



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/06056/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 5 May 2017

Promulgated

On 25 May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

R T

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muquit, Counsel, Kanaga Solicitors

For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal (Judge Swaniker) dismissing his appeal against the respondent's decision of 31 May 2016 refusing his application for asylum and humanitarian protection.

Background

2. The appellant is a citizen of Sri Lanka born on 9 June 1987. He claimed that he was forced to help the LTTE in 2008 and 2009 and was detained by the authorities on 29 January 2011 until 29 March 2012 after being sent to a rehabilitation camp. He was released without any conditions but the CID came to his village and asked him to report and questioned him. He said

that he decided to leave the country and did so on his own passport in November 2012, his agent having arranged for him to go to Canada. He flew from Colombo Airport via two countries and then went by bus to Senegal. From there he flew to France on an Indonesian passport with his photograph on it and he flushed this passport on advice from the agent. He was detained for fifteen days in a camp in France and then released. He then travelled to another African country but he did not know which one and was then returned to Sri Lanka.

3. He claimed that he started helping the LTTE again in May 2013 and was detained by the army on 20 February 2014 for ten days. He was kept in a cell, beaten and questioned. A bag doused in petrol was placed over his head and he sustained scars whilst detained. He was released on payment of a bribe by his father. He remained in Sri Lanka for ten days and then left with the help of an agent, travelling by air to Qatar with a false Indian passport where he remained for two and a half months before flying on to Belgium where he stayed for two days before making an unlawful entry into the UK in a van.
4. The appellant was arrested on 3 February 2015 during an enforcement operation. He said he had entered illegally on that date. He was served with papers as an illegal entrant and then claimed asylum.
5. The respondent accepted that the appellant's identity and nationality were as claimed but rejected his claim about the problems he had suffered in Sri Lanka and whether he would be at risk on return. The respondent's reasons for refusing the application are set out in full in Annex A of the decision letter dated 31 May 2016.

The Hearing before the First-tier Tribunal

6. At the hearing before the First-tier Tribunal the judge heard oral evidence from the appellant and a witness and had documentary evidence supplied on behalf of the appellant in a bundle indexed and paginated 1A - 90 and a supplementary bundle indexed and paginated 1 - 20. The judge did not find the appellant to be a credible witness setting out her findings in [15]-[34]. Her findings on credibility are summarised at [31] where she said:

"I find for all these reasons that the appellant's account of the reasons he claims to have left Sri Lanka in 2014 is not to be believed. I find him to be a witness lacking in overall credibility. I do not accept that he was a person of any interest to the Sri Lankan authorities when he claims to have last left the country and I find no reason from the totality of the evidence before me to conclude that he would be a person of adverse interest upon return."
7. The judge accepted as reasonably likely that the appellant had been arrested and detained in 2011, that he was required to undertake the rehabilitation programme, that in common with many others he had some low level connection with the LTTE during the war years and that this low level led to him being detained by the authorities once his involvement came to light in 2011 [23]. She also accepted that there was a reasonable

likelihood that he was mistreated during this detention but he was eventually released because he was found to be of no further interest. The judge was not satisfied that the appellant would be of any continuing interest to the Sri Lankan authorities or that he was of any such interest in 2012 when he left. She did not accept his evidence about his arrest and detention in 2014 and found that there was no credible evidence pointing to any records of him being retained in the database of wanted persons or as a person otherwise of interest to the authorities in Sri Lanka [25]. Accordingly, his appeal was dismissed.

