



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

Appeal Number: PA/13342/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 13 September 2019**

**Decision & Reasons
Promulgated
On 14 February 2020**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**MOHAMED [S]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Fisher of Counsel instructed by ABN Solicitors.

For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is an appeal against the decision of First-tier Tribunal Judge Lucas promulgated on 3 July 2019 dismissing the Appellant's appeal against a decision of the Respondent dated 9 November 2018 on protection grounds.
2. The Appellant is a national of Sri Lanka born on 13 June 1984. The Appellant entered the UK on 3 June 2010 pursuant to entry clearance as a Tier 4 student valid until 15 November 2011. On 30 April 2018 he was

served with documents as an overstayer. On 2 May 2018 he claimed asylum; a screening interview was conducted on the same date. A substantive asylum interview was held on 10 October 2018.

3. The basis of the Appellant's protection claim is summarised at paragraphs 4 and 5 of the Decision of the First-tier Tribunal:

"4. ... He stated that he helped people travelling to and from Sri Lanka to Canada because he had been asked to do by a friend. After his arrest, he became aware that the people he was assisting were involved in the LTTE.

5. He stated that the two contacts called Ramaman and Bala were the ones who got him involved. He assisted them between 2007 until December 2009. He stated that he was detained for twelve days on the 22nd December 2009. He stated that he was accused of helping the LTTE. He was able to apply and leave Sri Lanka with a Student Visa in 2010. He stated that there is an arrest warrant for him in Sri Lanka because he breached his reporting conditions. He believes that if he returns to Sri Lanka he will be arrested, detained and "maybe they will kill me"."

4. Written Submissions prepared by the Appellant's counsel before the First-tier Tribunal sought to emphasise aspects of his 'profile', and to argue that this gave rise to a risk of persecution within the framework of the country guidance in **GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)**. Pertinent elements were pleaded as: arrest, detention and ill-treatment in 2009; leaving detention on payment of a bribe and being placed on reporting condition that was breached; passing through the airport undetected with the assistance of an agent; the authorities maintaining a continued adverse interest in him after leaving detention; and the issuing of an arrest warrant. The Appellant also pleaded that he had a deteriorating mental health condition and that there would be insufficient psychiatric treatment available to him in Sri Lanka. The Appellant further relied upon 'diaspora activity', specifically being involved in pro-LTTE demonstrations and the Transnational Government of Tamil Eelam ('TGTE'), an organisation proscribed in Sri Lanka. (See e.g. Written Submission at paragraph 2)
5. The Appellant's application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 9 November 2018. The Respondent did not accept that the Appellant had been accused of being an LTTE supporter, or that he was ever arrested and detained, or that he was a genuine supporter of Tamil Eelam, or that he was wanted by the authorities in Sri Lanka (see summary of findings at paragraph 50 of the RFRL).

6. The Appellant appealed to the IAC.
7. The appeal was dismissed for reasons set out in the Decision of First-tier Tribunal Judge Lucas promulgated on 3 July 2019. Essentially the First-tier Tribunal rejected the credibility of the Appellant's account of events in Sri Lanka, characterising aspects of his account variously as "*not... at all convincing or plausible*" (paragraph 47), and "*concocted*" (paragraph 50); supporting documentary evidence from a JP in Sri Lanka was considered to be "*of little corroborative weight*" (paragraph 56), and a 'scarring report' not to "*greatly assist his claim*" (paragraph 58). The Judge did not accept that the Appellant's mental health condition "*is in any way related to well-founded fear of persecution*", and otherwise considered that his symptoms could not avail him in immigration terms (paragraph 59). The Appellants political activities in the UK were found to be "*entirely opportunistic*" (paragraph 64).
8. The Appellant applied for permission to appeal to the Upper Tribunal. Permission to appeal was granted by Designated First-tier Tribunal Judge Macdonald on 13 August 2019.

Consideration of 'Error of Law' challenge

9. I am persuaded that there is merit in two aspects of the challenge raised against the decision of the First-tier Tribunal.
10. At the core of the Appellant's case is his claimed activity in assisting persons to leave Sri Lanka. In his asylum interview the Appellant said that he had been "*helping some Tamil youths*" (question 34), but denied that he had known at the time that any of them were LTTE members. He had become involved through a classmate, Ramanan, who had introduced him to Bala (questions 42 and 43); on the Appellant's account Bala was the principal mover in the operation; the Appellant was asked to assist Tamil youths not fluent in Sinhala in obtaining passports and documents. By way of context, at the interview the Appellant referred to the heightened security situation at the time:

"So at this time 2007-8, the war was at a severe level at LTTE members were fleeing the country. All around the country there were checkpoint and everything. So he wanted me to help, not just because of LTTE members, in Sri Lanka, whoever cannot speak Sinhala, mean they could be from the north. They could detain them for no reason. Bala wanted me to help these people to go to the passport office to do the documents for them." (question 43)

