IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/04745/2019**

THE IMMIGRATION ACTS

Heard at George House, Edinburgh	**Decision & Reasons Promulgated**
On the 21 September 2022	**On the 06 October 2022**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

JUDE ARJUNA CRIZANTHA LAZAROUS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Caskie, instructed by McGlashan MacKay Solicitors
For the Respondent: Mr J Mullen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge D Clapham promulgated on 22 August 2019 in which he dismissed the appellant's appeal against a decision of the Secretary of State made on 25 April 2019 to refuse his protection and human rights claims.

The Appellant's Case

2. The appellant is a citizen of Sri Lanka of Sinhalese ethnicity. His problems in Sri Lanka began in 2009 as a result of an incident in which the house of a politician, Palitha Range Bandara, was burned down. This had occurred when the appellant was working for Johnson Fernando, also a member of the Sri Lankan parliament. Mr Bandara believed that the appellant was involved in this incident and, at his uncle's suggestion, went into hiding with his wife. They were able to come to the United Kingdom on 1 May 2010.

3. The appellant entered the United Kingdom with leave to enter as a dependant of a Tier 4 student, he was granted leave until 14 August 2012. That was later extended but curtailed to 10 February 2015. On 24 February 2015 he submitted an application for leave to remain on the basis of his article 8 family and private rights. That was refused and on 6 October 2015 he claimed asylum on the basis that he faced threats from Mr Bandara who had the power of the state in his support. It is part of the appellant's case that he made a complaint to the police in Sri Lanka on 13 December 2009, that he had received death threats from Mr Bandara or his associates.

4. The asylum claim was refused on 22 January 2016, and his appeal against that decision was dismissed by Judge Kempton on 10 August 2017. An appeal against that to the Upper Tribunal was dismissed on 5 June 2018. It is of note that Judge Kempton did not accept the appellant's account and made adverse credibility findings.

5. During the course of the previous proceedings before the First-tier Tribunal a representative of the British High Commission visited Kandana Police Station with a follow-up telephone call which resulted in a conclusion drawn and set out in a Document Verification Report, that the copy complaint was not reliable.

6. Subsequent to the dismissal of his appeal the appellant learned that a witness summons had been issued by the Negombo Magistrates' Court on 6 March 2017, summoning him as a witness for the incident which led down to the burning of a house. This was followed by an arrest warrant, premised on the basis that he had not attended and hence the witness summons. Copies of these documents and a message from the police force in Sri Lanka were obtained through a family lawyer in Sri Lanka and formed the basis of the appellant's fresh claim.

7. The appellant's case is that he believes the police in Sri Lanka informed Mr Bandara the British High Commission made enquiries and thus, learning that the appellant was outside the United Kingdom, he decided to file a complaint.

The respondent's case

8. The respondent did not accept the appellant's account of what had happened in Sri Lanka either prior to his departure or that he was now at risk of arrest. She did not accept that the documents he had produced were reliable.

The First-tier Tribunal's decision

9. The judge heard evidence from the appellant and his wife and submissions from both parties. He also had before him several inventories of productions

10. The judge concluded that:-

(i) all that the appellant's wife could offer by way of evidence was what she had told others particularly her husband [58] and she had not offered any independent information;

(ii) there had been no reason why Mr Bandara would make a complaint to the police in 2017 when he knew the appellant was in the United Kingdom and had he in fact thought the appellant was still in Sri Lanka then there would have been more sense in making his complaint to the police earlier than using the resources of the police to trace him nor why he would want to warn the appellant that he was wanted in Sri Lanka;

(iii) weight could not be attached to the warrant of arrest or the letter from the appellant's mother [60] it not making sense why Mr Bandara would make a complaint in 2017 and that as regards the letter from Mr Weerasinghe (the appellant's uncle) he would not be surprised if officers of the British High Commission had in fact gone to Kandana Police Station twice to check important documents relating to the appellant and "I would be surprised if British officials started to try to bring the appellant back to Sri Lanka";

(iv) there was no basis to interfere with Judge Kempton's findings that she was not satisfied there was any genuine current threat against the appellant, the judge noting that the evidence had been produced after the fact;

(v) the documentation the appellant now produced was not reliable, noting [65] that no identification had been produced for the attorney nor could it be seen that he wrote the relevant letter; and, the appellant had not been considered a credible witness previously and he did not accept it credible that Mr Bandara would wait eight years to report the appellant [66].