The Grounds and Submissions

8. In the grounds of appeal it is argued that the judge's assessment of credibility and in particular the rejection of his account of detention and torture in 2014 was flawed firstly, in ground 1(i) because the Tribunal did not appear to reject but accepted the fact that he suffered from mental health difficulties and had therefore erred by failing to treat him as a vulnerable witness in accordance with the guidance given in the Practice Direction relating to child, vulnerable adult and sensitive witnesses. It is argued that the judge thereby failed to give proper consideration to whether his condition was such that there were explanations for the inconsistencies in his evidence. It is then argued in ground 1(ii) that the evidence produced from a lawyer in Sri Lanka should not have been rejected but treated as potentially verifiable in accordance with the judgment of PJ v Secretary of State [2014] EWCA Civ 1011. It is further argued in ground 1(iii) that no reasons were given for the judge's comments in [24] discounting evidence as unreliable from the appellant's family on the basis that it was self-serving. Ground 2 argues succinctly that, not least given the flawed assessment of credibility for the reasons set out in ground 1, the judge's assessment of risk was legally untenable premised as it was upon a disbelief of the case.
9. Permission to appeal was granted by the First-tier Tribunal on the basis that for the reasons given in ground 1(i) it was arguable that the Tribunal had failed to factor into the assessment of the appellant's overall credibility the accepted fact that he was suffering from a moderate depressive episode and post-traumatic stress disorder. Permission was granted on this ground only.
10. Mr Muquit submitted that the judge had failed to take proper account of the opinion set out in the psychiatric report dated 4 November 2016 from Dr Dhumad that the appellant was suffering from a moderate depressive episode and post-traumatic disorder symptoms. He argued that when considering her credibility findings, the judge had failed to factor in the appellant's vulnerability and medical condition in her assessment of the weight to be placed on his evidence and, in particular, how any inconsistencies and discrepancies should be treated. He submitted that the judge had made her credibility findings before [26] where she considered the psychiatric report. Even then, she had discounted the report as having any relevance to the assessment of credibility on the basis of findings of fact she had already made.

11. Mr Muquit sought to re-open the grounds where permission to appeal had been refused and in particular ground 2 arguing that the judge's assessment of the appellant's involvement in diaspora activities in the UK had not been adequately assessed in the light of the respondent's failure to produce at the hearing the Policy Guidance and Country of Origin Information published on the Home Office website on 28 August 2014. He relied on the judgment of the Court of Appeal in UB (Sri Lanka) v Secretary of State [2017] EWCA Civ 85 submitting that, if this material had been produced at the hearing, the judge might well have taken a different view on whether the appellant would be at risk on return in the light of his involvement with the TGTE referred to in [27] of the decision.
12. Ms Ahmad submitted that there was no reason to believe that the judge had reached credibility findings without consideration of the psychiatric report. At [15] the judge had prefaced her assessment of credibility by saying that she was taking into account the appellant's oral evidence and all of the evidence before her including the expert reports. The judge had explained in [26] her concerns about the psychiatric report and that paragraph formed part of her assessment as a whole. The appellant had not been granted permission to argue any ground other than ground 1(i), no notice had been given of an intention to re-open the other grounds or to rely on the judgment of the Court of Appeal in UB (Sri Lanka).

Assessment of Whether the First-Tier Tribunal Erred in Law

13. I am not satisfied that the appellant should be permitted to pursue an argument based on grounds 1(ii), (iii) or ground 2. Permission was refused for the following reasons:

"It is not arguable,

- (a) that the Tribunal was bound to accept the contents of a letter purporting to be from a Sri Lankan legal attorney simply because the respondent had not sought an opportunity to verify its provenance and authenticity (the burden being upon the appellant to establish those matters) or
- (b) that the Tribunal employed the term 'self-serving' as meaning that the evidence in question supported the appellant's case (the criticism made of that phrase in the authorities cited by the applicant) it being clear, when read within the context of paragraph 24 as a whole, that the Tribunal was legitimately commenting upon the fact that that evidence was not truly independent of the appellant. Permission to appeal upon the grounds raised by subparagraphs (ii) and (iii) of ground 1 is therefore refused. Moreover, it is not understood how ground 2 operates 'distinctly' or independently of ground 1. Permission to appeal on ground 2 is therefore also refused."

14. I agree with the reasons for refusal and I am not satisfied that there is any proper basis for granting permission on those grounds. There is a right to renew an application for permission to appeal when the First-tier Tribunal

only grants permission on limited grounds but no application was made in the present case. Mr Muquit also raised the issue of UB (Sri Lanka) and whether there had been procedural unfairness before the First-tier Tribunal arising from the respondent's failure to disclose the Policy Guidance and Country of Origin Information referred to in that judgment. However, that issue was not raised in the grounds of appeal and there is nothing in the grounds to indicate that this was an issue which might be raised. Mr Muquit tentatively argued that ground 2 could be taken as referring generally to issues of risk but the ground specifically relates back to the credibility findings.

