IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/10888/2014
AA/10891/2014
AA/10894/2014
AA/10898/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th February 2016	**On 1st March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

NIPUL SHARMILA THEWARAPPERUMA ARACHCHIGE DON – 1ST APPELLANT
SHANIKA S WATHTHAGE PERERA – 2ND APPELLANT
A S T A D– 3RD APPELLANT
A S T – 4TH APPELLANT
(ANONYMITY ORDERS NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms J. Hassan of Counsel
For the Respondent: Mr P. Nath, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The first Appellant who I shall refer to as the Appellant was born on 17th March 1977. He is married to the second Appellant born on 29th November 1988 and the third and fourth Appellants born 26th June 2011 and 26th July 2013 are their children. All four Appellants are citizens of Sri Lanka. The Appellants appeal against the decision of Judge of the First-tier Tribunal Anstis sitting at Hatton Cross on 24th July 2015 who dismissed their appeal against decisions of the Respondent dated 24th November 2014. Those decisions were to refuse the Appellant's application for asylum and the second, third and fourth Appellants' applications as dependents of the Appellant and to make consequent directions for the removal of the Appellants from the United Kingdom.

2. The Appellant's case was that he feared to return to Sri Lanka since a man called Buddika who was the boyfriend of the Appellant's sister was killed by the government whilst in prison. The Appellant feared he would be arrested and killed by the authorities acting under the influence of two Sri Lankan MPs Felix Perera and Sarana Gunawardena. The Appellant stated he was a prominent member of the United National Party (the UNP) and was the youth development officer of its young person's organisation the National Youth Front in London. At the time of the application for asylum the UNP was one of the opposition parties in Sri Lanka although following elections in January 2015 it is now one of the governing parties in Sri Lanka. The leader of the UNP is the current Prime Minister of Sri Lanka.

The Decision at First Instance

3. At paragraphs 11 to 17 of the determination the Judge summarised the Appellant's case. Buddika had beaten a man called Merrill who had been attacking the Appellant's aunt. A group of men led by the two MPs, Felix Perera and Sarana Gunawardena, came to the Appellant's house and set fire to it shooting at the Appellant. Other members of the Appellant's family were also attacked. In 2004 Felix Perera tried to hold the Appellant and Buddika responsible for the death of Merrill and filed a case against them. Buddika was arrested when he returned to Sri Lanka in 2014 and was later found dead in prison. It was part of the Appellant's case that he was a famous actor and model in Sri Lanka and that he used connections gained through his modelling and artistic work to act as an undercover reporter feeding information to newspapers. He had kept this work secret to avoid it damaging his career as an actor and model.

4. The Judge concluded at paragraph 22 that it was apparent that the Appellant had a modelling career of some kind in Sri Lanka prior to his arrival in the United Kingdom in 2004. The Appellant had also appeared in films since arriving in the United Kingdom. The Judge did not accept that the Appellant was a prominent actor when in Sri Lanka nor that his modelling had made the Appellant a household name in Sri Lanka. The Judge wrote at paragraph 22:

> "If [the Appellant] had been such a prominent actor or model there would be much more material in support of his career as an actor or model in Sri Lanka."

5. At paragraph 23 the Judge did not accept that the Appellant was a journalist or journalistic source for anti-government newspapers during the Appellant's time in Sri Lanka. It was in the nature of work as a secret informer that there was unlikely to be evidence in the public domain of the role but if the Appellant had any substantial role as an informant or journalist the Judge would expect there to be some documentary evidence of this or testimonials produced from fellow journalists. There was nothing of that nature. The Appellant had been active and achieved a profile within the UNP whilst in the United Kingdom but the Judge did not accept the Appellant's evidence as to any ongoing risk from Felix Perera or Sarana Gunawardena. There was nothing to say what were the circumstances of the death of Buddika only that there was an obituary notice that he had passed away. There is nothing beyond the Appellant's own testimony to suggest that Buddika had died in prison. The Appellant's attribution of Buddika's death to Felix Perera and Sarana Gunawardena must contain a substantial degree of speculation. The Appellant could have had no first hand knowledge of this.

6. Despite the fact that there was said to be twenty witnesses of the Appellant's dispute with Merrill there was no evidence beyond that of the Appellant about the incident. There was nothing to suggest why the Appellant was apparently in hiding for six years after that incident before then feeling safe enough to appear on magazine covers and public publicity material in 2002/2003. Although Counsel's skeleton argument had referred to an arrest warrant being outstanding against the Appellant, the Appellant himself had not said that there was one and there was no documentary evidence of such an arrest warrant. The Judge did not accept the Appellant's account of a fear of Felix Perera or Sarana Gunawardena and dismissed the appeal. The Judge dismissed the Article 8 appeal finding that whilst the Appellant's children would be upset by a move away from their familiar surroundings to a new environment in Sri Lanka it had not been suggested that their long term interests would be best served by remaining in the United Kingdom. The best interests of the children did not so substantially require them to remain in the United Kingdom as to override the public interests in effective immigration control.