11. At question 49 the Appellant was asked if Bala had ever spoken to him about the conflict. He replied *"No, nothing about LTTE. He was telling me about the police treating these people, just because they do not know the language, the basic difficulties getting things like passports, so I just wanted to help those people."*
12. The Appellant gave further information at interview in respect of the location of the passport office (question 44) and the number of people he had helped (question 50). He also described the process at some length and in some detail (questions 51-64, and 71).
13. Although the Appellant spoke of wanting to help 'those people', it is also apparent that he thought that in due course Bala would help him reach Canada (e.g. see at questions 42 and 43); he was also paid for his work (question 65).
14. At question 67 the Appellant was asked if there was any indication that the people he was helping were affiliated with the LTTE. He responded in these terms:

"Most were innocent people, even when I was talking to them, they would not talk about the fighting or anything. They just say they are fleeing the country, they said they had problems in the country, the government was cracking down on things by the end of the war. Even when I was in Colombo they would check my ID, the police department, there were checkpoints all over the place. When it was someone who could not speak Sinhalese, without ID, they definitely going to take him, it was difficult for them to stay in Colombo."
15. In my judgement it is adequately clear that the Appellant was describing the real phenomenon of many Tamil youths seeking to leave Sri Lanka - irrespective of any actual involvement with the LTTE - because of (at the very least subjective) fears of persecution.
16. It is the Appellant's case that he was arrested on 22 December 2009, and questioned about an individual, Suresh, whom he had helped a few days earlier - including, relatively unusually, dropping him at the airport. The Appellant claims that he was accused of helping the LTTE. At interview he was asked if the suspected connection was specified to him (question 82): the Appellant said that on his third day of questioning Suresh had been mentioned, and, it appears to have been suggested to the Appellant that Suresh had informed on him. (I pause to note that in an interrogation, the

suggestion that the interrogator already has information that condemns the suspect might possibly be employed as a tactic of questioning irrespective of whether the interrogator actually has such information.)

17. At question 46, the Appellant claimed that he did not know he was helping the LTTE until he was arrested.
18. The First-tier Tribunal dealt with this aspect of the Appellant's account in the following way:

“47. The Tribunal does not find his account of his asserted activities in Sri Lanka to be at all convincing or plausible. He states that he was reliant upon a person called Ramaman because he asked him to help him and he did not feel that he could refuse, because he wished to emigrate to Canada. His intention to leave Sri Lanka therefore existed prior to his claimed difficulties.

48. It is neither plausible nor conceivable that this Appellant would not have been informed that he was assisting LTTE members in Sri Lanka.

49. The period 2007-2009 was a period of effective war in Sri Lanka and it is inconceivable that the Appellant, a student would have asked no questions or been informed about the risks of assisting LTTE members. It makes no sense.

50. In the view of the Tribunal, the Appellant has simply concocted this claim and simply concocted the assertion that some call Suresh named him as an assistant for the LTTE.”

19. In my judgement in reaching this conclusion the Judge has failed to engage with the detailed evidence of the Appellant at interview as to 'process'. I consider an evaluation of this should have been an inherent part of an assessment of whether the Appellant's account was 'plausible'.
20. Moreover, and more particularly, I cannot identify in the Decision any sustainable basis for the conclusion that the Appellant's account in this regard was 'concocted'. The Judge's reasoning rests on it being 'inconceivable' that the Appellant would not have known that he was assisting LTTE members. Although the Judge has identified the heightened security situation, he has not engaged with the Appellant's explanation that there were numbers of essentially 'innocent' Tamil youths seeking to flee the country precisely because of the heightened security situation. It is a matter of record that throughout the conflict in Sri Lanka the Respondent and the IAC have received and rejected numerous asylum

claims from persons who have fled Sri Lanka with the assistance of agents on the basis that such persons were not members of, or otherwise significantly connected to, the LTTE. Manifestly, there has been a significant 'market' in people seeking to leave Sri Lanka: necessarily not all such 'customers' will have been members of the LTTE, or even helpers or supporters; 'customers' for agents will reasonably likely have included people not involved with the LTTE but who had fallen under suspicion, people just generally concerned about the security situation, and mere opportunists and economic migrants; some person leaving Sri Lanka may even have been seeking to evade the LTTE. I also observe that it is not clear the extent to which genuine LTTE members make use of the same agents as others, or the extent to which they might have had access to a more exclusive network of support - for example exiting Sri Lanka through LTTE controlled territory in the North towards India before travelling beyond Asia.