15. The judgment in UB (Sri Lanka) was issued in February 2017. If the appellant sought to rely on that judgment, the Tribunal and more particularly the respondent should have been given notice before the hearing. I have considered whether I should adjourn this hearing to give the appellant an opportunity to apply to amend his grounds and the respondent the opportunity of considering the issues but I am not satisfied that the interests of justice require this course. The appellant is not without remedy: it is open to him to make further representations based on the judgment in UB (Sri Lanka), if so advised, and it will be for the respondent to decide whether and to what extent that judgment impacts on the appellant's circumstances.
16. I now turn to the issue of whether the judge erred in law by failing to treat the appellant as a vulnerable witness and whether she failed to take into account the psychiatric evidence when assessing the appellant's credibility.
17. I was referred to the Tribunal decision in JL (medical reports-credibility) China [2013] UKUT 00145 and in particular [26] which I should set out in full:

"26. A second error we discern consists in the judge's treatment of the appellant's vulnerability (the appellant's ground 3). It is clear from her determination that despite disbelieving much of the appellant's evidence including the account she gave of her psychological problems (the judge placed particular emphasis on the appellant's ability to perform well in her studies) the judge was prepared to accept that she was a vulnerable person. To be specific, she appeared to accept that the appellant had been the victim of physical abuse at the hands of her former boyfriend in the UK [104]; and, although rejecting the reasons given, accepted that 'it may well be the appellant has certain mental health issues'. Given that the judge described the respondent's reasons (as set out in the preceding para) as 'cogent' and that they included reliance on inconsistencies, it was of particular importance to see what findings, if any, the judge made about the possible relevance to these of the appellant being a vulnerable person. In the case of a vulnerable person, it is incumbent on a Tribunal judge to apply the guidance given in the Joint Presidential Guidance Note No 2 2010, Child, Vulnerable adult and sensitive appellant guidance. At [14]-[15] of this guidance, which dealt with assessment of evidence, it is stated:

- '14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those who are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
15. The decision should record whether the appellant has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind.'

Whilst in [14] above the focus is on oral evidence, it is clear from [15] and the guidance read as a whole that the same approach should inform assessment of discrepancies in the written record."

18. At the heart of Mr Muquit's submission is that the judge failed, when assessing the evidence and in particular the discrepancies, to take account of the fact that the appellant was suffering from moderate depressive episode and PTSD. He argued that the judge approached the report on the basis that she had found that the appellant had not been arrested in 2014 and that for this reason it was not relevant whereas it was relevant as part of the evidence as a whole.

19. In [26], the judge said:

"I have regard to the psychiatric report of Dr Saleh Dhumad who, according to the information in his report had two interviews for two hours with the appellant. I note only one interview date of 4.11.2016 was recorded in the report so that I can only surmise that the two interviews were conducted on the same day. Whilst I note Dr Dhumad's diagnosis of the appellant suffering from moderate depressive episode and PTSD I find for all the reasons I have set out above that these do not relate to a second arrest of the appellant in 2014. I also consider it worth noting that the appellant/his family have invested some considerable effort and finances (Q209 AIR) in getting him to the UK and he has by his account made two attempts to relocate to the west, the first apparently resulting in a failed asylum bid in France, after which I have found he was reasonably likely deported back to Sri Lanka and where he was, by his own account able to proceed safely through the airport. I consider in the ordinary course of events that the potential or prospect of all these efforts coming to nothing is a material factor which would also reasonably likely weigh on the appellant mind and cause some distress. This is not a factor which appears to have been considered in the psychiatric report. In sum, given I have accepted the appellant's account of his arrest and detention in 2011-2012 but rejected his account of arrest, detention and mistreatment in 2014 and his account of there being continued interest in him from the

Sri Lankan authorities, I do not consider that Dr Dhumad's report takes the appellant's case any further forward in relation to the facts of his claim. I found he was not of adverse interest to the Sri Lankan authorities when he last left the country, and I do not consider that his stated mental health issues changes that."

