Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/06131/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 September 2015	**On 15 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms L Taylor-Gee, of counsel
For the Respondent: Ms E Savage, a Home Office Presenting Officer

DETERMINATION AND REASONS

1. An anonymity order was previously in place. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Introduction

2. In this appeal, the appellant appeals against a decision of the First-tier Tribunal dismissing his appeal. The appellant had appealed against the respondent's decision taken on 19 August 2014 to refuse to grant asylum or Humanitarian protection under the Immigration Rules HC395 (as amended).

Background Facts

3. The claimant is a citizen of Sri Lanka who was born on 16 May 1987. He claimed asylum and asked to be recognised as a refugee under the 1951 Refugee Convention. He claimed to have a well-founded fear of persecution in Sri Lanka on the basis of his fear of the Sri Lankan authorities because of his ethnicity and imputed political opinion. He claimed that his removal from the United Kingdom would be in breach of Articles 2 and 3 of the European Convention on Human Rights. That claim was refused on the basis that the respondent was not satisfied that the appellant had established a well-founded fear of persecution The respondent also considered that the appellant had not demonstrated that there were substantial grounds for believing that he would face a real risk of suffering serious harm on return to Sri Lanka so that he did not qualify for Humanitarian Protection or that his removal would breach Articles 2 or 3.

Appeal to the First-tier Tribunal

4. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 26 March 2015, Judge Turquet dismissed the appellant's appeal. The First-tier Tribunal found that the appellant had fabricated his account of events, concluded that the appellant had invented his asylum claim and as a result found that he is not of adverse interest to the authorities in Sri Lanka. The judge found that his removal would not breach the UK's obligations under the Refugee Convention or the Qualification Directive and would not breach his Article 2 or 3 Rights.

Appeal to the Upper Tribunal

5. The appellant sought permission to appeal to the Upper Tribunal. On 21 April 2015 First-tier Tribunal Judge Ford granted the appellant permission to appeal. Thus, the appeal came before me.

Preliminary Issue

6. In the Grounds of appeal the appellant asserted (Ground 1) that the First-tier Tribunal judge had failed to apply a concession made by the Home Office Presenting Officer at the hearing. The concession was said to be that the Secretary of State accepted that there was an arrest warrant on the court file in Sri Lanka in respect of the Appellant. Grounds 2 and 3 (although incorrectly also numbered 2) set out errors alleged to have arisen as a consequence of the judge's failure to take this concession in to account.

7. The appellant applied for an adjournment of the hearing and for the Secretary of State to respond setting out whether or not she accepted that the concession had been made. The application for an adjournment was refused. However, the Secretary of State did respond shortly before the hearing indicating that she did not accept that a concession had been made.

8. Counsel who represented the appellant at the First-tier Tribunal hearing, Ms Victoria Laughton, withdrew from the case and provided a witness statement setting out her recollection of events together with her contemporaneous note to her instructing solicitor which accorded with her witness statement. Ms P Ellis, the Home Office Presenting Officer, who represented the Secretary of State at the First-tier Tribunal hearing also provided a short witness statement and a contemporaneous note from the hearing. Ms Ellis did not accept that a concession had been made.

9. I consulted the record of proceedings and read to both representatives a couple of passages from the notes (although I had some difficulty in reading parts of the notes). It was clear from those notes that the presenting officer accepted that the lawyers were bona fide. However, there was nothing in the judge's notes that gave an indication that a concession had been made in the terms advocated Ms Laughton with regard to the arrest warrant.

10. I also considered the fact that the Secretary of State had been directed to notify the appellant and the tribunal whether the evidence from Mr Mansoor (sic) was accepted. The respondent did not respond to this direction.

11. Both representatives made submissions to me. I concluded that it was clear that both representatives were honestly representing their recollection of events. As the parties were in disagreement, without having to undertake an investigation, hear evidence on the point from the representatives and reach a conclusion, it would have been difficult to find a material error of law in respect of the judge's failure to take that alleged concession into account in the absence of an indication of such a concession in the judge's notes.

12. However, as set out below I did consider that there are material errors of law and that the decision should be set-aside. On the basis of the evidential issue regarding the arrest warrants I concluded that the matter should be remitted to the First-tier Tribunal for a *de novo* hearing.

