Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05074/2013

THE IMMIGRATION ACTS

Heard at Taylor House	**Determination Promulgated**
On 5 December 2013	**On 10 December 2013**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

Y K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Jo Wilding, Counsel instructed by Messrs HK Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant a citizen of Sri Lanka, born on 30 August 1989, against the decision of the First-tier Tribunal heard at Taylor House on 25 September 2013, when the Appellant's appeal against the decision of the Respondent dated 20

May 2013 refusing the Appellant's asylum claim and his application to vary his leave to enter the United Kingdom and to remove him by way of directions under Section 10 of the Immigration and Asylum Act 1999, was dismissed on asylum, humanitarian protection and human rights grounds.

2. The Appellant made a successful application for permission to appeal to the Upper Tribunal against that decision and in granting permission on 31 October 2013, Upper Tribunal Judge Martin had this to say:

> "It is arguable, as asserted in the grounds that the Judge has failed to take all the evidence into account (e.g. that of the brother) and has failed to give reasons for some findings (the evidence of scarring not being corroborative). There also appear to be findings that matters are incredible or implausible without reasons given".

3. Thus the appeal came before me on 5 December 2013, when my first task was to determine whether the determination of the First-tier Judge disclosed an error or errors on a point of law, such as may have materially affected the outcome of the appeal.

4. In that regard and most helpfully at the outset of the hearing, Mr Jarvis for the Respondent informed me as follows:

> "It is right to say that although Ms Wilding in her grounds cites a number of factors that she submits would make this determination unsafe, the Secretary of State concedes that it is unsafe in terms of what is said at ground 5".

5. In order to place Mr Jarvis' observations in context, it would be as well to set out in ground 5 below:

> "**Ground 5: Improper reliance on plausibility assertions.**
>
> The Judge relied on the assertion that it was implausible that the Appellant would be released on payment of a bribe since he had been identified as the brother of a high profile LTTE operative that the authorities believed may still be alive [paragraph 12(v)(a)].
>
> First, it is objectively clear that bribes are a common means of securing release in Sri Lanka. Second, the Appellant cannot be expected to know the authorities' reasons for accepting the bribe. The authorities may have believed his explanation that his brother was killed in the war; they may have hoped the Appellant would lead them to his brother if released. The Appellant could not reasonably be expected to have an explanation but it cannot properly be regarded as inherently implausible that the authorities would release him after five days on payment of a bribe. The higher courts have cautioned on numerous occasions against making incredibility findings based on assumptions as to plausibility".

6. Mr Jarvis continued:

> "The First-tier Judge did not consider it plausible that the Appellant could have been able to bribe himself out of detention and leave a highly secure camp on the basis of the Appellant's claimed family connections to high profile members of the LTTE.

> The First-tier Judge failed to show any consideration to the specific findings of the Upper Tribunal in GJ and Others (post-civil war returnees) Sri Lanka CG [2013] UKUT 00319 (IAC), specifically paragraph 275 which made it clear that the Upper Tribunal accepted expert evidence that it was possible, and also possible for a person to leave through the airport even if they were high profile themselves.
>
> I agree that this undermines the First-tier Judge's credibility findings in their totality.
>
> In those circumstances the matter is one that in my submission should be heard afresh and I would not object to the appeal going back to the First-tier in accord with the Senior President's Guidance at paragraph 7 because of the need for full fresh factual findings".

7. It would be as well for the sake of completeness to set out below what the Tribunal indeed had to say in CJ at paragraph 275:

> "275. Mr Anton Punethanayagam's evidence is that of a practitioner who has dealt with 3,000 cases of detainees, in Colombo and Vavuniya. His evidence on the process of bribery was particular useful. We did not have the opportunity of hearing him give oral evidence, and some of his evidence goes beyond what he can be taken to know himself, but where his evidence concerns the criminal processes in Sri Lanka, we consider that it is useful and reliable. We take particular account of his view that the seriousness of any charges against an individual are not determinative on whether a bribe can be paid, and that it is possible to leave through the airport even when a person is being actively sought".

8. In light of Mr Jarvis' both helpful and realistic concession, I agreed with the parties that for like reason the determination of the First-tier Tribunal Judge could not stand and should be set aside.

9. Although I was presented with further, substantial and clearly argued grounds on the part of Ms Wilding, following EK v ECO (Columbia) [2006] EWCA Civ 926 I do not have to determine each point raised. My task has been to decide if the determination of the First-tier Tribunal is right in law and for the reasons above referred and as conceded by Mr Jarvis, it does not.

10. The guidance of their Lordships in EK whilst given in terms of the reconsideration process applicable to the previous jurisdiction of the Immigration and Asylum Tribunal still has relevance today. They held that it was not necessary at the first stage of a reconsideration to go through each of the grounds of appeal and decide whether the error of law asserted could be made out. It was enough if one of the grounds disclosed an error of law. The "second" stage of the reconsideration might then encompass all of the issues raised in the original appeal.

11. I agreed with the parties that none of the First-tier Tribunal Judge's findings could in the circumstances be preserved, save for his findings at paragraph 13 of the determination, that he accepted that the Appellant did have close family links with the LTTE that he had outlined in his evidence. Further that the First-tier Judge acknowledged the concession by the Respondent, that the Appellant had some involvement in the LTTE and he accepted the Appellant's evidence of his involvement in the LTTE.

12. In consequence of my findings, it follows that there has been no satisfactory hearing of the substance of this appeal at all. The scheme of the Tribunals, Courts and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. In such circumstances Section 12(2) of the TCEA 2007 requires us to remit the case to the First-tier or remake it ourselves. For the reasons that I have given above and with the agreement of the parties, I have concluded that the decision should be remitted to a First-tier Tribunal Judge other than First-tier Tribunal Judge Devitte to determine the appeal afresh with all issues at large at Taylor House. I am satisfied that there are highly compelling factors, falling within paragraph 7.2(b) of the Senior President's Practice Statement decision that the decision should not be remade by the Upper Tribunal. It is clearly in the interests of justice, that the appeal of the Appellant be heard afresh in the First-tier Tribunal.

13. For that purpose and so as to ensure the expedition of the hearing in the interests of justice, I have arranged for the matter to be listed at Taylor House on 25 March 2014 for substantive hearing with a time estimate of three hours. Further that arrangements are to be made for the provision of a Tamil interpreter.

Decision

14. The First-tier Tribunal erred in law such that their decision in the present appeal should be set aside. I remit the remaking of the appeal to the First-tier Tribunal at Taylor House to be heard before a First-tier Tribunal Judge other than First-tier Tribunal Judge Devitte.

15. Anonymity direction made.

Signed Date: 9 December 2013

Upper Tribunal Judge Goldstein