



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

Appeal Number: DA/00603/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 5 September 2013**

**Determination Sent
On 24 September 2013**

Before

**LORD BANNATYNE
UPPER TRIBUNAL JUDGE WARR**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**M F M S
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr S Walker
For the Respondent: Mr C Physsas

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State but we will refer to the original appellant, a citizen of Sri Lanka born on 23 September 1977, as the appellant herein.
2. It appears that the appellant had visited the United Kingdom in 2008 with an entry clearance visa. However he then returned to Sri Lanka. He re-

entered the United Kingdom on 21 October 2011 at Heathrow Airport with a false Malaysian passport. He was stopped on 26th October 2011 at Holyhead travelling to Ireland and gave police a forged driving licence as proof of his identity. He was then arrested for providing a false document and taken to Holyhead Police Station. He was charged and subsequently pleaded guilty to the charge relating to the false driving licence. He was sentenced at Mold Crown Court on 12 December 2011 to eight months' imprisonment and recommended for deportation.

3. There was a complex history which it is not necessary to rehearse here involving judicial review proceedings the upshot of which was a decision by the respondent on 20 March 2013 to deport the appellant and the appellant appealed that decision on 21 March 2013 and then was released from immigration detention.
4. The appellant's appeal came before a panel on 22 May 2013 when the appellant was represented by Ms Physsas, as he was before us.
5. The appellant claimed that he had been imprisoned because it was suspected he had been funding the LTTE but he had been actually donating money to an orphanage which had been situated in an area controlled by the LTTE. He had made donations between 2005 and August 2008 and had not had problems with the authorities prior to that time. He had been to the United Kingdom in 2008 having been granted a business visa and on return had been asked what he had been doing in London and then he had been accused of money-laundering for the LTTE. He was then allowed to go home but the following day police had come and searched his house and had taken all his documents. He had been detained at the local police station and ill-treated and interrogated. He had been detained for a year and nine months and had never been taken to court. However it had been arranged that he could be taken to court instead of someone else and from there he had managed to escape from a toilet window. The following day his father took him to the coast and he went to India by boat.
6. The respondent considered that his account lacked credibility and took a point under Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The respondent considered that the appellant had claimed asylum only after his arrest by police for providing false information.
7. The appellant gave oral evidence before the panel and was cross-examined. The appellant's account was supported by medical evidence from a Dr Keniger.
8. The findings of the panel have been the subject of a challenge by the Secretary of State and we set out the relevant parts of the determination as follows:

- “79. As with so many claims for asylum, the Appellant’s credibility remains a critical factor. In assessing his credibility we have to have regard to section 8 of the 2004 Act as the Respondent had. It was suggested to us that the Appellant claimed asylum immediately. Judge Hughes was much closer to events and we note his sentencing remarks (see Annex B of the Respondent’s bundle) in which he stated that he had to sentence the Appellant (and his co-accused) for events that had happened ‘in Holyhead in October’ but not when he came into the United Kingdom illegally. He went on to say ‘that had happened some considerable time previously’ and he was concerned with a false driving licence and not passports which had been used to gain entry. But without any further evidence at all, such perhaps as an extract from any interview on arrest, we are not satisfied as to the extent of any delay and any impact upon the Appellant’s credibility adversely. It is true that he did not seize the opportunity to claim at the Airport on arrival but was seeking to remove himself to Ireland, having crossed England and Wales to do so. In all, however, we find that any adverse effect on his credibility under s. 8 is relatively minimal.
80. Ms Ellis has sought to press upon us what she described as an inherent contradiction in the Appellant, as a Muslim, being suspected of involvement with LTTE. She considering that the background evidence shows a sustained hostility between that organisation and all Muslims. She referred us to part of section 18 of the latest full Country Report (issued in March 2012) concerning this issue. We see no reason to doubt the comments made from the British High Commission in Colombo quoted at paragraph 18.19 and, in particular, the reports that a spokesman for the Muslim community had told the High Commission that in 1990 the entire Muslim community in Jaffna was expelled from the peninsula by the LTTE at gunpoint and they have lost all their property and belongings.
81. We were not of the opinion, however, that this of itself undermined the Appellant’s account. He has maintained throughout that he thought this was a charity for orphans and not a front for LTTE. Although as a Tamil Muslim he would be unlikely willing to support LTTE – indeed, very much the opposite – it is not impossible he would be duped by a sympathiser into donating to a front organisation. In this context we have also considered the background evidence (we prefer that term rather than ‘objective’) provided by the Appellant. We did not find that this information assisted us in this central issue – the relationship between LTTE and Muslims. It was, so far as we can see, all focussed on relationships between Muslims and Buddhists and others.