21. The Judge's reasoning rests on the premise that Bala was knowingly assisting LTTE members: it seems to me that that is not an established premise, and no consideration has been given to the possibility that it was otherwise. Allowing for the possibility that Bala was knowingly assisting LTTE members, it seems to me not remotely inconceivable that Bala would not have volunteered such information to the Appellant - whether asked or not. Indeed in this context the Judge's reasoning is significantly undermined by his own apparent acknowledgement to the effect that if the Appellant were involved as described he was essentially "*a dupe*" (paragraph 53). It also seems to me, recognising the Appellant to have been a young man still in education engaging with an internationally travelling Canada-based lawyer, out of whom he hoped to secure some personal advantage in due course, he would not have considered it his place to question Bala.
22. The Judge's reasoning also rests on the premise that Suresh actually was an LTTE member. There is no objective evidence for this: it seems to me that it cannot be dismissed out of hand - and therefore pursuant to **Karanakaran** is a relevant consideration - that in relating their suspicions in this regard to the Appellant, the security forces were possibly misconceived, or not being truthful.
23. In all such circumstances I conclude that the First-tier Tribunal's characterisation of the notion that the Appellant was unaware that he was assisting LTTE members as "*neither plausible nor conceivable*" to be unsustainable to an extent that it is an error of law. Plainly this was a significant and key element in the Judge's reasoning in rejecting the Appellant's account, and therefore claim for protection. It was a significantly material error such as to require the decision in the appeal to be set aside.

24. I also find that there was an error of law in the First-tier Tribunal's consideration of the Appellant's *sur place* activities. The Judge addresses these at paragraph 60-64. The Judge concludes that the Appellant's political activities in the UK "*are entirely opportunistic and had been adopted in an attempt to add weight to a claim that is otherwise lacking in any credibility or plausibility*" (paragraph 64).
25. The Judge's reasoning at paragraphs 61-63 is, in my judgement, clear and rational, and sustainably supports the conclusion that the Appellant was being 'opportunistic' in engaging himself with such activities. However, the Judge failed to go on to consider what risk might arise to the Appellant by reason of such activities, notwithstanding his lack of any genuine conscientious commitment to the cause of Tamil separatism. This was to fail to reach a decision in respect of an aspect of the Appellant's protection claim.
26. Had this been the only error of law, it may well have been possible for the Upper Tribunal to re-make the decision in this regard, or even to conclude that ultimately the Appellant would have been seen as a mere 'hanger on' (cf. **BA (Demonstrators in Britain - risk on return) Iran CG [2011] UKUT 36 (IAC)** and **KS (Burma) v SSHD [2013] EWCA Civ 67**), and that no risk would arise. However, for the reasons identified above, it is not the only error: this issue may be reconsidered pursuant to the setting aside of the decision of the First-tier Tribunal.
27. The Appellant has raised other bases of challenge to the decision of the First-tier Tribunal, but I have concluded that in significant part these lack merit, being more in the nature of disagreements with the outcome than examples of error of law. In my judgement the Judge was entitled to have regard to the delay in claiming asylum as an adverse factor in assessing credibility: even if it might be said that there was no full engagement with the Appellant's offered explanations in this regard - that he had never wanted to claim asylum, and was hoping a change in government in 2015 would lead to improvements - it is difficult to see how such matters adequately explain the delay at least from the expiry of leave in 2011 until 2015. The Judge was also entitled to conclude that the 'scarring' report added little to the Appellant's account - although it is to be acknowledged that the Judge was in part informed by his overall assessment of the credibility of the Appellant, a matter which I have concluded is to be vitiated for error of law.
28. The grounds of challenge to the effect that the Judge appears to have disregarded the power of bribery and the extent of corruption in Sri Lanka

- and how this might impact upon an evaluation of the Appellant's account of being released from detention and the intervention of a JP friend of the Appellant's father, and the Appellant's ability to pass through Colombo airport - are of more weight. However, because I am satisfied that the decision of the First-tier Tribunal requires to be set aside for the reasons identified above, it is not necessary for me to reach a definitive conclusion in this regard.

29. Similarly, I do not propose to engage in an evaluation of the challenge in respect of the Appellant's mental health. No doubt, given the possibly fluid nature of a mental health condition the Appellant will wish to bring forward more up-to-date evidence in the context of remaking the decision in the appeal - both as to his condition and symptoms, and the availability of treatment in Sri Lanka. The extent to which such evidence might provide corroboration of past events, and the extent to which it might indicate such difficulties on return to Sri Lanka to support a human rights claim irrespective of the claimed history of events in Sri Lanka, will be matters for the next judicial decision-maker.
30. Although I have indicated above that there are aspects of the First-tier Tribunal decision that in the abstract are sustainably reasoned, because of the nature of my finding of error of law and its impact on the issue of credibility, in my judgement it is not possible to remit the appeal on a partial basis, or to preserve any findings of fact. The decision in the appeal will need to be remade with all issues at large.

Notice of Decision

31. The decision of the First-tier Tribunal contained a material error of law and is set aside.
32. The decision in the appeal requires to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Lucas with all issues at large.
33. No anonymity direction is sought or made.

Signed:

Date: **13 February 2020**

Deputy Upper Tribunal Judge I A Lewis