Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13241/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 January 2019	**On 04 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

S S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Harris, Counsel instructed by Nag Law Solicitors
For the Respondent: Ms L Kenny, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sri Lanka whose date of birth is recorded as 18 August 1982. On 4 June 2017 he claimed international protection as a refugee, immediately upon arrival in the United Kingdom. On 30 November 2017 a decision was made to refuse that application and he appealed to the First-tier Tribunal.

2. The Appellant's case in short was that he was forcibly recruited into the LTTE in April 2009, his sister already having been recruited about two years earlier. At the end of the hostilities those who had been involved with the LTTE were asked to identify themselves. The Appellant's sister

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was identified but not the Appellant who was detained with other family members in a camp for six months before being released in 2010. The Appellant's sister has disappeared. In 2014 the Appellant began studies at Jaffna University where he took part in demonstrations. Those demonstrations included a call for the government to be called to account at the Internal War Crimes Tribunal. There were two demonstrations in 2015. It was the Appellant's attendance at those demonstrations and other events which brought him to the attention of the CID. In 2016 the Appellant went to the office of Mr Shritharan MP who was collecting information concerning missing people to pass on to the United Nations in Geneva. The Appellant had agreed to give evidence concerning what he had witnessed in June 2009 and concerning the family attempts to locate his sister. In May 2017 the Appellant travelled to Mullivaikal for the Remembrance Day celebrations. After returning home from that event he was detained by CID officials who took him to their offices in Colombo where he was detained and later questioned. He was warned that his life was at risk if he continued to participate in LTTE activities. The CID were apparently aware of his contact with the United Nations through the Member of Parliament. The detention lasted ten days. The Appellant was released after his uncle paid a bribe. The Appellant was told he needed to report monthly. These events led to the Appellant leaving Sri Lanka with the help of an agent with the use of forged documents.

3. The Appellant's appeal was heard by Judge of the First-tier Tribunal K Henderson, on 14 March 2018, at North Shields. She rejected the Appellant's account and dismissed the appeal.

4. Not content with that decision, by Notice dated 4 April 2018 the Appellant made application for permission to appeal to the Upper Tribunal and on 16 May 2018 Judge of the First-tier Tribunal Keane granted permission.

5. There are two grounds. Ground 1 contends that there was a failure to consider relevant evidence. Ground 2 contends there was a failure to make findings of fact on relevant evidence and in each case, it is submitted that there was a lack of reasoning.

6. The grounds, helpfully, are very well particularised.

7. The Appellant relied on a letter from Mr Shritharan MP. That letter on the MP's letterheaded paper refers to the Appellant having been "called for witnessing the war crimes before the Commission for Investigation …". That same letter refers to the "Presidential Commission". The Judge took the point that, "One would have expected a letter from a member of Parliament to have been more precise when referring to the Commission and would have made mention of the United Nations". Though with respect to that letter it was the Appellant's account that he had never reported to the CID after he had been released, the letter from the Member of Parliament states, "…Thus, he had informed about the life threats he was facing by them to the Presidential Commission. As a result, he was called to 4th floor of army intelligence personnel and investigated

about his revelations at the commission. Further he was conditioned to sign at 4th floor every month. During these visits, he was being hindered and tortured in the name of investigation."

8. The apparent inconsistencies were such that the Judge was unwilling to attach *any weight* to the letter from the Member of Parliament which was described by Judge Henderson as being *completely* inconsistent with the Appellant's account.

9. It is submitted in the grounds that it was not open to the Judge to attach no weight to the letter.

10. As Judge Keane in granting permission points out, that the Appellant was "called to report to the 4th floor of Army Intelligence" is not necessarily inconsistent with the Appellant not attending, however what is of note is what appears at paragraph 73 of Judge Henderson's Decision and Reasons in italics, because the letter of Mr Shritharan MP speaks of it being "*during these visits* he was being hindered and tortured in the name of investigation…".