82. The Appellant has described in some detail the injuries he says he has received and how he came to suffer them. He has also provided the report we have mentioned from Dr. Keniger. From her c.v. we note she appears to have qualified in 2010 and to have received training from 'Medical Justice' for whom she has volunteered since 2007, the year she gained her first degree. We infer that Dr. Keniger had about two year's experience post-qualification when she wrote her report on the Appellant. Dr. Keniger is clear in outlining her understanding of the Istanbul Protocol and her overriding duty to the Tribunal. Nowhere does she give any information about the numbers of scarring reports she has written. She describes herself, in her c.v., as 'a doctor with a strong interest in women's health and health system provision as components of international development'. Her achievements, as she describes them, do not appear to feature any work on alleged victims of torture, although she clearly has volunteered with a charity working with asylum seekers. This appears to have been pre-qualification.
83. We have laboured this issue because an expert has to be just that. Nevertheless, every expert has to have written her first report or series of reports. We have regarded Dr. Keniger's report with respect. We have approached it, however, with a modicum of caution simply because Dr. Keniger cannot yet have gained the experience valuable to her colleagues through examination of a considerable number of such claimants and the writing of large numbers of reports and, from time to time, no doubt getting feedback from the Tribunal.
84. We accept her finding that the scar on the Appellant's middle finger (of the left hand) is highly consistent with a cut from a sharp object such as a razor blade or similar. As such we find there is some potential corroboration that the Appellant has had a botched attempt to correct the injury to that finger. In our judgement this does not take very much further the issue of the cause of that injury.
85. Her finding concerning the scar to the back of the Appellant's head is said to be consistent with his being hit on the head with an iron pole as claimed but it is important to note that 'consistent with' tells us that the trauma could have been caused as described by the Appellant 'but it is non-specific and there are many other possible causes'.
86. The final injuries described by Dr. Keniger are on the Appellant's right forearm and we see no reason to doubt her conclusion that these are highly consistent with cigarette burns. We note her comments on alternatives - including self-harm and accept what she says about those possibilities and the fact of the appearance

confirming that the injuries are more than a year old. We find it very likely these are a series of cigarette burns administered by a third party.

87. We have reminded ourselves of the lower standard applying in claims for asylum. Putting all the findings from Dr. Keniger's report together, we find it corroborates his account of being tortured. Nothing is inconsistent with and much is indicative of torture.
88. The Respondent has asked us to find that it is not credible that the Appellant would have been tortured for three or four days and then not questioned or tortured during well over a year in detention. We understand the comment. We also accept that there were several inconsistencies of account. These include, the numbers of those escaping, who found the Appellant in prison, whether his brother was arrested on the day of his escape or the following day, when he was in solitary confinement and when he was not, how many escaped prison. There are some surprises, if the Appellant's account is true. These include the claim that he was not questioned or tortured after his initial contact with CID and others.
89. Yet again, however, we remind ourselves of the standard of proof. To some extent we consider that any one who is ill-treated and manages to arrive here as an asylum seeker may well have some unusual facts in his account and potentially some elements of fortune.
90. We consider most of the inconsistencies are explicable. The Appellant might well not know, for instance, precisely how many escaped with him. It really is not very germane precisely when his brother was arrested. His account has been throughout that he never went home but to a friend's house and then to the Mosque before his father arranged his departure by boat. The accounts of how his [sic] found in prison are not mutually incompatible in our view for the reasons suggested to us by Ms. Physsas.
91. Broadly, however, the Appellant has given a consistent account throughout. We have found he has suffered the injuries described. There are some inconsistencies but we have reminded ourselves that the interviews he has given and his evidence before us were all conducted with an interpreter. Small inconsistencies can occur from the nuance of interpretation - there was a suggestion of such an incident before us. We did not find the Appellant's credibility was essentially disturbed.

