IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00090/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 November 2014	**On 20 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

AM (SRI LANKA)
(ANONIMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms F Allen, Counsel instructed by S Satha & Co
For the Respondent: Mr P Armstrong, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal the decision of the First-tier Tribunal (Judge Afako sitting at Taylor House on 5 August 2014) dismissing his appeal against the decision by the respondent to refuse to recognise him as a refugee, or as otherwise requiring international or human rights protection.

2. The appellant is a national of Sri Lanka. He first came to the United Kingdom on 6 September 2008 as a visitor. He returned

to Sri Lanka on 15 December 2008, and re-entered the country on 6 January 2009 within the currency of his six month visit visa. He claimed asylum on re-entry, and his application was refused. In April 2009 Judge Del Fabbro promulgated a determination dismissing his appeal. In 2011 the appellant instituted judicial proceedings, relying on new evidence. This included a psychiatric report from Dr Raj Persaud and statements from relatives in Sri Lanka and elsewhere supportive of his claim of past persecution and continuing adverse interest. The judicial review proceedings were later withdrawn, as the respondent agreed to give consideration to the new evidence within the context of a fresh consideration of his asylum claim.

3. On 12 December 2013 the Secretary of State gave her reasons for rejecting the appellant's claim that he had a well-founded fear of being detained and tortured upon his return to Sri Lanka because of his past involvement with the LTTE.

4. The respondent listed in paragraph 8 the documents which had been generated in 2011, and which were relied upon in support of the fresh claim. The respondent went on to quote extensively from Judge Del Fabbro's determination, in which he gave detailed reasons for finding that the appellant's claim of being detained and tortured on his brief return to Sri Lanka at the end of 2008 was not credible.

5. Judge Del Fabbro held that if the appellant had been involved with the LTTE, his limited activities for the LTTE, undertaken under duress, had ceased years ago. The appellant confirmed that he had not been involved with the LTTE from at least the year 2000 onwards. He had been able to live and work in the most difficult of areas for many years, based on the credentials and identification documents that had been issued to him. The very same documents had been produced in the appeal before the judge. The appellant had never been required to register with the authorities, and he had never been required to sign a register in relation to his whereabouts. The fact that he was able to obtain a passport in order to travel to India in order to seek medical assistance from his daughter and thereafter to travel to the United Kingdom to attend his brother's funeral without any hindrance by the authorities indicated that he was no interest to them whatsoever. The fact that the appellant had injuries to his back which might be consistent with burn marks did not provide the necessary confirmatory evidence to support the account of ill-treatment. In any event, the authorities' release of the appellant on the payment of a bribe indicated that there could not have been any serious, ongoing interest in him. It was noteworthy that the appellant was able to leave Sri Lanka within days of being released and without returning to his home in Jaffa. He was able to obtain and bring with him to the UK relevant

documents, including his passport and other personal documents which would assist him in his claim for asylum and which were deployed to that effect on arrival in the United Kingdom. The judge found there must have been a degree of pre-planning and organisation which, on the facts as presented by the appellant, there would have been no opportunity to undertake given his purported fear of the authorities.

6. The respondent addressed the supporting letters from his sister, father-in-law and brother in paragraph 18 of the RFRL. His brother and sister claimed that he was arrested in 1996 and 2008 and on each occasion they sent money to his father-in-law to secure his release. He had previously stated that it was his wife and brother who had secured his release in 1996 and that it was his uncle and a friend who secured his release through a bribe in 2008. He provided no reasonable explanation for this inconsistency. In any event, the letters were self-serving and not independent.

7. The respondent addressed the wife's 2011 statement in paragraph 19. She claimed she was visited by the authorities on 3 February 2011 and ordered to report weekly at a local police station until he was arrested. She claimed that her attorney was aware of this, but she had not provided any supporting evidence of these reporting conditions. It was noted that his solicitors provided a copy of a letter they sent to his wife's attorney on 24 September 2011 asking him to provide any evidence relating to his wife's reporting conditions. It was noted that no response had been submitted, and more than two years had passed since the letter was sent. It was therefore considered that little weight could be given to his wife's claim relating to police reporting conditions.

8. The respondent concluded that, taking into account the previous adverse credibility findings, the provenance and reliability of the new documents, the objective evidence and the principles of **Tanveer Ahmed**, the new documents did not establish the appellant was at a real risk of being subjected to treatment amounting to persecution or serious harm in breach of the Refugee Convention.

9. The respondent went on to address in considerable detail the scarring report from Dr Josse, and Dr Persaud's psychiatric report of November 2011. With regard to the latter, Dr Persaud had accepted that his separation from his family and the deaths and carnage he had witnessed during the civil war (as an ambulance driver) could be a contributing factor to his mental health problems. Furthermore, Dr Persaud did not engage with the findings of Judge Del Fabbro who found his account of being detained and tortured not to be credible.

