



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

Appeal Number: AA/05212/2015

THE IMMIGRATION ACTS

Heard at Field House

Decision and Reasons

On 5 January 2016

Promulgated

On 13 January 2016

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

Pooventhirarajah

Appellant

and

The Secretary Of State For The Home Department

Respondent

Representation:

For the appellant: Ms S. Jegarajah, Counsel, instructed by Wimbledon Solicitors

For the respondent: Mr I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The substance of the submissions made by Ms Jegarajah before me was directed to the procedural fairness of the hearing conducted by First-tier Tribunal Judge Birk on 16 September 2015 and whose determination was promulgated on 28 September 2015.
2. The appellant instructed HK Solicitors to act for him in the conduct of his asylum appeal. The firm settled grounds of appeal to the Tribunal

on 25 March 2015 which challenged the decision made by the Secretary of State to reject his asylum claim on the basis that the appellant's account of having joined the LTTE was vague and unclear. The Secretary of State also rejected the appellant's claim to have been arrested. However, in paragraph 28 of the refusal letter, the respondent noted the appellant's claim that he had been detained for a single day during the course of which he had been attacked by security officers resulting in a broken arm or wrist and of being beaten on the back. On the basis of the objective information, the Secretary of State accepted that there was a pattern of torture against detainees in Sri Lanka but that the Secretary of State maintained his rejection of the appellant's claim involvement with the LTTE and hence his claim to have been arrested, detained and beaten.

3. On 14 April 2015, HK Solicitors wrote to the Tribunal stating, amongst other things, that the appellant had been examined by a scarring consultant who had produced a report confirming the causation of his scars. The Tribunal was asked to adjourn the Case Management Review hearing in order to await funding and the evidence from the appellant's father as well as to enable the production of a psychiatric report on the appellant. The Case Management Review was adjourned to 6 May 2015 at which point directions were given, including a direction that the case be sent down the hearing.
4. In due course, the matter was set down for hearing on 16 September 2015.
5. Five days before the hearing, on Friday 11 September 2015, the appellant wrote two letters. The first letter was a complaint about his solicitors' conduct to the Legal Ombudsman. The second was faxed to the Tribunal at 15 hrs 39 on Friday, 11 September 2015. It was entitled '*Complaint against the HK Solicitors*'. The letter stated:

"... I regret to inform the court that I contacted my above solicitors and asked them to arrange a Tamil interpreter for me to prepare the witness statement. I was handled by an Accredited Solicitor who worked in this firm, handled my case earlier. She left the firm in May 2015 and informed me that another Solicitor will take over my matter.

Since then I am unable to communicate with them. They repeatedly tell me that they can do my case. To date they have not communicated with me in preparing my witness statement. When I went two weeks ago I was given a witness statement. I asked him what this is. My statement has not been read and explained in Tamil. I am very unhappy with my Solicitors.

I was not given a copy of the scarring report. The Solicitor who has given me the attached witness statement said he did not know anything about my medical report.

I am fully aware that the Solicitor who handled my case initially obtained report from Dr Andres Martin and I have seen this Doctor in Royal Free Hospital at A and E Department.

I humbly request that my case be adjourned ...

I really worry that I should have instructed another Solicitor at least one month ago. Until the last minute I believe that a Tamil interpreter will be arranged for the preparation of my case. However they failed to book a Tamil interpreter despite of my several request. Without communication I was very disappointed with them and could not do my case effectively.

I have found a solicitor in Tooting Bec who is franchised in asylum and immigration. I have been advised them that if the First-tier Tribunal adjourned the hearing, they will be able to submit all the reports and complete bundle within four weeks."

6. The letter was sent by facsimile and date-stamped as received by the Tribunal on 14 September 2015, the following Monday, presumably because it was too late to be processed on the preceding Friday, the day of receipt. It went before a Judge on 14 September 2015 who refused the application to adjourn in these terms:

"Application refused. There has been ample time to prepare."