11. Ms Harris however submitted that one could not say that the letter was completely inconsistent. It was always the Appellant's case that he had been taken by the CID and had been detained for a period of ten days before being released. If one then looked at the letter such that a Member of Parliament had made an error but only about when it was that the Appellant was mistreated, the core of the letter was capable of being read consistently with the core of the Appellant's account. Still further the grounds contend that as the Appellant had been consistent in other aspects of his claim the Judge, inferentially from the grounds, ought not so easily to have dismissed the letter, giving it no weight.

12. The second point taken under ground 1 relates to paragraph 69 of the Decision and Reasons in which the Judge held against the Appellant that in the screening interview he made no mention of his having given evidence to the United Nations about his experience and the disappearance of his sister when this was held to the at the core of the Appellant's account. The point is taken in the grounds that at his initial interview the Appellant was invited only to give a brief account of the reason why he was claiming "asylum". Still further the Appellant was interviewed at the airport with an interpreter over the telephone and the Appellant was made to understand that he would be able to provide a more detailed account in the later interview.

13. What the Appellant did say however is recorded at 4.1 of the initial contact and asylum registration form. The Appellant made mention of his involvement in Memorial Day celebrations; that he was taken by a white van; that he feared the Army and CID; that he was forcibly recruited by the LTTE; that he was detained for ten days and threatened with his life.

14. References made to the case of **JA (Afghanistan) [2014] EWCA Civ 450** and in particular to paragraphs 24 and 25 of that Judgment where reference is made to interviews where it is said:

> *"Such evidence may be entirely reliable, but there is obviously room for mistakes and misunderstandings, even when the person being questioned speaks English fluently. The possibility of error becomes greater when the person being interviewed requires the services of an interpreter, particularly if the interpreter is not physically present. It becomes greater still if the person being interviewed is vulnerable by reason of age or infirmity. The written word acquires a degree of certainty which the spoken word may not command. The "anxious scrutiny" which all claimants for asylum are entitled to expect begins with a careful consideration of the weight that should properly be attached to answers given in their interviews. In the present case the decision-maker would need to bear in mind the age and background of the applicant, his limited command of English and the circumstances under which the initial interview and screening interview took place.*
>
> *In my view the common law principle of fairness which underpins the decision in Dirshe requires the Tribunal to consider with care the extent to which reliance can properly be placed on answers given by the appellant in his initial and screening interviews and, as I have already indicated, I do not think that it is a foregone conclusion that the Upper Tribunal would decide that they could properly be given the degree of weight which the First-tier Tribunal gave them…"*

15. Ms Harris amplifying the grounds in relation to the first ground submitted that the letter from the Member of Parliament confirmed the Appellant's evidence and gave weight to it and was consistent with the core of the case. It was not open to the Judge to give no weight to it at all.

16. The second ground submits that the Judge having attached no weight to the letter of the Member of Parliament went on then immediately to reject the Appellant's evidence in respect of his detention and subsequent release on payment of a bribe. Though there was, it was accepted, what is submitted to have been minor discrepancy as to the date upon which the Appellant attended the Remembrance Day commemoration which the Appellant had said had been 19 May 2017 when the evidence supported it being on 18th May 2017, there was, it was submitted, no sufficient reasoning, indeed no reasoning for rejecting the Appellant's attendance at the Remembrance Day events at all.

17. At paragraph 75 of the Decision and Reasons the Judge does deal rather more with the Appellant's account of being released with a bribe but the Judge held as inconsistent the Appellant's account with background material provided by the Respondent in a fact-finding mission document dated July 2016.

18. At paragraph 60 of the Reasons for Refusal letter dated 30 November 2017 reference was made to paragraph 8.1.18 and 8.1.19 of that document. 8.1.18 reads as follows:

> *"A person who is being detained will be told they can leave if they pay a certain amount of money. The starting price for a 'bribe' is 1 million LKR [Approximately 5.3 million GBP] – but based on the background of the person, this can either go up or down. Most people will sell their property to pay bribes. A mediator - a third person will act for both sides, but the mediator may make money in the process – they could say the amount was 1.5 million LKR, when in fact the original price was 1 million, and keep the balance. It is also very likely that people higher up in command may also receive a cut of the bribe money. The money is deposited into the 'guard's bank account."*

