



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

Appeal Number: PA022972017

THE IMMIGRATION ACTS

Heard at Field House

**Decision and
Promulgated**

Reasons

On 6 July 2017

On 21 July 2017

Determination prepared 6 July 2017

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VCS

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer

For the Respondent: Miss A Seehra, of Counsel, instructed by Messrs Nag Law Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against a decision of Judge of the First-tier Tribunal Phull, who in a determination promulgated on 26 April 2017 allowed the appeal of VCS against a decision of the Secretary of State made on 16 February 2017 to refuse to grant asylum and humanitarian protection. Although the Secretary of State is the appellant before me I will for ease of reference refer to her as the respondent as she

was the respondent in the First-tier. Similarly I will refer to VCS as the appellant as he was the appellant in the First-tier.

2. The appellant entered Britain as a dependent partner in February 2010 and had leave to remain in that capacity until March 2011. That leave to remain was extended until April 2012. In June 2012 he returned to Sri Lanka and then came back to Britain before returning to Sri Lanka again in October that year. He then applied for an extension of stay and this was granted until February 2015. His visa was then curtailed and he was instructed to leave Britain by 5 January 2015. However, a further visa was granted expiring on 15 May 2016. An application for leave to remain as a dependant on a family and private life basis was refused on 14 December 2015. On 17 May 2016 the appellant was advised of removal directions and on 26 August that year he claimed asylum.
3. The basis of his claim to asylum was that his brother had been killed while at college in Kandy in June 2005 and that his father had been told by a friend of his brother called John, after his brother's funeral that he had been taken from his boarding house by people in a van on suspicion of links with the LTTE. The appellant asserted that his father had lodged a complaint in June 2005 with the police but there was no response.
4. His father had also lodged a complaint in July 2005 with the Human Rights Commission in Kandy but they had not responded. A further complaint was made to the LLRC in 2011 together with documents signed by the appellant. His family had then been visited twice by unknown people asking about his brother's connections with the LTTE. He asserted that his father was taken into custody for three days by unknown people in November 2011.
5. He had not encountered any difficulties in June 2012 but said that he had been taken into custody by unknown people on 22 October 2012, and held for two days, beaten, slapped and threatened and had passed out. He had awoken in hospital and, when discharged gone to Colombo and then returned to Britain.
6. The Secretary of State considered the appellant's claim and stated that it was not found to be credible. Very detailed reasons were given for that conclusion by the Secretary of State in paragraphs 12 onwards of the determination. It was pointed out that there was no reason why the appellant's family would believe his brother's friend John rather than people in the boarding house who had given no indication that the appellant's brother had been taken by men in a white van rather than drowned while swimming. In any event the appellant had not believed his brother had any links with the LTTE and there was nothing which would have led him to consider that he would have been a target or would have been arrested. Moreover the appellant had not known who had abducted him, claiming only that it was "unidentified people". He had stated at interview that "until they came to our house, threatened us we did not

know who kidnapped him". It was stated that it was unclear why he believed his brother had been involved with the LTTE and abducted because of that involvement. Having referred to the fact that the appellant could give no details of his brother's friend, John, it was then stated that it was not accepted that his brother had been killed due to his involvement with the LTTE.