7. When the appeal came before First-tier Tribunal Judge Birk on 16 September 2015, the appellant was represented by counsel who was clearly instructed by HK Solicitors. A Tamil interpreter had been arranged. Miss Bachu had been instructed to apply for an adjournment on the basis that there was a scarring report which had not been served and the appellant had not gone through his statement in Tamil. His counsel, on instructions, indicated the appellant's wish to transfer his instructions to another solicitor whom he had contacted but the appellant had not formally withdrawn his instructions from HK Solicitors. The appellant had signed his statement on the previous Tuesday but he had only been told about it in English. He had seen a scarring report two or three months before. He had tried to find alternative solicitors a week before.
8. The Judge refused the adjournment. She noted the fact that the hearing was adjourned on 15 April 2015 in order for the appellant to obtain a psychological report. She thought there had been no mention of scarring in his asylum claim to date although this was not accurate as the scarring report had been mentioned in HK Solicitors' letter of 14 April 2015 in which his representative confirmed such a report was to hand. Directions of 15 April 2015 referred to serving expert reports, in the plural.
9. I have seen the report of Dr Andres Martin dated 16 April 2015 two days after the letter from HK solicitors and one day after the Case

Management Review was due to take place on 15 April 2015 which was adjourned for the purpose of obtaining the psychiatric report.

10. The report of Dr Martin noted several linear scars on the middle and left side of the forehead, a transverse scar from the left corner of the mouth and transverse scars on the whole length of the back as well as a scar on the left upper arm. The scars on his face were caused by shrapnel injuries; those on the back and left arm were, according to Dr Martin, described by the appellant as the result of his being beaten during his detention in 2006. The latter were typical of scars caused by an intentional beating.
11. The report was not before the First-tier Tribunal Judge when she made her decision. According to the Judge, the appellant did not mention in his asylum interview that he sustained any scarring. In paragraph 23 of the determination the Judge concluded:

“I find that his injuries were no worse than he has mentioned and I take into account that he was only detained for a day.”
12. Thus, the Judge accepted the appellant had been beaten by the authorities as he claimed but that his injuries were no worse than his account given in interview which made no mention of scarring.
13. The Judge concluded in paragraph 28:

“I also find that it is not credible at all that taking into account the extremely low level of being involved with the LTTE which ended in 2003, his one day detention when he was legally released and his very low level involvement in Tamil groups in the UK that they would be seriously and actively interested in him. There is no suggestion by the appellant that he is on a ‘wanted’ or ‘stop’ list or that there are any court proceedings, any charges or arrest warrants for him.”
14. Applying the Country Guidance afforded in *GJ and others (post-civil war: returnees)* Sri Lanka CG [2013] UKUT 00319 (IAC) she concluded that the appellant did not fall into any of the risk categories set out, namely, a person who had been targeted and perceived as a threat to Sri Lanka by reason of his having a significant role in post-conflict separatism. On the material before her, that conclusion was plainly open to her.
15. It is clear that the scarring report should have been placed before the Tribunal by the appellant's former solicitors, HK Solicitors. Although there is a general rule that where allegations of misconduct are made against a solicitor, the solicitor should be given an opportunity to answer. I am, however, satisfied in the circumstances of this case that there was an unequivocal assertion by the appellant's former solicitors that they had a copy of the scarring report before them or would have had it by April 2015 and that they failed to file and serve it as directed.