13. I also consider that there is a real risk of unfairness to the appellant. Having heard the submissions it is clear that evidence was not led in connection with the arrest warrant that Ms Laughton would most probably have led had she not considered that the Secretary of State had conceded the matter. That evidence may have made a material

difference to the judge's conclusions on the risk to the appellant on return to Sri Lanka in light of the risk categories identified in GJ (Sri Lanka) [2013] UKUT 00319 (IAC). I have also borne in mind the special responsibility carried by the Tribunal in the context of asylum appeals and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account - R (YH) v Secretary of State for the Home Department [2010] 4 All ER 448, para 24. There is a real risk of unfairness to the appellant if he does not have an opportunity to have this matter considered fully.

14. Given the problems that have arisen on this issue it would be of assistance to the First-tier Tribunal to have clarity on the position of the Secretary of State regarding the arrest warrant. I was asked to make a direction for the Secretary of State to make her position clear. I agreed to make such a direction and asked the representatives to agree a form of words. My direction is set out below. I am grateful for the assistance of both representatives in dealing with this difficult issue.

Submissions

15. Ground 2 of the grounds of appeal assert that the judge failed to explain why the appellant would not be at risk on return if two lawyers had confirmed an arrest warrant in respect of the appellant was on the court file in Sri Lanka. It was submitted by Ms Taylor-Gee, at the hearing that even if the arrest warrant was fraudulent (which for the avoidance of doubt was not accepted by the appellant) the judge had failed to consider and explain how the mere existence of an active arrest warrant on file would not of itself place the appellant at risk on return. If the genuineness of the lawyers was not disputed and what they had seen and recorded regarding the arrest warrant, it was illogical for the judge not to accept that there was an arrest warrant on the court file. The Sri Lankan authorities would pursue the appellant even if the documents were false. Ms Savage submitted that there is no presumption that the documents are reliable. At paragraph 69 – 71 of the decision the judge made numerous findings of inconsistencies. The burden of proving the existence of the arrest warrant is on the appellant. There were numerous broader inconsistencies found by the judge. If the arrest warrant was not genuine then it is not necessarily the case that the authorities would act on a fraudulent warrant.

16. In ground 3 the appellant asserts that the judge failed to give adequate reasons for placing little weight on the letters from the lawyers and arrest warrant. In the case of PJ (Sri Lanka) [2014] EWCA Civ 1011 clearly states at paragraph 41 that if the judge considered that the arrest warrant was fraudulent sufficient justification was required as to how that conclusion was reached. Ms Taylor-Gee submitted that the judge did not give any detailed analysis of how the appellant could have arranged for false documents to be placed in the court records. Ms Savage submitted that with regard to sufficient justification the judge did give a detailed analysis as set out in paragraphs 69-71 as to why

little weight was placed on the documents. This was in accordance with the requirements in PJ. The fact that the Secretary of State failed to undertake enquiries is irrelevant as the Secretary of State is not obliged to make enquiries and the judge is not obliged to accept the documents as reliable.

17. In ground 4 the appellant asserted that the judge erred by failing to give adequate reasons for the rejection of the medical report and in ground 5 that the judge failed to consider the evidence in the round. Ms Taylor-Gee submitted that although there has to be some order to the decision when writing the decision up, in this case the judge has made her findings regarding the credibility of the appellant before considering the medical or other corroborative evidence. Only after making those adverse findings did the judge then consider if this moved her from her previous findings. It was submitted that this approach was incorrect in accordance with the cases of IY (Turkey) [2012] EWCA Civ 1560 and Mibanga [2005] EWCA Civ 367. There was no discussion of the medical report and no reasons given as to why the judge disagrees with the conclusion. The judge had an obligation to give good reasons if she was going to reject the evidence. It is clear from paragraph 76 of the judge's decision that the previous findings on credibility informed the judge's approach. The judge was merely paying lip service to the requirement to consider the evidence in the round. The fact that the judge states at paragraph 78 that the fact that the appellant has given an account to medical personnel is not evidence that it happened as claimed is highly indicative that she had not approached the medical report in the correct way.

18. Ms Savage submitted that paragraph 43 clearly indicates that the judge, in setting out her decision in some sort of order, did not indicate that some matters were considered by her to be more important than others. The fact that the medical evidence was considered after the other evidence does not mean that the judge did not take it into consideration in her overall assessment and before reaching her ultimate conclusion which is set out at paragraph 81. This conclusion is reached after the medical evidence has been considered. The medical evidence was clearly taken into account before reaching a conclusion. The weight to be attached to evidence is a matter for the judge. Paragraph 78 of the judge's decision must be considered alongside paragraph 74 where the judge records that the medical evidence notes that the injuries could have been caused by other causes. The judge records in detail in paragraph 74 why she considered the report to be of limited evidential value in assessing the appellant's claim. The conclusion reached was entirely open to the judge.