20. I am not satisfied that the judge has committed the error of discounting the report when assessing credibility or that she has prejudged credibility before taking the report into account. The judge's comments that she found for the reasons set out that the moderate depressive episode and PTSD did not relate to a second arrest of the appellant and that having rejected his account of arrest, detention and ill-treatment in 2014 she did not consider that the report took the case any further forward in relation to the facts of the claim must be read in context and the phraseology should not be analysed as if a statute.
21. The judge said in [15] when assessing credibility that she took into account the evidence including the expert reports and came to the overall conclusion that the appellant had not been truthful. She then said that there were material inconsistencies and implausibilities in the appellant's evidence for which he had been unable to give any credible or reasonable explanation and these cumulatively served to undermine his account and the reasons he claimed to fear returning to Sri Lanka. The judge has comprehensively set out those matters in the following paragraphs. She deals with his evidence about the basis of his claim in [16]-[25]. She introduces [26] by saying that she has had regard to the psychiatric report of Dr Dhumad and in [27]-[28] she deals with the appellant's post-flight activities in the UK.
22. In [30] the judge finds that the appellant's credibility is damaged under s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 because he misrepresented his date of entry into the UK to the respondent and he sought to conceal the fact of having been a failed asylum seeker in France. He claimed to have entered the UK in October 2014 but had previously claimed to the respondent that he entered the UK in December 2015. He had not claimed asylum until he was encountered and arrested in December 2015 and she considered that a person who had genuinely fled his home country in the circumstances claimed by the appellant would have looked to present his circumstances to the authorities as soon as possible and certainly well within the year of his arrival.
23. I am not satisfied that it could be argued that the judge had reached her findings on credibility without taking into account the adverse factors set out in [30]. Indeed, in [31] she says that it is for "all these reasons that the appellant's account of the reasons he claims to have left Sri Lanka in 2014 is not to be believed". I am therefore not satisfied that the judge approached the psychiatric evidence on the basis that she had already decided that the appellant had not in fact been arrested in 2014 as claimed. The judge noted that the psychiatric report was prepared on the basis of two interviews for two hours but there was only one interview date and she reasonably surmised that the two interviews were conducted on

the same day. The judge was entitled to comment that the appellant's own history of making a failed asylum claim in France and then being returned to Sri Lanka might reasonably weigh on his mind and cause some distress.

24. The judge had concerns about the psychiatric report set out in [26]. I note that at para 18.5 of the report Dr Dhumad said that in his opinion the appellant was fit to attend a court hearing and give oral evidence but he was depressed and his concentration was poor and it was likely to get worse. If he were to be cross-examined, he respectfully recommended that he was given regular breaks and allowed enough time to comprehend the questions. I am not satisfied that there is anything to indicate that this was not the case at the hearing. The judge noted and understood the appellant's account. He was represented and there was an opportunity to make submissions on the weight to be attached to his evidence in the light of the psychiatric report. I am not satisfied that the judge erred by failing to make a specific finding on whether the appellant was a vulnerable person or not. The purpose of the Practice Direction is to ensure that proper account is taken of an appellant's vulnerability. I am satisfied that the judge did so. She considered the substance of the psychiatric report and its implications and relevance to the assessment of credibility, and she explained why, taking the report into account, she did not find the appellant to be credible. The substance of the approach set out in JL (China) has been followed.
25. When the decision is read as a whole, I am not satisfied that the ground on which permission was granted is made out. The judge considered all the relevant evidence and reached findings and conclusions properly open to her for the reasons she gave.

Decision

26. The First-tier Tribunal did not err in law and its decision stands. As I have already indicated, if further matters now arise which were not before the judge it is open to the appellant to make further representations to the respondent. The anonymity order made by the First-tier Tribunal remains in force until further order.

Signed H J E Latter

Dated: 22 May 2017

Deputy Upper Tribunal Judge Latter