7. In paragraph 15 of the letter of refusal onwards it was stated that the appellant had claimed to have been involved in the complaint made to the Human Rights Commission in Kandy in July 2005 but had then said that although he had been there his father had handled everything and therefore it was unclear why he had stated that he had played an active role in the complaint. It was also stated that the appellant had said that his report had been recorded and the police had told his father they would search for evidence to find out who had kidnapped his brother, which would suggest that they did in fact take the report and then try to do something.
8. It was then stated that if immediately thereafter the appellant's father had gone to the Human Rights Commission in Kandy that would not have left a reasonable time to allow the police to investigate the matter. Again, it was pointed out that the Human Rights Commission were said to have recorded the report but had not taken any action but there was evidence, however, that they had recorded 208 reports that year. It was stated that it was surprising that the appellant's father had waited until 2011 before reporting the matter to the LLRC, the Lessons Learnt and Reconciliation Commission.
9. With regard to the assertion that his father had been abducted in November 2011 it was noted that it was not the police who had abducted his father but unknown people and that his father had not reported this to the police and that was why he had gone to the LLRC. It was stated that it was not reasonable to accept that the appellant's father had not gone to the police as he felt they had not taken action about a different matter six years before. It was noted that he had said that his father had been abducted when he was threatened "to disclose about your younger brother" who had died over six years previously but it was stated it was unclear why this group of unknown people would want information on a person who may have supplied information to the LTTE while on study leave over six years before.
10. It was noted that the LLRC had concluded its work on 15 November 2011 and the report had been handed to the President on 20 November 2011. As the appellant had not stated a date in November that his father was abducted it was not reasonable to consider that a group who wanted one individual to withdraw his complaint would wait until the report was about to be concluded before trying to force his father to withdraw it. With regard to his father's death it was noted that his father was said to have suffered from diabetes and poor health and that if he had been abducted

the authorities were not contacted to help. It was therefore not accepted that the appellant's father was abducted.

11. With regard to his own claim to have been abducted and tortured when he returned in October 2012 but it was noted that his older sister, his brother-in-law and his younger brother had been present when he claimed to have been abducted but they had not alerted the authorities. It was stated that it was unclear why others would be looking for information in 2012 about his brother's involvement in 2005. It was therefore not accepted that the authorities would be looking for information who had died seven years previously. It was noted that the appellant had not been stopped when leaving the country nor had he contacted the police and it was stated that it was not reasonable to accept that he would be arrested by the authorities.
12. The various categories set out in the country guidance case of **GJ (Sri Lanka)** were considered but it was considered that there was no basis on which the appellant would qualify for asylum under the categories set out therein.
13. With regard to the provisions of Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 it was noted that the delay in the appellant's claiming of asylum was not noted. It was considered that that further damaged his credibility. It was therefore considered that the appellant would not be at risk on return.
14. Judge Phull set out the burden and standard of proof in paragraph 4 of the determination and asserted that she had taken into account the respondent's bundle of documents as well as the bundle of documents of the appellant and said that she had heard oral evidence from the appellant but she would not set that oral evidence out. Having summarised his claim and the submissions of both representatives in brief she set out her findings and conclusions in paragraphs 18 onwards. She first stated in paragraph 18 that "the respondent alleges that the appellant would not be at risk on return to Sri Lanka for his imputed political opinions".
15. In the following paragraphs she said:

"19. I take a different view to the appellant [*sic*] for the following reasons."

She then stated as follows:

"In his asylum interview the appellant said that someone took his brother in a van (Q35). The death certificate of the appellant's brother is at page 11 together with the newspaper announcement of his death (page 9) and the deceased memorial booklet (at page 37 to 41, AB). In a letter dated 28 March 2017, Trini Gordan Rayen, attorney at law says that her services were

sought by, 'your client's late father after the body of the late SSR was recovered from... Mahaweli Ganga (river) on 13 June 2005. I assisted both their client's father and your client during the inquest conducted by the coroner/judicial medical officer and subsequently in their attempt to raise this death with the local police and human rights organisation, when it was realised that the police was unwilling to be helpful. I can also confirm that when your client's father decided to submit a complaint to the LLRC in May 2011, I assisted him to draft his statement and also that of your client...'