92. It follows that, applying the applicable lower standard, we accepted the core of the Appellant's account and, in particular that he had been detained unlawfully and without any subsequent court process for suspected funding of LTTE and that he had been ill-treated as he claimed and imprisoned for the period he has suggested, escaping in the manner he has described and, indeed, was confirmed by contemporaneous media reports."
9. In the light of the findings of fact made by the panel and the country guidance then applicable (**LP (Sri Lanka) [2009] UKAIT 00049**) as well as more up-to-date country information it found that the appellant met the majority of the risk factors in **LP**. The appellant was suspected of funding the LTTE, was a Muslim Tamil, and the panel had accepted his account of why he was wanted and of his escape. The escape produced publicity and the fact that it had been a coordinated escape with a number of escapees would be likely to draw the adverse attention of the authorities. There was the issue of scarring and the increased sophistication of records identified in the country guidance. The appellant had in all the circumstances demonstrated to the required standard that he had a well-founded fear of persecution and the panel accordingly allowed his appeal on asylum grounds and under Article 3.
10. The Secretary of State applied for permission to appeal on 14 June 2013. This application was refused by the First-tier Tribunal. It was renewed on 11 July 2013 and Upper Tribunal Judge McGeachy granted permission to appeal on 31 July 2013 commenting that he considered the grounds of appeal are "just" arguable. He observed that it was argued that the Tribunal had not properly assessed the matters which had led the Secretary of State to consider that the appellant's credibility was damaged and adequate reasons had not been given for the conclusions of the panel. The appellant filed a response on 13 August 2013.
11. Mr Walker submitted that there was a major credibility issue which arose under Section 8. This had been inadequately dealt with by the panel. The appellant had been arrested in October but had not made his asylum claim until December. The panel had not properly looked into this aspect.
12. It had also been argued in the grounds that the Tribunal had erred in finding that inconsistencies in the appellant's asylum claim could be attributed to interpretation issues. This had never been raised as a problem.
13. In relation to the medical evidence, the panel had not given satisfactory reasons why it had found that it was likely the cigarette burns had been administered by a third-party to cause harm to the appellant rather than to bolster his case. The absence of an arrest warrant indicated that the appellant was not of interest.