Material error of law

19. I consider that the judge has undertaken a very thorough analysis of many aspects of the case and has reached conclusions on several issues

that were clearly open to her. However, I find that there were material errors of law in the decision of the First-tier Tribunal.

20. With regard to the judge's analysis and conclusions on the arrest warrant she set out at paragraph 68 that she had considered the evidence in the round. She then set out is some detail the evidence regarding the general position with regard to corruption in Sri Lanka that she had taken into consideration together with the inconsistencies in the appellant's account of the document which led the judge to the conclusion that, despite accepting that Mr Marsook and Mrs Pinnalawatta are lawyers, she could place little weight on the lawyers' letters as evidence that the appellant is the subject of an arrest warrant in respect of prevention of terrorism charges and is of adverse interest to the authorities. The judge concluded that she could place little weight on the arrest warrant and police message. It is not entirely clear whether or not the judge considered that there simply was no arrest warrant on file or that she accepted that the lawyers had seen a document but that it was fraudulent. The finding is that little weight is to be placed on the lawyers' letters, the arrest warrant and police message. If the latter, there was no explanation by the judge as to how she considered the document had been placed on the file in this particular case and no detailed analysis and explanation of this feature of the evidence (a requirement indicated in para 42 of the case of PJ). If the judge did not accept that there was an arrest warrant on file at all then a clear conclusion should have been reached with sufficient reasons given as to why she reached that conclusion in the absence of any challenge to the bona fides of the lawyers.

21. If the judge accepted that there was an arrest warrant on file even if fraudulent she did not set out sufficient reasoning as to why she considered that his would not present a risk on return to Sri Lanka. The judge correctly referred to GJ and Others (post-civil war: returnees) Sri Lanka [2013] UKUT 00319. When setting out the risk factors indicated in that case the judge referred to a person on a stop list. In **GJ** it was set out that a person on a 'stop list' comprises:

> '… a list of those against whom there is an extant court order or arrest warrant' (para 356(7)(d)).

22. At paragraph 81 of the First-tier Tribunal decision the judge concluded that, *'I do not find that there are any factors attributable to this appellant, which would cause him to be at risk'.* There is no specific mention of, or reasoning given by, the judge as to why the arrest warrant, even if it were fraudulent, would not give rise the adverse interest of the authorities. Whilst it clearly is a finding that is open to the judge the lack of analysis and reasoning regarding the arrest warrant amounts to an error of law.

23. In respect of the medical evidence and the overall approach of the judge there is some doubt that the judge did consider all the evidence in the round and that she considered the medical evidence before arriving at

her conclusions. I acknowledge that the weight to be given to expert evidence is a matter for the First-tier Tribunal judge. In this case there are indicators that the judge did reach her conclusion before considering the medical evidence. At paragraph 78 the judge set out, 'For *the reasons given above I have not found the appellant to be credible... I do not find the fact that he has given an account to medical personnel, is evidence per se that it happened as claimed, taking into account my pervious findings'.*

24. The judge appears to have erred by approaching the medical evidence in the manner specifically disapproved in the case of Mibanga**.** At paragraph 24 the court set out:

> '… What the fact finder does at his peril is to reach a conclusion by reference only to the appellant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence' and at 25 '… She addressed the medical evidence only after articulating conclusions that the central allegations made by the appellant were … wholly not credible'.

25. I consider that there was a material error of law in the approach of the judge to the medical evidence.

Decision

26. The decision of the First-tier Tribunal involved the making of a material error of law. I set aside that decision pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').

27. I remit the case to the First-tier Tribunal for the case to be heard before a different judge pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. The case has been listed at Hatton Cross for 2 hours for hearing on 14 January 2016.

28. I also make the following directions (pursuant to section 12(3)(b) of the TCEA) to the Secretary of State for the Home Department:

Directions

The Tribunal directs that the Secretary of State for the Home Department:

1. Must within 42 days of the date of receiving these directions, notify the appellant and the First-tier Tribunal whether evidence from Mr Marsook and Ms Pinnalawatta is accepted, and

2. Whether the existence of the arrest warrant on the Sri Lankan court file is accepted.

3. If there is no response by the Secretary of State the First-tier Tribunal may draw an inference in the appellant's favour.

Signed P M Ramshaw Date 14 September 2015

Deputy Upper Tribunal Judge Ramshaw