10. On the issue of risk on return, the respondent referred to the country guidance case of **GJ and Others** and said the appellant had not established that he was, or perceived to be, a threat to the integrity of Sri Lanka as a single state; or that he had had significant role in either post-conflict separatism within a disapora or the renewal of hostilities within Sri Lanka; or that his name appeared on a computerised stop-list of individuals against whom there was an extant court order or arrest warrant; or that his name appeared on a computerised intelligence-led watch list which could lead to him being monitored and subsequently identified as a Tamil activist working to destabilise the unitary Sri Lankan state or provide the internal armed conflict.

The Hearing Before, and the Decision of, the First-tier Tribunal

11. At the hearing before Judge Afako, Mr Sowerby, Counsel for the appellant, indicated at the outset that he was not intending to call the appellant as the medical advice was that he was not fit to give evidence. But he called the appellant's brother to give evidence, and he adopted his recent witness statement which was primarily concerned with the topic of the appellant's mental health. He was not cross-examined. In his submissions, Mr Sowerby accepted that the appellant's involvement with the LTTE was at a low level, relating to his work in Jaffna Hospital. He submitted that the appellant's circumstances were similar to that of the third appellant in **GJ**. Although he had been receiving medication, his condition had not improved. He would be returned in a fragile mental state and would lack assistance in Sri Lanka. His account of past persecution was consistent with independent evidence of the notorious white van abductions in former LTTE areas.

12. In his subsequent determination, the judge gave his reasons for rejecting the appellant's claim at paragraphs 17 onwards. At paragraph 28 he concluded he was unable to find any good grounds to depart from the conclusion of Judge Del Fabbro. The appellant was not re-interviewed and he had not given evidence, managing only to speak to his doctors. The new case therefore rested on the latest medical appraisals, the letter from the appellant's wife as well as his brother's evidence. None of these added in content to the 2009 narrative which was rejected by the learned judge. The key difficulty with the medical reports was they did not engage seriously with the previous judicial rejection of the appellant's case and they had not provided a sufficient basis for reaching new conclusions. In any event, the key consideration was risk on return, which he had assessed in the light of the latest guidance and information. The appellant's historical claim was not credible and did not indicate on the lower

standard of proof the appellant would face persecution or serious ill-treatment if returned to Sri Lanka.

13. The judge went on to dismiss the claim on refugee, humanitarian protection, and human rights grounds. He understood from Mr Sowerby that the appellant was not pursuing a discrete Article 8 claim based on the risk of suicide or on the strength of his connections to this country. The appellant was estranged from his sister, and his brother lived in Switzerland.

The Application for Permission to Appeal

14. Charlotte Bayati of Counsel settled a very lengthy application for permission to appeal to the Upper Tribunal. She argued that the judge had made serious factual errors which rendered his findings on the asylum and Article 3 ECHR appeal unsafe, such that the determination should be set aside. There was no appeal against the rejection of the appellant's claim under Article 8.

15. On 29 September 2012 Judge McDade granted permission to appeal for the following reasons:

> The grounds of application for permission to appeal, although long, are detailed and concerning. They assert the judge has misapprehended the evidence presented on a number of occasions in a number of different areas and has misapprehended the evidence that he believed was before the original judge when that judge made his adverse findings against the appellant. These grounds are arguable. There is an arguable error of law.

The Hearing in the Upper Tribunal

16. At the hearing before me, Ms Allen confirmed that the essence of the error of law challenge was that the judge had made material errors of fact as to the documents that were before Judge Del Fabbro, and had thus not properly taken into account the new evidence which was probative of the core claim of past persecution and the authorities' ongoing adverse interest in the appellant. On behalf of the Secretary of State, Mr Armstrong accepted that there were some factual errors, but he submitted they were not material.

Discussion

17. Having reviewed the documentary evidence with the assistance of the parties, I have been able to identify the following factual errors in the determination.

18. At the end of paragraph [22}, the judge noted that Dr Persaud did not list among the documents that he had seen the determination of Judge Del Fabbro. He said it appeared that he did not have it before him, as he had made no reference to it. In

fact, Dr Persaud had seen the determination of Judge Del Fabbro, although he did not explicitly comment on its contents.

19. In paragraph [25], after commenting on the recent documents provided by the appellant's wife, the judge said at the end of this paragraph that the wife had provided letters in support of her husband's initial application, which formed part of Judge Del Fabbro's appraisal. That was not in fact the case. Before Judge Del Fabbro, the appellant simply relayed what his wife had allegedly told him had happened in Sri Lanka in his absence. He did not rely on a letter in support from his wife.

20. In paragraph [26], the judge incorrectly asserted that the appellant's brother had also provided a witness statement back in 2009 in support of his brother's case, and that this statement was considered by Judge Del Fabbro. He says that this evidence did not add any significant weight to the case that was rejected by Judge Del Fabbro. In fact, although in his recent witness statement the appellant's brother referred to making a previous witness statement in 2009, the information he gave in this statement was incorrect. He had actually provided a witness statement in 2011, not in 2009. So Judge Del Fabbro did not have a witness statement from the appellant's brother when determining the appellant's appeal in 2009.

21. Ms Allen also sought to persuade me that the judge had misquoted Dr Persaud at the end of paragraph [21] where the judge attributed to Dr Persaud the following:

> Drawing from other medical reports, he noted that the appellant was 'possibly at suicide risk.