14. In reply Ms Physsas submitted that the appellant's case was that he had claimed asylum immediately. It was recorded in paragraph 67 of the determination that he had claimed on arrest. That was the way in which he had put matters in his witness statement. The panel had considered the remarks of the sentencing judge. There was nothing to show that the date on which the respondent had claimed the asylum application had been made was the accurate date. It was accepted that the appellant had not claimed asylum on arrival. Any adverse effect on credibility was minimal. Paragraph 79 might have been better worded but was not evidence of a flawed approach. It was possible that the sentencing judge had made a mistake but at that stage the appellant had not provided a certified copy of his passport to show that he had been in the United Kingdom lawfully in 2008.
15. Interpretation issues had arisen at the hearing as was apparent at paragraph 53 of the determination. Mistakes could happen when evidence was being interpreted. The panel had set out very clearly at paragraphs 88 to 91 their consideration of the inconsistencies. Adequate reasons had been given for the conclusions of the panel. The panel had made an overall credibility assessment.
16. Counsel submitted that the medical evidence entitled the panel to conclude as it had done. Dr Keniger had considered alternative ways in which the injuries might have been inflicted. Counsel noted in the response that a point had been taken that the original application for permission to appeal had been out of time on 14 June 2013.
17. At the conclusion of the submissions we reserved our decision. We have carefully considered the points that have been made on both sides. We remind ourselves that we can only interfere with the decision of the panel if it was materially flawed in law. Before dealing with the points made by the Secretary of State we also remind ourselves that the panel had the benefit of hearing oral evidence from the appellant who was cross-examined, it appears, at some length.
18. We turn to the point based on Section 8 first. It is accepted by Counsel that paragraph 79 is not as clear as it might be. The panel note the suggestion that the appellant claimed asylum immediately. In referring to the sentencing remarks it may be that the panel confused itself because it appears that at the time of sentencing it had not been appreciated that the appellant had come to the United Kingdom in 2008 on the basis of a business visa. This had not been accepted until a certified copy of his passport had been produced. It was the appellant's case that he had claimed asylum on arrest. It is accepted that he did not claim asylum at Heathrow Airport.
19. While we find, as we have said, that paragraph 79 is not as clear as it might be it is apparent that the panel did have regard to the issue of delay. It was open to the panel to conclude that in all the circumstances

of this case there was not a significant impact upon the appellant's credibility. We do not find that the panel materially misdirected itself when making its observations in paragraph 79.

20. In relation to the medical evidence the panel gave careful consideration to the qualifications of Dr Keniger as is apparent from the extracts from the determination which we have reproduced above. It probed the issue with due care. It considered whether the injuries to the appellant's arm had been self-inflicted and noted the comments of the doctor. The age of the scarring was noted. The panel in paragraph 87 reminds itself of the lower standard of proof that applies in claims of this nature. The panel was not obliged to give reasons for reasons. When paragraphs 86 and 87 are read together and in the context of the findings of the panel as a whole we do not find that the panel inadequately reasoned its decision and again it was entitled to conclude that the medical report corroborated the appellant's account of being ill-treated.
21. As Counsel points out it is clear from paragraphs 88 to 91 of the determination that the panel did not overlook the various challenges that the respondent had made to the appellant's credibility. It took into account the challenge that the account had been inconsistent. It sets out the various inconsistencies relied upon. The panel considered the background and the finding it had made about the ill-treatment the appellant had suffered. It further considered that most of the inconsistencies were explicable. The panel had to resolve the matters in the light of the low standard of proof and the concern that inconsistencies might arise through interpretation. Counsel reminds us that there had been a small problem at the hearing.
22. The Secretary of State argues that there is an inadequacy of reasons in the determination but we do not find that the panel neglected to reason its findings appropriately in the circumstances. It may be that not every First-tier Judge or First-tier panel would have resolved matters in favour of the appellant and another panel might have been more impressed with the effect of the inconsistencies on the appellant's general credibility. However, as we have said, we can only set aside the determination on a point of law and not a factual disagreement. We do not find, as we have said, that the panel misdirected itself in relation to the Section 8 issue. It properly probed the evidence before it, including the medical report – approaching it with a modicum of caution as is said in paragraph 83. The evidence was properly probed and sifted and we are unable to accept that the positive assessment made by the panel is flawed as contended.
23. In the circumstances we do not need to deal with the point made in the appellant's response that the grounds of appeal from the panel's decision were out of time on 14 June 2013. The First-tier Judge who determined the matter on 26 June 2013 in fact expressly said they were in-time in paragraph 1 of her decision. The point was not developed before us. We say no more about it.

24. For the reasons we have given the decision of the panel was not materially flawed in law and we direct that it shall stand.

Anonymity Direction

25. The panel made an anonymity direction in this case and we confirm that that direction continues.

Signed

Date 20 September 2013

Upper Tribunal Judge Warr