Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09408/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 June 2016	**On 7 July 2016**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

MR RAJENALOSAN THANGRASA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Hassan, Counsel, instructed by A & P Solicitors
For the Respondent: Mr J McGirr, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a national of Sri Lanka. He came to the UK in May 2007 and claimed asylum. His claim was refused and his appeal against that refusal was dismissed in

May 2007. He subsequently made a number of further representations. On 4 September 2014 he applied as an 18 year old child of parents present and settled. The respondent refused that application on 18 February 2015, pointing out, inter alia, that as he was 33 years old he could not bring himself within paragraph 298(ii)(a) of the Immigration Rules nor could he meet the requirements of paragraph 298(ii)(c)-(e). The respondent also concluded that his claim could not succeed under Appendix FM or private life provisions or outside the Rules on the basis of compelling circumstances. The respondent served a One-Stop Notice.

2. In his grounds of appeal to the First-tier Tribunal the appellant appealed on asylum grounds and Articles 2, 3 and 8 of the ECHR. In a determination sent on 8 September 2015 First-tier Tribunal (FtT) Judge Clemes dismissed the appellant's appeal.

3. The principal challenges levelled in the grounds are that the judge wrongly treated the findings of the previous Immigration Judge as determinative; wrongly discounted evidence, in particular the appellant's evidence regarding the disappearance of his brother and father in Sri Lanka; and wrongly approached the appellant's asylum grounds as a "back door" attempt to create a further appeal procedure. There was also a challenge raised to the judge's treatment of the psychiatric report.

4. I am persuaded that the judge materially erred in law. Despite citing from **Secretary of State for the Home Department v D (Tamil) [2002] UKIAT 00702 (Devaseelan)**, the judge wrongly construed that case to hold in unqualified terms that he must not go behind the earlier (2007) determination. The judge stated at [9] that "I am not prepared to go behind the previous determination – in fact according to **Devaseelan**, I must not do so". The judge wrongly treated that past determination both as a start and a finishing point that the appellant was not a credible witness. I also note that the appellant's 2007 appeal was heard in the fast track and proceeded even though the appellant said he needed more time to produce certain documents, considerations which should at least have been treated as of potential relevance to the efficacy of the first determination.

5. A second error in the determination is that the judge appears not to have taken into account all the relevant evidence. In [11] he stated that insofar as the appellant was seeking to base his claim on his brother (TV) having disappeared in Sri Lanka, "there is no proof of this assertion. I am not satisfied I need to look at this point of the claim at all due to the lack of any such evidence." This entirely ignored the fact that the appellant had produced on arrest warrant for TV on 16 June 2009 and a letter from British Red Cross confirming that TV had been registered in detention on 17 June 2009, transferred to Anuradhapura Prison on 15 September 2009 and visited by the ICRC on 11 October 2009. Whilst the respondent had considered and rejected both these items of evidence in the course of rejecting his earlier further representations, this did not justify the judge's failure to consider them at all.

6. The fact that the judge in several places stated that he considered the appellant was seeking to pursue an asylum claim by the "back door" is not enough on its own to establish an error of law because, although of course the appellant was entitled by virtue of the Section 120 notice to raise asylum grounds, the appellant's actual application was not based on asylum grounds. However, given that these observations went in tandem with a failure to consider the asylum claim properly - by the front or back door – this feature of his determination does add to the sum of errors.

7. There were other arguments advanced on behalf of the appellant but it is unnecessary for me to address them because the above two errors are more than sufficient to satisfy me that the judge materially erred in law.

8. It is most unfortunate, given the length this appellant has been in litigation or conducting further representations that there is still no finality. I see no alternative, however, to the judge's decision being set aside for legal error and the case being remitted to be heard by the First-tier Tribunal.

9. For the above reasons:

   The judge materially erred in law and his decision is set aside.

   The case is remitted to the First-tier Tribunal (not before Judge Clemes).

No anonymity direction is made.

Signed Date: 6 July 2016

Dr H H Storey
Judge of the Upper Tribunal