19. As to whether or not reporting conditions are set for people who leave detention it reads at 8.1.19:

> *"People who leave detention on a bribe do not report when they leave".*

20. The point is taken that the document relied upon by the Secretary of State was selective because at 8.1.22 it reads:

> *"People returning from the UK with a previous LTTE connection would be subject to torture and harassment and their families will be harassed, particularly if there is no male present".*

21. What I note however is that the Appellant's bundle did contain selected passages such that paragraph 8.1.22 was not included. That particular passage referred to in the grounds 8.1.22 was not before the Judge that is clear from the Home Office bundle which is paginated in a way that demonstrates that that was the case.

22. On that point Ms Kenny for the Secretary of State submitted that it was open to the Appellant to submit evidence to rebut the Home Office evidence which was being submitted for the purpose of dealing with the question of the bribe not for the issue of whether a person with an LTTE connection would be subject to torture or harassment etc on return.

23. Certain it is that the Judge cannot be criticised for not having regard to evidence that was not put before her. There is no suggestion in the grounds nor indeed in the Decision and Reasons that any point was taken by the Appellant at the hearing before the First-tier Tribunal with respect to the requirement for the Respondent to produce the whole of the document relied upon nor any application to produce upon by the Appellant the rest of that evidence.

24. The final point in the grounds relates to paragraph 77 in which it is said that the First-tier Tribunal failed to make any findings on the evidence from the Appellant's father, set out in a letter in the Appellant's bundle, which letter in the grounds was said only to have had passing mention of

paragraph 77 of the Decision and Reasons what the reference at paragraph 77 of the Decision and Reasons shows however is that the Judge did read that letter.

25. At paragraph 12 of **VW (Sri Lanka) [2013] EWCA Civ 522** McCombe LJ said:

> *"Regrettably, there is an increasing tendency in immigration cases, when a First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully. In my judgment, with respect, that is no basis on which to sustain a proper challenge to a judge's finding of fact …".*

26. The basis for challenge was considered, helpfully in the case of **R (Iran) [2005] EWCA Civ 982** the factors that I should bear in mind in summary are set at paragraph 9 of that case and they are as follows:

> *"i) Making perverse or irrational findings on a matter or matters that were material to the outcome;*
>
> *ii) Failing to give reasons or any adequate reasons for findings on material matters;*
>
> *iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;*
>
> *iv) Giving weight to immaterial matters;*
>
> *v) Making a material misdirection of law on any material matter;*
>
> *vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;*
>
> *vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made".*

27. It is the point taken at paragraph 7 of the grounds under ground 2 which in my judgment means that this decision cannot stand, notwithstanding the observations I have made above concerning the willingness on the part of some representatives to tease out errors of fact. The Judge appears to have come to conclusions as to the Appellant's credibility before consideration of the totality of the evidence. That is clearly an error of law, though there was, as was pointed out in the grounds, no sufficient consideration before making a finding on the Appellant's credibility of the

impact of the Appellant's father's evidence nor did the Judge stand back from rejecting the letter of the MP to see where she was left.

28. If no weight was to be attached to the letter of the MP then it was still incumbent upon the Judge to look at the core of the Appellant's account as given from the initial screening interview; subsequent interview; and other evidence and apply the lower standard. Add into the mix those concerns raised in the grounds about there being, on one view, no inconsistency between being called and actually not attending. (I recognise the inconsistency upon which considerable weight appears to have been given by the Judge at paragraph 73 in which the Member of Parliament appears to be reporting that the Appellant did return to answer to his "bail" conditions). Notwithstanding that, for the reasons I have stated the decision is flawed and must be set aside.

29. I have considered whether it is possible to remake to the decision, but it seems to me that it is beyond repair such that it will need to be reheard before a Judge other than Judge Henderson at North Shields.

Decision

The decision of the First-tier Tribunal contained error of law. The decision is set aside to be remade before a Judge other than Judge Henderson.

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 Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed **Date: 27 February 2019**

Deputy Upper Tribunal Judge Zucker