22. Having examined the relevant passage in Dr Persaud's report of 22 April 2014, I do not consider that the attribution was inaccurate or unfair. The gist of Dr Persaud's observation was that other medical professionals agreed with him that the appellant was possibly at suicide risk, and suffered from a recognisable psychiatric disorder: see the appellant's bundle at page 18F.

23. Addressing the mistakes of fact that have been established, the key question is whether they are material. I do not consider the error in paragraph [22] is material as it is undeniably the case that Dr Persaud does not specifically comment on the determination of Judge Del Fabbro. In fairness to Dr Persaud, he recognises that credibility is not a matter for him, and this probably explains why he does not comment specifically on the determination. But even if the judge had correctly recognised that Dr Persaud had seen the determination of Judge Del Fabbro, he would still have attached little weight to it for the reason given by the respondent in the RFRL (see paragraph 9 above).

This is apparent from his approach to Professor Lingham's report in paragraphs [23] and [24] where he accepted that Professor Lingham had seen Judge Del Fabbro's determination, but said that his failure to engage with the formal findings of the determination detracted from the report's standing. So the mistake of fact did not have a material bearing on the judge's reasoning with respect to the weight to be attached to the medical evidence.

24. I do not consider the error with respect to the wife's evidence is material, as the judge acknowledged that there was up to date evidence from the wife that was not before Judge Del Fabbro. Similarly, the judge acknowledged that there was up to date evidence from the brother that was not before Judge Del Fabbro.

25. Although Judge Del Fabbro did not have a letter of support from the appellant's wife, he had the appellant's hearsay evidence of what the wife had told him about what had been going on in Sri Lanka. The fact that this evidence was conveyed to Judge Del Fabbro through the mouth of the appellant, rather than through a letter purportedly written by the wife herself, is not material, bearing in mind the guidance given in **Tanveer Ahmed** and the fact that the putative letter would not have come from an independent and authoritative source.

26. The thrust of the brother's statement in 2011 was that he had sent money from Switzerland in 2008 to help fund the appellant's release from detention. While this evidence was supportive of the appellant's claim, the appellant's brother did not have direct knowledge of the events which had precipitated the request for funding.

27. Earlier, at paragraph [19] of the determination, the judge expressly referred to the reasons given by the respondent in the refusal letter for attaching little weight to the letters from the appellant's relatives, including the 2011 letter from the appellant's brother.

28. Since it was open to Judge Afako to attach little weight to the evidence given in 2011 by the appellant's wife and the appellant's brother, for the reasons given in the refusal letter which the judge adopts, I am not persuaded that his erroneous belief that these 2011 letters were before Judge Del Fabbro had a material impact upon his assessment of the overall claim. Although the 2011 letters were not considered by Judge Del Fabbro, their limited probative value was such that they would not have impacted on his findings, any more than the *new evidence* from the mother and the brother *to the same or similar effect* impacted *retrospectively* on Judge Del Fabbro's findings in the estimation of Judge Afako: see paragraph [28].

29. There is no error of law challenge to the Judge's finding at paragraph [27] that the appellant would not be perceived as rendering a threat to the state of Sri Lanka as a result of his participation at a demonstration in London in front of the Sri Lankan High Commission. There is also no error of law challenge to the concluding sentence of paragraph [28], where the judge held that the key consideration was a question of risk on return.

30. Viewed holistically, I consider that the judge has given adequate reasons for finding that the appellant does not qualify for recognition as a refugee, having regard to **GJ and Others**, and also the dicta of Underhill LJ which was cited by Judge Afako in paragraphs [14] and [15] of his determination. As stated by Underhill LJ at paragraph [50] of **MP**:

> The clear message of the Upper Tribunal's guidance is that a record of past LTTE activism does not as such constitute a risk factor for Tamils returning to Sri Lanka, because the government's concern is now only with current or future threats to the integrity of Sri Lanka as a unitary state; and that is so even if the returnee's past links with the LTTE were of the kind characterised by the UNHCR as 'more elaborate.'

31. Against this background, there was not a real risk, as the judge found at paragraph [29], that a person with the appellant's profile would face persecution or serious ill-treatment if returned to Sri Lanka.

32. There is a separate challenge in the grounds of appeal to the judge's findings on suicide risk, and the availability of medical treatment for the appellant's mental health problems in Sri Lanka. The appellant was not granted permission to appeal on this discrete ground. Also, I consider that the challenge is no more than an expression of disagreement with findings which were reasonably open to the judge, applying **J v SSHD [2005] EWCA Civ 629**, as he does in paragraph [31]; and having regard to the evidence referred to, and the findings made, in paragraphs [32] and [33] of the determination. In particular, the judge found that there was nothing to prevent the appellant from seeking help from the former hospital where he worked, and there was nothing to suggest he would not be properly cared for at this hospital. Moreover, he found that the appellant's family would rally around him were he to return. The judge held that whilst removal might cause the appellant some anxiety, he would be provided with medical escorts and on arrival he would have access to the medication he needed.

Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed Date **20 November 2014**

Deputy Upper Tribunal Judge Monson