11. The appellant sought permission to appeal to the Upper Tribunal on the grounds that the judge had erred:-

(i) in finding that the appellant's wife had not offered independent information, the judge failing to note her actions in response to what the appellant had told her [(iii)];

(ii) in failing to have regard to all of the relevant documents when indicating there was no basis for saying that the witness summons indicates there is no criminal charge against the appellant;

(iii) in concluding that there were no reasons why Mr Bandara would make a complaint in 2017 in that he had failed to have regard to the argument that by making a complaint and obtaining an arrest warrant for the appellant, Mr Bandara would have ensured that the appellant's name was included in the "stop list" of persons of interest and if that he attempted to return to Sri Lanka he would be detained and passed on to the law enforcement agencies and had he done so it was not inconceivable that he would have concluded that Mr Bandara had no reason to get assistance from the police;

(iv) in not giving a proper evidential basis for the findings at paragraph [60];or, he made a mistake based on the content of Mr Weerasinghe's letter;

(v) in failing to have regard that the letter from the attorney was on letterheaded paper referring to the name and qualifications and offices held by the author, contained his home and office contact details is signed and stamped by him and accompanied by a business card, and was accompanied by the DHL envelope in which it was sent from Sri Lanka;

(vi) in finding that there was no statement from Mr Fernando in that he had failed to take into account the reasons given as to why that was so as referred to by Mr Weerasinghe in his letter.

12. On 4 November 2019, Upper Tribunal Judge O'Callaghan granted permission to appeal stating "I am satisfied that [4] of the original grounds and its consideration of [58] of the decision is arguable".

Procedural History

13. The appeal was first listed to be heard before the Upper Tribunal on 19 March 2020. That was adjourned owing to the pandemic.

14. The matter first came before the Upper Tribunal on 16 January 2020. On that occasion Upper Tribunal Judge Macleman adjourned the matter, giving directions to both parties to ascertain and advise whether at any stage of the asylum proceedings in the UK the appellant had asked the respondent to make enquiries in Sri Lanka to verify his claims or whether the respondent had arranged for enquiries to be made at police stations or elsewhere in Sri Lanka to verify the claims.

15. In response to those directions, in a letter of 24 January 2020 the respondent explained that on 30 November 2016, an immigration liaison assistant had visited Kandana Police Station, and met the officer in charge who ordered another officer to check the corresponding information book. He requested a call back the next day for the verification outcome. In a

phone call the following day the officer from the records division confirmed that there was no record under the references in the information books and on that basis the liaison assistant concluded that the document was not genuine.

16. It is also evident from the responses to the directions (see inventory of productions 8) that, at the hearing on 17 February 2017 the appellant's representative advised that they had undertaken their own verification checks of the same document which was in direct contradiction to the information contained in the respondent's report, an adjournment was granted to allow for further investigations to be attempted. This was not done owing to restrictions on resources in Sri Lanka, confirmed in a letter from the British High Commission.

17. The matter was then listed for hearing on 19 March 2020 but that hearing did not proceed owing to the pandemic and on 6 April 2020 Judge Macleman gave directions that it would be appropriate to determine whether the decision of the First-tier Tribunal involved the making of an error of law and if so, what should follow without the need for a hearing, giving directions also as to further submissions that could be made. As an aside, these directions were in the form found to be unlawful in R (JCWI) v President of UT (IAC) [2020] EWHC 3103. The appellant made submissions on 13 May 2020; the respondent replied in a "skeleton argument" served on 15 May 2020.

18. In a decision promulgated on 31 July 2020 Judge Macleman found there had been no error of law and upheld the decision of the First-tier Tribunal. Permission to appeal to the Court of Session was then sought and refused by Judge Macleman on 10 September 2020. In an application made on 2 December 2020 the appellant asked the Upper Tribunal to set aside its decision by reference to JCWI. Having had regard to EP (Albania) & Ors (rule 34 decisions; setting aside) [2021] UKUT 233 Judge Macleman set aside his decision to refuse permission to the Court of Session and the finding that there was no error of law.

19. On that basis, the appeal before me proceeded on the basis that it was an oral hearing concerned with whether the decision of the First-tier Tribunal involved the making of an error of law.

20. Before dealing with the grounds in detail, I observe that this was an appeal to which Devaseelan applies; it is also an appeal in which an appellant tribunal is being asked to find an error in the decision of the fact-finding carried out by a judge who heard evidence from the appellant and his wife.

21. The guidance given in Devaseelan is summarised by Rose LJ in SSHD v BK (Afghanistan) [2019] EWCA Civ 1358 at [31] to [39] of her judgment as follows.

> (1) The first adjudicator's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made. In principle, issues such as whether the appellant

was properly represented, or whether he gave evidence, are irrelevant to this.

(2) Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator.

(3) Facts happening before the first adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second adjudicator.

(4) Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection.

(5) Evidence of other facts, for example country evidence, may not suffer from the same concerns as to credibility, but should be treated with caution.

(6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.

(7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the appellant's failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him. Such reasons will be rare.

(8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case.

22. It would have been helpful if the judge had directed himself to these principles and focussed on them when reaching his findings of fact from [58] onwards. It is to be borne in mind, materially, that Judge Kempton found that the appellant was not involved in the arson attack or could be linked to it in any way [32]; and, doubted the documentary evidence. It needs also to be borne in mind that even with the addition of the new documents, the core of the claim rests on the appellant being identified as being involved with an arson attack on the property of Mr Bandara, a fact expressly rejected by Judge Kempton.