20. A copy of a letter written by the appellant's father to the LRRC is at page 27 to 28, AB and a letter from the appellant to the LLRC at page 29, AB. Having considered the evidence in the round and on the basis of the appellant's evidence I am satisfied that his brother was abducted in a van and then died. I find that the objective evidence in particular pertaining to Sri Lanka Tamils against genocide confirms in their 2012 report that, '... Sri Lanka's white van's [*sic*] is a dual criminality of the Sri Lankan state and the Rajapaksa's administration; ... TAG's interviews and testimonies indicted that in the dormant state, the white van network(s) can be activated by directives from the command hierarchy, especially the top echelons of the defence establishment ... For example, Gotabhaya Rajapaksa's ... threats targeted at Fonseka Vithyadaran and more recently Frederica Jansz, predicated on the sustained operability of white van networks, dormant or active, to target any means of the state as needed. There exists reasonable evidence of his clandestine power to abduct and eliminate people who are perceived as a threat to his command and reputation'.
21. The International truth and justice project report from 6 January 2016 says, '... being white vanned has become short hand in Sri Lanka for abduction by the security forces. The vehicles usually hiaceny [*sic*] white in colour belong to the country's police and military intelligence services. Usually between 3 and 5 plain clothes officers are involved ...'
22. I find that there is a reasonable likelihood on the basis of all the documentary and oral evidence that the Sri Lankan authorities abducted the appellant's brother for his perceived or actual involvement with the LTTE and the death certificate together with the request certificate confirms that he was subjected to a sudden death. I find and accept that the appellant's father wrote to the LLRC in 2011 because he had not received a response from the police or the human rights commission. I accept the evidence that the appellant's father did not write a letter to the LLRC any earlier because he was waiting for a response from the two organisations and contrary to Ms Brown's allegations, the

objective evidence confirms that the LLRC was only set up on 15 May 2010. I am satisfied with the explanation given by the appellant that his father made the complaint to the LLRC after it had come into existence and when a response from the other two organisations was not forthcoming.

23. In terms of the problems encountered by the appellant on his return to Sri Lanka in 2012, I find as follows. In his interview the appellant said unknown people took him into custody for enquiries. He was taken in a van and he was asked questions about his brother's connection with the LTTE and mistreated, slapped and beaten (Qs 80 to 111 asylum interview). I have also taken into account the appellant's evidence that his father was arrested following the death of their brother. I have already accepted that the LLRC was only set up in 2010. I find the objective evidence confirms that the LLRC concluded its work on 15 November 2011. I find that the appellant's evidence has consistently been that his father lodged a complaint with the LLRC in 2011.
24. I find that the appellant's account that his father was abducted is supported by the Upper Tribunal decision in GJ & Others which held that individuals have given evidence to the LLRC implicating the Sri Lankan security forces, armed forces of the Sri Lankan authorities in alleged war crimes are at risk of persecution and require international protection. I therefore find it is plausible the authority knew who the complainants went to the LLRC, including the appellant and his father, which resulted in their abduction.
25. I have found earlier in this decision that the objective evidence supports the white van phenomenon. The appellant has stated that unknown men in a white van also abducted him. They wanted to know details about his brother's activities with the LTTE and he was mistreated, slapped and beaten. The respondent argues that it is not reasonable to accept that the authorities would be looking for information on a person who had died 7 years previously because the government's present objective is to identify Tamil activities in the diaspora. The appellant himself had not mentioned any involvement with any group whilst in the UK.
26. I have had regard to the case of GJ and find that the appellant falls within category C i.e. that he has given evidence to the LLRC implicating the Sri Lankan security forces, armed forces or the Sri Lankan in alleged war crimes namely the kidnap and murder of his brother which is known to the Sri Lankan authorities and the result was the appellant's detention and mistreatment in the past.

