



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

Appeal Number: PA/03294/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 21st April 2016**

**Decision & Reasons
Promulgated
On 14th July 2016**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

**MR MOHAMED ISMAIL ABDUL HAZAN ASFAK
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Khan, instructed by Marsh and Partners
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by Judge of the First-tier Tribunal Bradshaw dismissing an appeal on asylum and human rights grounds.

2. The Appellant was born on 3rd September 1992 and is a national of Sri Lanka. He entered the UK in January 2011 as a student. In January 2012 he was encountered working illegally. He claimed asylum but failed to attend his substantive interview on 2nd March 2012. His claim was rejected for non-compliance. The Appellant was detained in October 2015 and he made a further claim for asylum. His claim was refused after a substantive interview, giving rise to the present appeal.
3. According to the Appellant he was rejected by his family and community in Sri Lanka because of his physical deformities. He was born with six fingers on each hand and seven toes on each foot. He was befriended by a man called Vijay, who was a member of the LTTE. Vijay delivered supplies to the LTTE three or four times a month and the Appellant helped him. Both were arrested in February 2007. The Appellant was tortured but both he and Vijay were released after two days on payment having been made by the Appellant's father. The Appellant was not fingerprinted or photographed by the police and was released without charge. He had no further problems after his release but Vijay continued to be a member of the LTTE and the Appellant continued to help him. Vijay was arrested again in March 2009 at the Appellant's home, although the Appellant was absent at the time. The Appellant went to live with an aunt in Colombo where he stayed until 2011. His aunt kept him indoors telling him that his father had been arrested in 2009 and that she was arranging for him to leave the country. The Appellant has had no contact with his immediate family since 2009. He spoke to his aunt in 2015 on the day of his asylum interview and she told him it was not safe to return to Sri Lanka. The Appellant has produced two summonses to appear in court in Sri Lanka, dated August and October 2015. These were addressed to the Appellant at his family home.
4. The Judge of the First-tier Tribunal did not believe the evidence upon which the Appellant based his claim for asylum. The Judge further found that even if the Appellant had been arrested and detained for two days and mistreated, he was released without charge and was not photographed or fingerprinted. His release was secured by the payment of a bribe. This all indicated that he was no longer of any interest to the authorities. He was not arrested again in 2009 although he claimed that Vijay was arrested. The authorities at that time would have had no difficulty tracing the Appellant if they were actively seeking him.
5. In the application for permission to appeal it was contended that the Judge did not take adequate account of the medical evidence, in particular a report by a Clinical Psychologist and GP, described as a medico-legal report. The report had made clear findings that the Appellant had sustained severe PTSD, trauma, concussion and had memory loss. His memory loss explained why the Appellant was not able to give a detailed account of what had happened to him in Sri Lanka during his detention. The Judge had not taken into account submissions in relation to this.

6. In addition it was contended that the Judge failed to make findings on a submission on Article 3 with Article 14. This was based on discrimination the Appellant would experience in Sri Lanka because of his disability. There was no protection for such disabled people in Sri Lanka.
7. It was further contended that the Judge relied on the country guideline case of GJ and Others (Post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 but this has been overtaken by the decision of the Court of Appeal in MP and NT (Sri Lanka) [2014] EWCA Civ 829.
8. Finally it was pointed out that the medico-legal report was prepared by two medical experts, one dealing with the medical assessment and the other with the psychological assessment. The Judge found that the report was signed by both experts but it was not clear which of them made which findings. It was submitted in the application for permission to appeal that the experts prepared the report together. They should not have been required to make separate findings and distinguish who was responsible for which parts of the report. The Judge found that the report could not be relied upon because of this but this was an error.
9. In the grant of permission to appeal it was stated that it was arguable that the Judge of the First-tier Tribunal had not made findings on the discrimination claim, although the Judge said that the Appellant would not face treatment on return to Sri Lanka which would amount to a breach of Article 3. This was the only point upon which permission to appeal was granted.

Submissions

10. At the hearing before me, Mr Khan sought permission to argue one of the other grounds in the application for permission to appeal, as well as the one on which permission was granted. Mr Wilding submitted that this was contrary to the decision in Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304. I nevertheless allowed Mr Khan to address me on the point by way of a submission, in terms of the case management powers in rule 5(3)(d) of the Upper Tribunal Procedure (Upper Tribunal) Rules 2008.
11. In relation to the ground on which permission was granted Mr Khan submitted that the Judge had failed to make a finding on the issue of disability. The Judge referred at paragraph 37 of the decision to whether the Appellant would face treatment that would amount to a breach of Article 3. This was the only assessment made in respect of Article 3. There was no assessment of Article 3 with Article 14 and no mention of Article 14 in the decision. A skeleton argument prepared for the Upper Tribunal referred to Article 14 and, at paragraph 5, to the scope of Article 3, which included treatment which was grossly humiliating or capable of arousing feelings of anguish and inferiority and was capable of humiliating and debasing the victim. Although this description was originally formulated in relation to racial discrimination, it would apply equally to disability discrimination. In paragraph 9 of the skeleton argument it was

pointed out that alleged discrimination should be subjected to severe scrutiny. Mr Khan observed that paragraph 37 of the decision showed that there had been no scrutiny at all of the issue of discrimination on the grounds of disability. No findings were made in relation to this and there was no reasoning. This was despite the matter being referred to in the witness statement of the Appellant, at paragraph 12, where the Appellant recorded that since childhood he had been subjected to mockery and mental torture by his community, including his own family members, because of his abnormality. As was pointed out at paragraph 7 of the skeleton, in Sri Lanka the Appellant would be regarded as a second class citizen. An article by Francesca Bombi on the concept of disability in Sri Lanka was attached to the skeleton argument, along with Disability Information Sheet on Sri Lanka from May 2014.

12. Mr Khan then referred to the medical report prepared by the two medical experts, of whom one was a physician and the other a psychologist. Each had provided a CV and their individual contributions were clearly identifiable. In addition, with the application for permission to appeal Dr Beeks had provided a letter dated 29th February 2016 seeking to clarify some of the material in the report, as had Dr Hall, the Clinical Psychologist. Mr Khan submitted that the Judge's findings in relation to the medical report were perverse as the report clearly set out which medical expert had been responsible for preparing which part.
13. In his submission on behalf of the Respondent, Mr Wilding submitted that there was no permission for the Appellant to argue the second point, in relation to the medical report. He would limit his submission to the issue of Article 3 and Article 14. He described Article 14 as a "red herring". The question was whether return would breach Article 3. The grounds before the First-tier Tribunal were only concerned with asylum issues and did not raise any issue in tandem with Article 14. The background evidence now relied upon in relation to disability was not before the First-tier Tribunal. The only evidence was a report from January 2014 on the return of asylum seekers and an Amnesty International Report. The Appellant's claim was bound to fail. There was no evidence in the form of country information to support it.
14. Mr Wilding submitted that there was a further point as to whether the issue of Article 3 and Article 14 together constituted a "new matter" under section 85 of the 2002 Act. He drew attention to the grounds of appeal before the First-tier Tribunal.
15. Mr Wilding further submitted that if the Appellant had made a discrimination claim and the discrimination was so bad as to amount to serious harm then it would be a breach of Article 3 without the need to refer to Article 14. It was pointed out that serious harm to disabled people as a group might also amount to persecution by reason of membership of a particular social group.

16. Mr Wilding accepted that the Judge of the First-tier Tribunal did not deal explicitly with the discrimination point. Any submissions on this point before the First-tier Tribunal would have been bound to fail because there was no background evidence on societal attitudes. Furthermore, the point was not in the grounds to the First-tier Tribunal. It might have been advanced orally in submissions but would not have succeeded without the background material.
17. Mr Khan stated that he sought to submit additional evidence today in relation to discrimination and that the issue was not a new matter but was covered by section 85A of the 2002 Act.
18. Mr Wilding responded that the point did not fall within section 85A but was covered by section 85(6) as a new matter.
19. Mr Khan recorded that the evidence he sought to lodge today was not new but showed what was happening in Sri Lanka. Articles 3 and 14 were raised before the First-tier Tribunal and no findings were made. The Presenting Officer at the hearing before the First-tier Tribunal had not objected to this matter being raised.
20. Following the hearing, the solicitors for the Appellant sent in a copy of the original grounds of appeal to the First-tier Tribunal, although these were in fact in the appeal file before me. These grounds do not refer expressly to the Appellant's disability and do not invoke Article 14.