The Onward Appeal

7. The Appellant appealed against the decision arguing that he feared persecution from Felix Perera who was part of the national government. The Judge's findings on credibility were vague, unclear and without reasons. The present government would be unwilling to give protection to all of its citizens because Felix Perera was part of the government. The Judge had applied a higher threshold when carrying out the appropriate

proportionality test under Article 8. He had failed to consider the welfare and safety of the children.

8. The application for permission to appeal came on the papers before First-tier Tribunal Judge Ransley on 7th September 2015. In refusing permission to appeal he wrote that the Judge had given adequate reasons for rejecting the Appellant's claimed fear of persecution from Felix Perera. Even if that claimed fear were to be accepted it would not give rise to a well-founded fear of persecution for a Convention reason. The grounds of application amounted to no more than a quarrel with the findings of the Judge which were open to the Judge on the evidence.

9. The Appellant renewed his application for permission to appeal instructing different Counsel (who had not represented the Appellant at first instance) and who formulated very different grounds of appeal. The new grounds indicated that the Appellant had "engaged" with the refusal of permission by First-tier Tribunal Judge Ransley and now submitted alternative grounds of appeal for consideration. The Judge had materially erred in law by requiring corroborative evidence from fellow journalists in order to accept the Appellant's claim of being a journalist/journalistic source for anti-government newspapers. The Judge had misapplied the burden of proof by requiring such corroboration at paragraph 23.

10. At paragraph 25 the misapplication of the burden of proof continued. The Judge had required documentary evidence corroborating the manner in which the Appellant had stated that Buddika died in the form of the obituary notice. The Appellant had provided specific detailed and consistent oral evidence. The Judge had further materially erred by rejecting the Appellant's evidence about Felix Perera when finding that there was no evidence from the twenty witnesses to the dispute in Sri Lanka. At paragraph 32 the Judge had erred in his findings as to the Appellant's risk on return because they were adversely affected by the misapplication of the burden of proof and the rejection of the Appellant's core claim. The evidence of the Appellant should have been accepted even in the absence of corroborative evidence.

11. The renewed application for permission to appeal came on the papers before Upper Tribunal Judge Blum on 15th October 2015. In granting permission to appeal he wrote:

> "Following the Judge's adverse credibility finding based on the Appellant's delay in claiming asylum (which he was entitled to make) it appears from paragraph 21 of his determination that the Judge then specifically looked for corroborating evidence. In these circumstances it is arguable that the Judge may have erred in law by requiring corroborative evidence before he considered himself entitled to accept the first Appellant's account. When assessing whether there has been a material error of law the Upper Tribunal will however bear in mind that although there is no requirement for corroborative evidence in the context of an asylum appeal a Judge may take account of an unexplained failure to produce supporting evidence that could

have been available to an Appellant see **C [2006] EWCA Civ 151** and **TK [2009] EWCA Civ 40**."

12. Replying to the grant of permission the Respondent wrote to the Tribunal on 4th November 2015 stating that the assertion that the Judge had required corroborative evidence was a misreading of the determination. The Judge had merely stated he was looking for corroborative evidence. At paragraph 25 he was commenting on the apparent lack of documentary evidence. Nowhere in the determination did the Judge say that documentary evidence was required to support a claim for asylum or that in the absence of documentary evidence an asylum claim failed. At paragraphs 7 and 8 the Judge carefully laid out the burden and standard of proof. It was frankly unarguable that the Immigration Judge was unaware of the burden and standard of proof.

The Hearing before Me

13. At the outset Counsel clarified that the basis of the Appellant's onward appeal was relying on the amended grounds that had argued that the Judge had required corroboration (see paragraphs 9 and 10 above). The Appellant in this case was not a journalist as such who could reasonably be expected to have produced pieces that they wrote. The Judge had misunderstood the Appellant's case. Nor was the Appellant saying that he was at risk because of his membership of the UNP. He was at risk because of what had happened to Buddika and the adverse interest in the Appellant shown by the two MPs.

14. At this stage there was some discussion in court as to whether the Appellant was seeking to re-open the grounds of appeal for which permission had been refused by Judge Ransley and which were abandoned by Counsel on the renewed application to the Upper Tribunal. Counsel before me acknowledged that what the Appellant had been given permission to appeal was the issue of whether the Judge was requiring corroboration.

