IAC-AH-PC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05334/2014

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 5th December 2014	**On 29th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR SIVALINGAM SAIBAVAN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Jonathan Martin (Counsel)
For the Respondent: Mr David Mills (HOPO)

DETERMINATION AND REASONS

1. This was an appeal against the determination of First-tier Tribunal Judge Birk promulgated on 12th September 2014, following a hearing at Birmingham on 1st September 2014. In the determination, the judge dismissed the appeal of the Appellant. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Sri Lanka, who was born on 25th October 1982. He appealed against the refusal of his asylum claim dated 19th September 2007, which refusal was made because of his failure to attend interviews on 5th September 2007 and 13th September 2007, whereafter he was recorded as an absconder. After further representations were made, he was eventually interviewed on 6th September 2011. On 9th July 2014, the Respondent refused his application and issued removal directions. The appeal is against that decision.

The Appellant's Claim

3. The Appellant's claim is that he had been arrested by the army and taken to Uduvil Camp where he was detained and beaten and tortured. He required hospital treatment. He was charged under the Terrorism Act as a member of the LTTE. He went to court. He was released on bail after his uncle consulted with a lawyer. He was required to report after he was released. There were three periods of detention. He did not know whether an arrest warrant or court summons had now been issued because he had lost contact with his uncle who had told him not to get in touch for his own safety.

The Judge's Findings

4. The judge recorded the fact that the Appellant had been detained and tortured on three separate occasions by the army and the CID (see paragraph 24). However, he had failed to state he was tortured when he mentioned his detention in interview (see question 76). Although he was told to keep his replies brief he did not, in fact, keep his replies brief (see paragraph 24).

5. With respect to his detention in Uduvil Camp, he was unable to specifically say whether this was for two or three weeks and remained uncertain. There was a consultant medical practitioner's report from Mr Martin and the judge said that he "is experienced in this field and is a consultant in emergency medicine" (paragraph 26).

6. However, the judge's conclusion was that with respect to the Appellant's scars, which were not immediately visible, the medical report "states that it is possible for there to be alternative causes for these injuries …" (paragraph 38). The fact that the Appellant failed to attend interviews was suggestive of his claim not being a viable one (paragraph 33). In any event, he had a very low level

of involvement (paragraph 35) and had not been involved in any diaspora activities in the UK (paragraph 35).

7. The judge had regard to the latest country guidance in **GJ (Post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319** and this has been confirmed in **MP v SSHD [2014] EWCA Civ 829**, which authorities make clear that "not all Tamils are at risk and that Tamil ethnicity of itself is insufficient to require international protection" (paragraph 36). The appeal was dismissed.

Grounds of Application

8. The grounds of application state that the judge misdirected herself in dismissing the appeal on the basis that the timings of the Appellant's departure from Sri Lanka were inconsistent and that there had been no explanation forthcoming from the Appellant as to the discrepancies of these dates. The judge had excluded corroborative evidence from the Appellant's Sri Lankan lawyer. The factual findings were not sustainable.

9. On 30th September 2014, permission to appeal was granted.

10. On 10th October 2014, a Rule 24 response was entered by the Respondent Secretary of State.

Submissions

11. At the hearing before me on 5th December 2014, Mr Jonathan Martin, appearing on behalf of the Appellant, submitted that the judge's treatment of the Appellant's credibility is sparse, being confined to only paragraphs 22 to 24, because it is only here that the Appellant's account is dealt with. Even if the findings in relation to the Appellant not having been tortured are correct, that does not mean to say that the findings in relation to detention are correct as well.

12. The Appellant had, after all, been taken to Colombo. He had been detained three times. Nothing in the determination deals with the second detention. The judge goes straight on to a consideration of the medical report (at paragraph 24). However, this is treated separately from the main account.

13. It is well-established that the evidence, including the medical report evidence, must be treated in the round and as a whole with the other evidence. The doctor had described the injuries as "highly consistent" with ill-treatment. The letter from the lawyer confirms the third detention of the Appellant, and this ties in with what the judge had recorded at paragraph 30, in terms of the Appellant's movements through France, and to the UK.

14. For his part, Mr Mills submitted that he would rely upon the Rule 24 response. There was no error of law. It was accepted that the Appellant's scars were "highly consistent" (in the words of the medical practitioner) with his having been mistreated (see paragraph 38). However, the scars could also be consistent with an alternative explanation (see paragraph 30). Moreover, the cases that the judge does cite in the body of the determination (at paragraph 36) confirm that mere membership of Tamil ethnicity does not qualify one for refugee status.