27. I find that it is plausible that having a sibling linked to LTTE connections would be of interest to the Sri Lankan authorities on return. I find it is plausible that the authorities would seek to make enquiries about the appellant's involvement and what he knew about his brother's activities.
 28. I therefore find that the appellant satisfies to the required standard that he has a fear of persecution from the Sri Lankan authorities. I am satisfied that as with GJ he was able to leave the country using his own passport. I find that he falls within the categories identified in GJ. I find the objective evidence satisfies that persecution Sri Lanka is carried out with impunity. I find he cannot relocate to any other part of the country because it is the authorities that he fears and they would be unwilling or unable to protect him.
 29. I therefore find the appellant is a refugee. As I found the appellant is a refugee he does not qualify for humanitarian protection.
 30. Since I found that the appellant satisfies that he is a refugee by analogy I find he is at risk of persecution under articles 2 and 3. I find it is not necessary here for me to consider his claim under article 8 under the rules and under the ECHR.
 31. In making this decision I have had regard to Section 8 of the Asylum and Immigration (the treatment of claimants etc) Act 2004 with regard to all aspects of the Appellant's credibility in this case."
16. She therefore allowed the appeal.
 17. The lengthy grounds of appeal submitted by the Secretary of State stated that the judge had not given reasons for her conclusions nor did she appear to have engaged in any way with either the letter of refusal or the submissions of the Presenting Officer. She had considered the documents but had not looked at them in the round under the principles set out in the decision in **Tanveer Ahmed**. Moreover, she had not considered the appellant's immigration history considering the impact that would have on his credibility under the provisions of Section 8 of the 2004 Act.
 18. Mr Whitwell relied on those grounds. He emphasised that the terms of the refusal letter had not been considered by the Immigration Judge, who had merely stated that she believed what the appellant had said. She had not given anxious scrutiny to the claim. Moreover, she had not stated why the appellant would fall under the provisions in the country guidance case of **GJ** and in particular those set out in paragraph 356(7)(c). There was nothing to indicate that the appellant would fall into that category and he had not given evidence himself to the LLRC. He referred to the evidence

that the appellant had put in of his involvement with that organisation stating that it was extremely odd that a typed letter in English which was not signed would have been submitted or given any credence. Moreover, he emphasised that given the details of the appellant's history the fact that he had not applied for asylum in 2012 was relevant and for the did not engage with that and with the delay in claiming asylum.

19. In reply Miss Seehra relied in part of a skeleton argument, arguing that the judge had before her a letter from a Sri Lankan attorney authority upon which I was invited to place weight. The fact that that letter had only been submitted by the appellant's representatives the day before the hearing did not mean that the Secretary of State was unable to attempt to verify it. The Secretary of State could have applied for an adjournment in order to do so. The burden lay on the Secretary of State to show that the document could not be relied on. It was up to her following the judgment in **GJ (Sri Lanka)** to consider the documentation and to take steps to verify it.
20. Having referred to the judgment in **Karanakaran [2000] INLR 122 (CA)** she stated that the judge had taken a proper approach to the evidence and was entitled to place weight on the assertion of the appellant that both he and his brother had been taken by men in white vans. She referred to a report of Tamils Against Genocide in 2012 entitled "Sri Lanka's White Vans: Dual Criminality of the Sri Lankan State and the Rajapaksa Administration". Moreover, she stated from the International Truth and Justice Project report entitled "A Still Unfinished War: Sri Lanka's Survivors of Torture and Sexual Violence 2009 - 2015" that "being 'white vanned' has become shorthand in Sri Lanka for abduction by the security forces".
21. Moreover, she indicated that the judge was entitled to consider that the appellant fell into a category set out in **GJ and others (post-civil war: returnees) Sri Lanka [2013] UKUT (IAC)** and also to the judgment in **MM (Sri Lanka) [2014] EWCA Civ 36**, where it was stated that an appellant could depart from the airport unnoticed even if the Sri Lankan authorities had an interest in him. She stated that it was clear authority that delay should not necessarily be taken against an appellant when judging his credibility under the Section 8 criteria. She stated that there was clear evidence that those who had given evidence to the Lessons Learnt and Reconciliation Commission (LLRC) could be in danger if returned.

Discussion

22. I consider that there are material errors of law in the determination of the Immigration Judge. The reality is that it is incumbent upon the judge to give anxious scrutiny to the evidence before her. That does not mean that the judge need only consider the allegations made by the Secretary of State when refusing an application but also that claims made by an

appellant should be subject to such scrutiny. That simply did not happen here in this case.