15. What the Judge had said at paragraph 21 was as follows:

> "[The Appellant must have had long term plans in the United Kingdom as indicated by the fact of the application] this and particularly the failure to claim asylum before receiving his immigration decision must be taken into account as damaging the Appellant's credibility and to make me particularly look for corroborating evidence in respect of the Appellant's claims."

It was argued by Counsel that what the Judge was saying in this paragraph was that he would look at corroborative evidence before he had even considered anything else and that was clearly wrong. The Judgement on in the same vein at paragraphs 22 and 23 of the determination (which I have summarised at paragraphs 4 and 5 above).

16. For the Respondent reliance was placed on the Rule 24 response. The grounds amounted to a mere argument with the result. If there was any corroboration required it only applied to the Appellant's alleged journalist

activities and not to the remaining conclusions as to the Appellant's lack of credibility. In response Counsel for the Appellant stated that Section 8 was not determinative but the Judge should not have required corroborative evidence that was an error of law. The permission to appeal application and the grant identified instances where the Judge required corroborative evidence.

Findings

17. It is clear from reading the determination as a whole that the Judge did not accept the Appellant's credibility and gave cogent reasons why he arrived at that conclusion. Even taking the Appellant's case at face value as the Judge did at paragraph 32 it could still not amount to a fear of persecution for a Convention reason. The basis of the attack on the determination is founded in paragraph 21 in which the Judge indicated that the difficulties with the Appellant's application for asylum made him particularly look for corroborating evidence in respect of the Appellant's claims.

18. As the Respondent pointed out in the Rule 24 response, this did not mean that the Judge was indicating that the Appellant had to produce corroborative evidence. That would have been an error of law but the Judge was careful not to say that. What the Judge was indicating was that when it was reasonable to expect there to be supporting evidence he would look to see if such supporting evidence existed. On a number of occasions where it was reasonable to expect such evidence the Appellant had not provided it. The Judge made it clear at paragraph 23 that if the Appellant had a substantial role as an informant or a journalist he would expect there to be some documentary evidence of this. That was not saying that the Appellant had to show corroborative evidence before he could make out the claim to be afraid of persecution for such activities. What the Judge was saying there was that it was reasonable to expect such evidence in all the circumstances. That was an approach which as Upper Tribunal Judge Blum pointed out in granting permission was acceptable.

19. The Appellant claimed that there were at least twenty witnesses to a dispute with Merrill but there was nothing from any of those persons to support the claim. Nor was the Appellant able to give any reasonable explanation why if he had been in hiding for six years he then felt safe enough to appear on magazine covers and publicity material from 2002/2003. Those were important discrepancies and the Judge was entitled to draw adverse conclusions from them.

20. I do not accept that the Judge required corroborative evidence. What the Judge required was a reasonable explanation from the Appellant for apparent inconsistencies in the case. These included that the Appellant was in hiding but then went on to appear on magazine covers after coming out of hiding. The Judge's concerns were not to do with corroborative evidence or the lack of it but to the implausibility of the Appellant's case.

21. It was not helpful for the skeleton argument prepared by Counsel at first instance (who did not appear before me) to refer to the existence of an arrest warrant when that was not part of the Appellant's case. Whilst I appreciate that the Appellant cannot be criticised for mistakes made by his representatives, it was reasonable for the Judge to highlight that there was no documentary evidence to support an arrest warrant. Where a claim is made in a skeleton argument a Judge would be expected to deal with that claim as he did in this case.

22. The first set of grounds of onward appeal amounted to no more than a disagreement with the findings as Judge Ransley correctly observed. The second set of grounds of onward appeal raised a different issue altogether. They were based on a characterisation of the determination as requiring corroboration. For the reasons which I have given I do not find that the Judge did require corroboration. The Judge was looking for evidence before arriving at his final conclusions. That evidence which could reasonably have been expected if the Appellant's account had been a true one was not available. The Judge was entitled in those circumstances to draw an adverse inference from the lack of evidence and to find as he did. I do not consider there was any error of law in the Judge's dismissal of the asylum appeal.

23. There was no argument made before me in relation to Article 8 which was thoroughly dealt with by the Judge at first instance and which I have summarised above (see paragraph 6). There was no error of law in the rejection of the Article 8 claim. I dismiss the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal against it.

Appellant's appeal dismissed.

I make no anonymity order in relation to the first and second Appellants as there is no public policy reason for so doing. The two child Appellants will continue to be referred to by initials only.

Signed this 29th day of February 2016

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As the appeal was dismissed there can be no fee award.

Signed this 29th day of February 2016

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Deputy Upper Tribunal Judge Woodcraft