23. I now turn to deal with the grounds of appeal in turn.

Ground (i)

24. It should be recalled that the absence of evidence from the appellant’s wife had been noted in the previous appeal. It is correct that the appellant’s wife was not a direct witness of what happened in 2009 and is

reliant on what she was told. But of course, she is a direct witness as to when she was told matters. She is also a direct witness as to what actions she took, as Mr Caskie submitted. There is also the evidence that she believed what she had been told as to the danger, as did her parents who sold all their possessions, that is, actions taken in response to what she perceived to be a threat.

25. The appellant's wife is not, however, a witness who can confirm the authenticity of any of the documents relied upon. To that extent less weight could be attached to her evidence as regards the new documentary evidence, and it is a fair observation that her evidence is not independent, given she is the appellant's wife.

26. I accept that the appellant's wife was cross-examined as can be seen at [36 to 38] and it is of note that she saw videos about what had happened [38].

27. I accept, viewing the decision as a whole, that the judge did not engage with the point that she was a direct witness to when matters occurred, or as to her reactions. But, bearing in mind that she could have given evidence before Judge Kempton, and her evidence goes to what happened in Sri Lanka before she and the appellant left, and applying the principles set out in Devaseelan, it would have been open to the judge to attach little weight to her evidence for those reasons, not the reasons given which fail to take into account that she was a direct witness as to timing of the threats.

Ground (iii)

28. In assessing the documents, themselves there is merit in the submission that the judge does not consider the sequence of the documents, starting with a summons to attend followed by a police message, followed by a summons issued for a failure to attend court. The document dated 16 June 2017 is clearly headed Warrant of Arrest. The earlier document is headed Witness Summons and it is unclear why the judge refers to "a witness warrant" [58]. That appears to be an interpolation of his own.

29. The judge's reasoning at [58] is supplemented at [59] as to him considering it implausible that Mr Bandara would make a complaint to the police early in 2017. It is indeed clear what the judge says "the appellant's position may be that Mr Bandara only made his complaint when it was discovered that the appellant was outside Sri Lanka" that there would be an advantage to Mr Bandara in having the appellant arrested on the basis of him being put on a stop list but there appears to be no direct reference to this".

30. Viewed in isolation, the error identified here makes little or no difference, and were it the only error, I would not have found it to be material

Ground (iv)

31. I find that the judge has at [60] misunderstood what Mr Weerasinghe was saying in his letter. The letter reads:-

> "From this, it was clear that he lived in Great Britain and Kandana Police informed Mr Palitha Range Bandara of this. I had heard that as soon as they came to know this, they started trying to bring this young man back to Sri Lanka".

32. I consider that there is significant merit in the submission in the grounds that the "they" refers to Mr Bandara and his associates, not the authorities. As the judge himself recognised, it would be absurd to think that the British authorities would be seeking to bring the appellant back.

33. Whether, however, that is an error which is material is another matter. It is a minor point, but it is a basis on which less weight is attached to Mr Weerasinghe's letter.

34. There is significant merit in the judge's observation [62] that all the documentation he was being asked to accept as genuine depend for an explanation of a delay on the part of Mr Bandara since 2009, apparently only choosing this route in 2017. At [62] the judge makes it clear that he has ruled out (without saying so) this submission that Mr Bandara would now be using the apparatus of the state.

35. Again, it is difficult to see this as a material error, as the finding was open to the judge on the evidence, given that he was being asked by the appellant to speculate as to Mr Bandara's motives.

Ground (v)

36. The judge's rejection [66] of the authenticity of the letter from the appellant's Sri Lankan lawyer does not take into account that it was sent to the appellant's solicitors in Glasgow, nor that his business card was appended. It is unclear why identification would have been relevant, given that it is unclear how that would have assisted in verifying that the matters set out in that letter were true. While it might have been of assisting in assessing that the purported author was Mr Da Silva, it is difficult to understand how a copy of his identity card or passport could not have been produced by the perpetrator of a forged letter and court documents. Further, it is difficult to understand what is meant by the final sentence of paragraph [65].

Ground (vi)

37. There is merit in the observation that the judge erred when stating that there was no statement from Mr Fernando without taking into account the explanation which was provided which was that Mr Fernando had, in effect, swapped sides. The judge does not refer to that.

Conclusion

38. Taking all of these factors into account, and viewing the decision as a whole, whilst no one of the errors identified above is and of itself sufficient to undermine the findings, (and indeed two of the grounds are not properly made out) I find that cumulatively they have the effect of rendering the findings as to credibility unsafe. Accordingly, I am satisfied the decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

39. Given that the error identified undermines the findings as to credibility, none of the facts found can be sustained. In the light of the need for extensive judicial fact-finding, and given the length of time that has elapsed, I am satisfied that the appropriate course of action is to remit the appeal to the First-tier Tribunal to be heard afresh by a judge other than Judge David Clapham.

Notice of decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues.

3. No anonymity direction is made.

Signed Date 28 September 2022

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul