



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: AA/09553/2014

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THE IMMIGRATION ACTS

**Heard at Manchester Piccadilly
On 7 July 2017**

**Decision Promulgated
On 13 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

CHAMIKA THUSHANKA PALLIGODA VITHANAGE

ROSHANI P JAYANETHTHI KORALAGE

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Murphy counsel instructed by Nag Law Solicitors

For the Respondent: Mr C Bates Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The first Appellant (A1) was born on 25 June 1988 and is the wife of the second Appellant(A2) who was born on 6 December 1985. Both are nationals of Sri Lanka.
3. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
4. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Davies promulgated on 31 March 2017 which refused the Appellants appeal against the decision of the Respondent dated 27 October to refuse the Appellants claims for refugee protection and remove them from the UK.
5. The hearing before the Judge was the second occasion that the Appellants appeal had appeared before the First-tier Tribunal a previous decision having been set aside as a result of a finding of an error of law.

The Judge's Decision

6. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Davies ("the Judge") dismissed the appeal against the Respondent's decision.
7. Grounds of appeal were lodged arguing: that the Judge had failed to apply anxious scrutiny and erred in his assessment of the evidence; had failed to make findings in relation to key items of corroborative evidence; had erred in his assessment of court documents; had erred in his assessment of the objective evidence.
8. On 25 April 2017 First-tier Tribunal Judge Pedro gave permission to appeal.
9. At the hearing I heard submissions from Mr Murphy on behalf of the Appellant that :
 - (a) He relied on his skeleton argument.
 - (b) He relied on Ex parte Virjon B [2002] EWHC 1469 where Forbes J found that an Adjudicator had been wrong to use adverse credibility findings as a basis for rejecting medical evidence without first considering the medical evidence itself to argue that in this case the Judge had 'put the cart before the horse'.
 - (c) The Judge in stating that there was no medical evidence to support the Appellants claim failed to take into account or make any findings in respect of

the evidence of Mr Mason at AB152-160 which found evidence of injuries that were consistent with the Appellants claim.

- (d) The Judge failed to make adequate findings as to why he rejected the evidence of the Attorney Mr Fernando. He acknowledged that the decision recorded at paragraph 50 a concession made by Ms Anzani counsel then representing the Appellant that the certificate produced showing that Mr Fernando was a member of the Bar Association of Sri Lanka was misleading but the Judge's rejection of that evidence was not based on this concession.
- (e) The Judge made no findings in respect of the evidence of Mr Ekanayake an independent attorney who also addressed the issue of the court documents produced by the Appellant and his claim that there was an extant arrest warrant for the Appellant in 2015.
- (f) The Judge made no findings in respect of the newspaper articles at 61-73 at least one of which specifically referred to A2.
- (g) The Judges assessment of the court documents themselves was flawed and his conclusions at paragraph 117 suggests that he has rejected the documents on the basis of adverse credibility findings.
- (h) The Judges findings at paragraph 116 were inadequate in that they failed to take into account the background material relied on by the advocate in the course of the hearing and in the skeleton argument together with the caselaw that showed that there was nothing incredible in the Appellants not being required to relinquish his passport or leave the country using his passport even when of active interest to the authorities.

10. On behalf of the Respondent Mr Bates submitted that :

- (a) The errors relied on were not material because the Judge considers at paragraph 106 in the alternative that there had been a fight between the A2 and Party members and this is relevant because he had not dismissed the possibility that a fight occurred and therefore the medical evidence was, at best, corroboration for the injuries he displayed. There may therefore have been a criminal investigation after a fight but not in the context that A2 claims.

- (b) The medical evidence was not determinative.
- (c) The Judge looked at the core of the Appellants claim and found discrepancies in that account: he found discrepancies between the account of the arrest at the hotel and the TID documents from AB35 and 26.
- (d) The rejection of the documents at paragraph is the conclusion of the findings not the starting point.
- (e) In relation to the documentary evidence Mr Fernando accompanied his letter with a certificate suggesting he was a life member of the Sri Lankan Bar Association. If that was not the case it should have been explained.
- (f) Given that questionable evidence had been reduced from the first layer the second lawyers evidence was contaminated.

11. In reply Mr Murphy on behalf of the Appellant submitted:

- (a) The second lawyers evidence was not dealt with and the suggestion that the evidence of the first lawyer contaminated that of the second lawyer went too far.

Finding on Material Error

- 12. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.
- 13. The grounds of appeal to the Upper Tribunal contend that the First-tier Tribunal Judge erred in four respects and that those errors were material to the outcome of the decision.
- 14. The Appellants case is that in essence his troubles began in 2008 when he claims that he received a CD showing the murder of a colleague Kumar and that two Government Ministers were involved in the killing. The Appellant handed this CD to the police as a result of which he and two of his colleagues were attacked by party members and the Appellant was stabbed in his right foot with broken glass. Then in 2011 during detention by the authorities he had chilli paste placed on his face and hot water thrown at him.
- 15. The Judges finding at paragraph 119 is challenged :

“ Having been carried out a thorough examination of the evidence before me I would point out that I have not found any medical evidence to support the Appellants claim that during the altercation with party members he was stabbed with a broken glass in his right leg nor is there any indication regarding his claim that he was beaten and tortured whilst detained by the authorities.”

16. It is argued that the finding is based on a failure to take into account the evidence of Mr Mason but also coming as it does at the end of the decision the Judge has used adverse credibility findings to reject the medical evidence.
17. I am satisfied that the Judge has not fallen into error as argued is using adverse credibility findings to reject medical evidence because he has failed to note that such evidence exists. I am satisfied that the Judge has not engaged with the medical report of Mr Mason and indeed I am concerned that there is no reference at all to it in the decision as of course it may have been a matter that he took into account and for whatever reason gave little weight to. However the report clearly provides support for A2s account in that his examination found (3.2) scarring to A2s right foot which was consistent (6.6) with his claim to have been stabbed in his right foot (not the right leg as stated by the Judge). Mr Mason also found deeper pigmentation to A2s face that was the result of an inflammatory process (4.2) that was consistent with his claim of being injured with chilli paste and hot water (6.1). I am satisfied that the mistake in failing to acknowledge and engage with the medical evidence must have played a material even if not necessarily decisive part in the Judges reasoning and could have made a difference to the outcome.
18. The Appellant produced a number of documents in support of his appeal and among them was a letter from an Attorney Mr Fernando who is essence confirmed that he represented the Appellant at court proceedings where the Appellant was not formally charged but released on bail pending further investigations. Mr Fernando stated in his letter (AB23) that he was a member of the Bar Council and gave his Bar Association of Sri Lanka membership number and annexed as evidence his to his Bar Association of Sri Lanka Enrolment Certificate dated 5 October 1992 (AB21) This certificate showed he was a lifetime member of the Bar Association. A DVR report found the certificate to be 'false'

although a subsequent letter from the Bar Association it is asserted confirmed that the certificate was not false but rather at the time of the DVR enquiry Mr Fernando was not registered on their records. A statement was given by Mr Fernando that he ceased to be a member of the Bar Association in 2004 because of a disagreement over human rights issues but nevertheless pointing out that the Supreme Court in Sri Lanka it is the regulatory authority for Attorneys in Sri Lanka and that it is optional for attorneys at law to obtain a membership of the Bar Association

19. It is contended that against this background it was not open to the Judge to find that *'the lawyers evidence can be wholly discounted by the fact that the lawyer had used deception in providing evidence. He produced a certificate showing that he was a lifetime member of the bar association when that was not the case and even in his letter at claimed to be a member of the bar association. I have low taken into account his explanation for doing so that but that does not persuade he is in any way he a witness whose evidence can carry weight.'*
20. I have considered this argument and I am satisfied that the finding was open to the Judge. He recorded at paragraph 50 that Ms Ansari who represented the Appellant before the Judge conceded that the letter was misleading, as well she might: the letter from Mr Fernando dated 19 January 2015(AB23) stated that he was at that time a member of the Bar Council and produced a certificate as evidence of that fact. Mr Fernando was not a member of the Bar Council: the fact that he was not required to be in order to practice as an Attorney and the reasons for him withdrawing his membership were considered by the Judge but the fact remains that he made a statement that was factually incorrect at the time he made it and the Judge was entitled, having noted that Ms Ansari categorised it as misleading, to confirm why he rejected his evidence.
21. Nevertheless he had other potentially important evidence from another Attorney, Mr Ekanyake , whose bona fides had not been challenged by the Respondent. There are no findings made in respect of that evidence and only the very briefest mention of 'second verification of the documents' in his summary of the Appellants case at paragraph 50. While Mr Bates seeks to argue that this Attorneys evidence was tainted by that of the previous lawyer that is not the inevitable conclusion that would be reached. I am satisfied that the failure

therefore to make findings in respect of this evidence was material to the outcome of the decision.

22. It is contended that the Judge's finding at paragraph 116 that if he was sought in connection with assisting the LTTE or a plot to kill a government minister he would not be bailed with reporting conditions and was not required to surrender his passport and leave the country using his own passport failed to engage with the background material highlighted in the hearing and the skeleton argument at paragraphs 22 and 23 and in particular was contrary to the findings of the court at paragraph 275 of GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) and MM (Sri Lanka) v SSHD [2014] EWCA Civ 36 which explicitly stated that the seriousness of the charges is not determinative of bribes being paid for release and it is possible to leave through the airport while being actively sought or on bail with reporting conditions and this was no indication of a lack of adverse interest. There is no reference to by the Judge to the background material and caselaw relied on by the Appellant and I am therefore satisfied that the conclusion in failing to engage with this material as inadequately reasoned.
23. The failure of the First-tier Tribunal to address and determine these issues constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.
24. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set aside in its entirety. All matters to be redetermined afresh.
25. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:
 - (a) *the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or*

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

26. In this case I have determined that the case should be remitted as I have found there were a number of errors of law in relation to key credibility findings. In this case none of the findings of fact are to stand and the matter will be a complete re-hearing.

27. I consequently remit the matter back to the First-tier Tribunal sitting at Manchester to be heard on a date to be fixed before me.

28. I made the following directions for the resumed hearing:

- List for 4 Hours
- Sinhalese interpreter.
- A consolidated bundle to be provided by the Appellants and served on all parties 5 days before the hearing.

Signed

Date 12.7.2017

Deputy Upper Tribunal Judge Birrell