Decision

21. Before me Mr Wilding raised the issue of whether a claim based on discrimination on the grounds of disability would be a new matter under section 85 of the Nationality, Immigration and Asylum Act 2002, as amended by section 15 of the Immigration Act 2014. I was not addressed by the parties on whether the relevant provision was in force at the relevant date. I note that the refusal decision is dated 19th November 2015. By this time it appears that the amended form of section 85, including sub-sections (5) and (6), was in force so far as a protection claim was concerned, in terms of Article 8 of the Immigration Act 2014 (Commencement No. 4, Transitional and Savings Provisions and Amendments) Order 2015, SI 2015/371. In terms of section 85(5) the Tribunal may not consider a new matter unless the Secretary of State has given the Tribunal consent to do so. A matter is a new matter if it constitutes a ground of appeal of the kind listed in Section 84 and has not previously been considered by the Secretary of State either in the decision appealed against or in a statement made by the Appellant under section 120.
22. Turning to section 84, which sets out the available grounds of appeal, these include that removal of the Appellant from the UK would breach the Refugee Convention and that removal would be unlawful under section 6 of the Human Rights Act. This is a broad category. The Appellant had

clearly made both a protection claim and a human rights claim invoking Article 3. As he had already invoked Article 3 in his grounds of appeal, the issue of whether the Appellant would encounter discrimination contrary to Article 3 would not be a new matter in terms of section 85 of the 2002 Act. It was a matter which was open to the First-tier Tribunal to consider.

23. There is still the point, however, that the discrimination issue was not referred to specifically in the grounds of appeal to the First-tier Tribunal. It was not recorded by the Judge of the First-tier Tribunal in his decision when summarising the Appellant's claim. It was raised indirectly in the Appellant's witness statement, where at paragraph 12 he described having been subjected to mockery and mental torture since childhood because of his abnormality. Prior to the hearing before the Upper Tribunal the parties did not ask for a copy of the Record of Proceedings kept by the Judge of the First-tier Tribunal. Mr Khan, however, stated that he did refer to Article 14 at the hearing before the Judge of the First-tier Tribunal and, given the Appellant's evidence in his witness statement, I accept that the issue of the Appellant's disability was before the Judge.
24. This brings me to Mr Wilding's next point, which was that there was no background evidence before the Judge as to the treatment of disabled people in Sri Lanka or of societal attitudes towards them. This is a significant issue. Mr Wilding's submission was that without relevant background evidence, the Judge was bound to dismiss any claim made by the Appellant on the grounds of disability. The Judge did not err by failing to consider a point which was not supported by sufficient evidence.
25. I note that at paragraph 34 of the decision the Judge of the First Tier-tier Tribunal found a large measure of inconsistency and a lack of credibility in the Appellant's evidence overall. In other words, the Judge did not accept the Appellant's evidence in its entirety. In conclusion the Judge found at paragraph 37 that the Appellant would not face a real risk of serious harm on return to Sri Lanka and would not face mistreatment that would amount to a breach of Article 3. Although this finding does not address the disability point specifically, the Judge had before him the Appellant's witness statement and had heard the submissions of Mr Khan. If the Judge had thought that the issue of disability was sufficiently serious to bring the Appellant over the Article 3 threshold, it was open to the Judge to have made a finding to this effect. The absence of such a finding does not mean necessarily that the Judge did not direct his mind to this point. It may alternatively be taken to mean that the Judge did not consider that the Appellant would have any prospect of succeeding in his appeal on this ground. On the basis that the Article 3 issues were argued before the Judge, having regard to the Judge's findings on the evidence I would be inclined to conclude that the Judge did not mention the Appellant's disability because he did not consider it material in relation to a breach of Article 3.
26. The second criticism which was made by Mr Khan of the Judge's decision at the hearing before me related to the Judge's treatment of the medico-

legal report. I accept that there are criticisms which may be made of the Judge's approach to this report. The significant findings made by the Judge, however, are at paragraph 34 in relation to ill-treatment, where the Judge records that even if the Appellant was arrested and detained for two days and mistreated by the Sri Lankan authorities, he was released without charge; he was not photographed or fingerprinted; and his release was secured by the payment of a bribe. He would not be regarded as having escaped from custody. All these factors indicated clearly that he was no longer of any interest to the authorities. He was not arrested again in 2009 when his friend was arrested and the authorities would at that time have had no difficulty in tracing the Appellant if they were actively seeking him. It was for these reasons that the Judge found that the Appellant was not a refugee. It was not because the Judge rejected the findings of the medical report in respect of the Appellant's detention and ill-treatment but because the manner of the Appellant's release and subsequent events showed that the Appellant was no longer of any interest to the authorities.

27. On this basis the Judge was correct to dismiss the appeal on asylum grounds as well as on human rights grounds. I find that there is no error of law in the Judge's decision which would have had any material effect on the outcome of the appeal.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an order for anonymity. I have not been asked to make such order and I see no reason or substance for so doing.

Signed

Date: 14 July 2016

Upper Tribunal Judge Deans