15. The Appellant had not been engaged in diaspora activities. He may have been involved in activities a decade ago in Sri Lanka, but the latest cases showed that, without anything further since then in the UK, one could not assume that he would be put at risk upon return to Sri Lanka.

16. In reply, Mr Jonathan Martin submitted that one had to consider whether it was reasonably likely for this Appellant, upon return to Sri Lanka, to be detained because he would be on a "stop list". Once it is accepted that he had been detained three times, then it must follow that he would be at risk upon return to Sri Lanka. He was, after all, detained under the Prevention of Terrorism Act. This was at a time when there was a ceasefire. The position would be far worse for a person in that situation compared to one who had been detained simply when there were ongoing hostilities.

No Error of Law

17. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law, such that I should set aside the decision. My reasons are as follows.

18. First, this is a case where the Appellant avoided having to attend for interview in order to put his asylum claim. It is well-established, including in European refugee law, that making a prompt asylum claim is in the interest of a genuine asylum seeker.

19. Second, after the claim had been made, the Appellant failed to mention that he had been tortured during his interview (see question 76). When he does mention this fact he does not in his account explain what his internal injuries were. In any event, the judge's conclusion was that "this incident was as a result of random gathering of people because of the LTTE having thrown [a bomb which] caused an explosion" (see paragraph 24). The judge had, accordingly, had full regard to all the material circumstances in the Appellant's account. The judge had indicated what she found plausible and what she did not find plausible.

20. Third, in relation to the Appellant's detention itself, the judge was unpersuaded that the account given was credible because the

Appellant "was unable to recall whether it was two or three weeks when this was a significant detention when he was severely tortured and received wounds on his account" (see paragraph 25).

21. Fourth, it is not the case that the judge neglected the evidence of the medical practitioner. On the contrary, the judge observed of Mr Martin that he is "experienced in this field and is a consultant in emergency medicine" (see paragraph 26).

22. Fifth, the judge has regard to the three main injuries that the Appellant refers to in his examination with Mr Martin, but observed that, "I do not find it credible that he failed to mention it in his interview" (paragraph 27). When considering this further, the judge is clear that "it is not possible to comment further as to whether this injury was caused accidentally or intentionally as any sharp instrument could have been used" (paragraph 27). The judge was entitled to come to this view.

23. Sixth, the judge considers the injuries to the back of the Appellant, which he said were caused by his being beaten by a blunt instrument. The judge treats this account in a fair and dispassionate way (see paragraph 28). The judge also has regard to the evidence that the Appellant was arrested, charged, and jailed, and then released on bail after a week (see paragraph 29). However, what ultimately leads the judge to conclude that the Appellant was not at risk are the following points.

24. First, there was a discrepancy in the account of the dates which had not been explained by the Appellant (see paragraph 30). Second, the Appellant was unable to say whether there had been an arrest warrant or a court summons, and the judge did not find it credible that he had failed to enquire about this from his uncle, if what he had said about his ill-treatment was correct (paragraph 31). Third, the actions of the Appellant were not found by the judge to be "those of a genuine asylum seeker. He stated that when he came to London he went with his uncle to see a solicitor who advised him not to make a claim". Indeed, "when he did make a claim he failed to attend the Respondent's interviews until 2011" (paragraph 33). These are not insignificant matters. They are substantial reasons for the rejection of a claim. Fourth, the Appellant has not been involved in diaspora activities to any significant extent, and the judge was entitled to take the view "that this was a 'very low level involvement'" (paragraph 35). Fifth, and no less importantly, the judge has regard to two of the latest cases given by way of country guidance after the cessation of hostilities in Sri Lanka. The judge rightly observes here that not all Tamils are at risk and that Tamil ethnicity is itself insufficient to require international protection.

25. Finally, the judge is able to conclude on this basis that the Appellant has failed to establish that he is of adverse interest to the government,

> "due to absconding whilst on bail in respect of terrorist charges. I find that he has failed to establish that he is likely to be perceived as a risk to the integrity of the country or as a person who is still actively opposed to the government or that he is on any 'stop' or 'watch' list" (paragraph 57).

In these findings, the judge has provided a complete answer to why this claim is not a viable one. I come to this conclusion notwithstanding Mr Jonathan Martin's very eloquent, fulsome, and comprehensive submissions before me. However, the facts as found by the judge, on the basis of the applicable law, do not suggest that the judge erred in law.

Decision

26. There is no material error of law in the original judge's decision. The determination shall stand.

27. Anonymity order is hereby made.

Signed Date

Deputy Upper Tribunal Judge Juss 27th December 2014