16. The appellant did not, therefore, have the benefit of the scarring report at the hearing. However, the Judge knew that such a report was in existence. He clearly accepted the appellant's account that, in the course of a single day's detention, his arm was broken and that he was beaten. Whilst he did not find that the appellant had established he was scarred, this would only have been of assistance if scarring was, in itself, a material factor in advancing his claim.
17. It is clear from *GJ and others (post-civil war: returnees)* that scarring is no longer a significant element in the assessment of a claim. The italicised words make this clear:
- (1) *This determination replaces all existing country guidance on Sri Lanka.*
 - (2) *The focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009. The LTTE in Sri Lanka itself is a spent force and there have been no terrorist incidents since the end of the civil war.*
 - (3) *The government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state enshrined in Amendment 6(1) to the Sri Lankan Constitution in 1983, which prohibits the 'violation of territorial integrity' of Sri Lanka. Its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka.*
 - (4) *If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.*
 - (5) *Internal relocation is not an option within Sri Lanka for a person at real risk from the Sri Lankan authorities, since the government now controls the whole of Sri Lanka and Tamils are required to return to a named address after passing through the airport.*
 - (6) *There are no detention facilities at the airport. Only those whose names appear on a "stop" list will be detained from the airport. Any risk for those in whom the Sri Lankan authorities are or become interested exists not at the airport, but after arrival in their home area, where their arrival will be verified by the CID or police within a few days.*
 - (7) *The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, are:*
 - (a) *Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka.*
 - (b) *Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who*

are associated with publications critical of the Sri Lankan government.

- (c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.*
- (d) A person whose name appears on a computerised “stop” list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a “stop” list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.*
- (8) The Sri Lankan authorities’ approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war. In post-conflict Sri Lanka, an individual’s past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government.*
- (9) The authorities maintain a computerised intelligence-led “watch” list. A person whose name appears on a “watch” list is not reasonably likely to be detained at the airport but will be monitored by the security services after his or her return. If that monitoring does not indicate that such a person is a Tamil activist working to destabilise the unitary Sri Lankan state or revive the internal armed conflict, the individual in question is not, in general, reasonably likely to be detained by the security forces. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual.*

- 18. The Judge correctly followed this guidance.
- 19. For these reasons, I do not consider that the Judge acted unfairly in refusing to adjourn the hearing. Sight of the scarring report would have made no material difference to the outcome.
- 20. Ms Jegarajah opened her submissions by saying that Miss Bachu, at the hearing before the Judge, had no instructions to act for the appellant. That submission is misconceived. The appellant had indicated that he wished to change solicitors but had not done so. Given the refusal of the application to adjourn that had been made on 14 September 2015, it was important that HK Solicitors continued to

act for the appellant at the hearing. Counsel was instructed and it cannot reasonably be asserted that Miss Bachu had no authority to act. She properly applied for an adjournment and, when that was refused, continued to advance the appellant's case and successfully argued that the appellant's account was credible. She managed, therefore, to persuade the Judge that the respondent was wrong in approaching the case on the basis that the applicant had never joined the LTTE, had never been arrested detained and beaten. Miss Bachu had done all that could reasonably have been expected of her. That did not mean that she could successfully persuade the Judge that a single arrest and a single day's detention (with mistreatment) followed by an official ('legal') release established the relevant criteria to make out a viable asylum claim. Given the appellant's account, that was asking the impossible.

21. Nor can the Judge be properly criticised. Whilst refusing the adjournment, he ensured that the appellant was not materially prejudiced because he accepted the appellant's account at face value. It is true that there was no evidence of scarring but that was no longer material to his decision since the Tribunal's approach in *Gj and others (post-civil war: returnees)*.
22. Miss Jegarajah also sought to argue that the appellant was not able to advance his claim as fully as he wanted by reason of his inability to produce a statement that had been read over to him in Tamil. That submission can be swiftly disposed of. In paragraph 3 of the determination, it is apparent that the Judge acted with scrupulous fairness in refusing to allow the appellant to be prejudiced by anything in the statement with which the appellant might disagree. The appellant was given the opportunity of advancing his claim just as he saw fit in oral evidence and was provided with sufficient time to give instructions. An interpreter was present and, in any event, the appellant had a working knowledge of English as he has studied here. Although this ground is not raised in the grounds of appeal, it is not arguable.

DECISION

The Judge made no error on a point of law and the original determination of the appeal shall stand.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
5 January 2016