23. It is unfortunate that the judge did not set out the appellant's oral evidence and indeed she barely mentioned the submissions made by the Presenting Officer. What is of greater concern, however, is that she did not appear to engage in any way with the matters raised in the letter of refusal. She did not appear to have addressed such issues as the fact that the appellant's brother had never, it appears, been involved with the LTTE and that the evidence of his friend was at odds with the evidence of those in the lodge where they had been living.
24. Moreover, she does not appear to have approached the documents with any degree of rigour. In particular, the typed letter in English to the LLRC is not signed – the judge makes no comments thereon. The reality is of course that there were no principal documents before her. These were issues which she should have factored in when considering the credibility of the appellant's claim.
25. Moreover, she did not appear to have considered the delay in the claim for asylum. Although in paragraph 31 she asserts that she had regard to Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 she does not say why she did not place any weight on the delay in claiming asylum or give reasons for stating that she did not consider that the delay damaged the appellant's credibility.
26. Moreover, she did not appear to engage with any reasons why the appellant or his brother would have been abducted by "white van men". Neither the appellant nor his brother had any connection with the LTTE. The reality appears to be that she took the fact that abductions are being made or have in the past been made by men in white vans and then the assertion of the appellant that he was taken by a man in a white van as showing that what he was saying was credible. There is a non sequitur in that reasoning: because one individual is abducted by a man in a white van does not mean that a man who states that he was abducted by a man in a white van is telling the truth. The judge does not engage with those factors. This is a short determination which lacks the detailed scrutiny which is required for a determination and that is, I consider, a material error of law.
27. I further consider that the approach of the judge to the assertion by the appellant that he was abducted because he had been in contact with the LLRC is also an assertion that does not bear scrutiny on the evidence before her given the lack of evidence from the appellant regarding his detention. I note that the judge did place evidence on the letter from Trini Gordan Rayen dated 28 March 2017 but the reality is that that letter was produced at a late stage and that the judge should have been concerned about that. Moreover, the letter does not say in terms that what was stated in the appellant's father's letter was true. Indeed, reading the

letter in its entirety, what Mr Rayen states is that he assisted the appellant's father during the inquest and the attempt to raise the death with the local police and human rights organisations when it was realised that the police were unwilling to be helpful and that he had helped the appellant's father to submit a complaint to the LLRC in May 2011 but not that he had any first-hand knowledge of what had happened and indeed he states that the death of the appellant's brother remained as an unsolved matter "although there was evidence to point to an extrajudicial killing". He does not say that there was an extrajudicial killing. Indeed, there seems no reason why that should have been the case.

28. When I consider the evidence given by the appellant at interview and in his witness statement it is of note that at paragraph 8 of the witness statement the appellant had stated that:-

"On 13 June 2005 Sydney's body was found in the river of Thennakumbura. We initially thought this must have been an accident. The boys Sydney boarded with told my father that Sydney had previously been to that river with his friends. They thought perhaps he had gone there by himself to swim, and had drowned. It was only later that we came to learn that Sydney had in fact been kidnapped by white van thugs."

That was focused on by the Secretary of State in the letter of refusal, who stated that there was no reason why the appellant's father should have been believed that his son, who was not a member of the LTTE or supported them, should have been taken by white van men when the perfectly understandable and reasoned explanation for the son's death had been put forward by those in his boarding house. This was yet another matter which the judge should have considered.

29. Particularly taking into account the lack of knowledge by the appellant of who "John" was, again, this is a matter on which the judge should have given anxious scrutiny but did not.
30. For these reasons I find that there are material errors of law in the determination of the Immigration Judge and I set aside her decision. I consider that the terms of the Senior President of Tribunal's Practice direction are met and it is appropriate that this matter be remitted for a hearing afresh in the First-tier on all issues.

Notice of Decision

The appeal of the Secretary of State is allowed to the extent that this appeal is remitted to the First-tier for a hearing afresh on all issues.

Directions.

The appeal will proceed to a hearing afresh on all issues in the First-tier Tribunal.

Signed 

Date: 20 July 2017

Upper Tribunal Judge McGeachy