I had some doubts as to whether the Appellant would be able to establish material errors of law by the judge, having looked more closely at the papers before me and having heard the submissions of the representatives, I conclude that there are indeed errors sufficient to warrant setting the decision aside in its totality.

10. My reasons for this conclusion are as follows.

11. In principle, there is nothing wrong with a judge finding that a particular aspect of the evidence is "wholly implausible". However, this must be based on an accurate view of the evidence and supported by adequate reasons.

12. At [34] the judge found it to be "wholly implausible" that the LLRC letter, being of real importance, would have remained unopened by his mother for a period of some six years. On the evidence before him at least, the difficulty with this finding is that neither the Appellant nor his mother would have known whether or not the letter was important in the first place. There seems to be nothing indicating that it was from the LLRC on the face of the envelope in which it was sent. It is difficult to determine when it in fact arrived at the mother's house, but in any event the Appellant was not living there at the relevant time: on his evidence he was away from home while still in Sri Lanka and then left the country in February 2011. In light of this and on the face of what is said in [34], it is difficult to see how the judge could have concluded that it was indeed "wholly implausible" that the letter remained unopened for a significant period of time.

13. Further, I note what is said in [36], namely that the judge took the view that the Appellant had not thought at the time that the LLRC would have been contacting him again. This would support the Appellant's challenge to the finding at [34] that it was extremely unlikely for the letter from this organisation to have remained unopened.

14. The term "wholly implausible" is used again in [39]. The judge states that his neighbours would have known that he was in the United Kingdom and that the Appellant himself had accepted that they knew that he was at least out of Sri Lanka. Having heard argument and with reference to [17] of the judge's decision, I cannot see the evidential basis for this finding. At [17] the Appellant is recorded as having said that the neighbours were unaware that he was no longer in the country. If, as I conclude it is, this initial premise is flawed then the subsequent conclusion that the authorities would not have bothered going to his home in the knowledge that he was not there is also flawed.

15. I have looked at the evidence from Ms KS. In my view, it did go to the important issue of whether the Appellant went to make a complaint with the LLRC in 2010. Her evidence supports this aspect of his case. Whilst not in any way decisive, it was relevant to the fact of making the complaint in the first place and, in turn, whether the LLRC would have sent a letter to the Appellant asking for further evidence, which would have gone to the question of whether any adverse consequences for the Appellant arose out of this chain of events. The judge has failed to deal with this evidence when setting out his findings of fact.

16. Next, I appreciate that the use of particular words when dealing with the standard of proof does not necessarily disclose a material error of law. In

this case I note that a standard paragraph is set out at [23] relating to the correct standard of proof. Having said that, it is of real concern that in amongst the actual findings, the judge uses the terms "on balance" and "unlikely" in [33] and [40]. These concerns are added to by the fact that at [31] the judge had concluded that the account as set out in the witness statement was "plausible". There is, in my view, a real tension here between the appropriate usage of different standards of proof, something that compounds my concerns as previously set out.

17. Taken together, these errors clearly go to the material issues in the case. I set aside the judge's decision.

Disposal

18. Both parties were agreed that if there were material errors of law in the decision, then this appeal should be remitted to the First-tier Tribunal. Having regard to paragraph 7.2 of the Practice Statement, I will follow this course of action. This appeal needs to be looked at afresh with no preserved findings of fact.

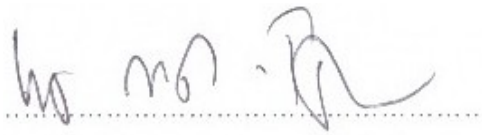
19. No specific procedural directions for the First-tier Tribunal are required, save to say that the remitted appeal shall not be heard by First-tier Tribunal Judge Hussain.

20. I would add that a very recent judgment of the Court of Appeal, KK (Sri Lanka) [2019] EWCA Civ 59 (handed down on 1 February 2019), addresses issues related to the LLRC and risk categories under GJ. The parties and First-tier Tribunal will no doubt wish to consider this case, although, given the specific nature of the Appellant's account as put forward, it does not necessarily fatally undermine the existence of a risk on return.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I remit this appeal to the First-tier Tribunal.

Signed  Date: 8 February 2019

Deputy Upper Tribunal Judge Norton-Taylor