Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02889/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th August 2018	**On 22nd October 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

W I
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Anzani, Counsel instructed by Nag Law Solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. In a decision sent on 9 November 2017, I set aside the decision of First-tier Tribunal Judge (FtT) A A Wilson for material error of law. Judge Wilson had dismissed the appellant's appeal against a decision made by the respondent on 4 February 2015 refusing his application for international protection. The appellant's original appeal had been heard by Judge Clarke of the FtT in June 2015 but Deputy Upper Tribunal Judge Archer set aside Judge Clarke's decision and remitted it to the FtT for a de novo

hearing. The error of law hearing before me took place on 16 October 2017. It is now my task to re-make the decision on appeal.

2. Central to the appellant's asylum claim is his contention that the Sri Lankan authorities had taken out an arrest warrant against him. At the hearing before Deputy Upper Tribunal Judge Archer (who was considering the decision of Judge Clarke) the appellant produced documents from a Sri Lankan attorney and an arrest warrant. Following DUTJ Archer's decision, the respondent took steps to verify the arrest warrant and filed a verification report dated 8 August 2016 stating that the arrest warrant relied upon by the appellant was not genuine. The report noted that a first telephone contact with the Registrar of Puttalam Magistrates Court met with a request for a written request to be submitted. The report then gave the reference to this request in PDF form with a number. The report then stated:

> "Contacted the Registrar [who] acknowledged receipt of the verification request. She confirmed the Warrant of Arrest document submitted to be a false document and stated that it had not been issued by the Puttalam Magistrates Court".

It concluded that the document was not genuine. The appellant then lodged a letter from the attorney-at-law (who had sent the original arrest warrant), Mr A M Kamarudeen, disputing the verification report. Judge Wilson did not accept that this document was genuine. In setting aside Judge Wilson's decision, I expressed concern about the judge's reason for preferring the verification report over the attorney's evidence, noting that "the evidence from the registrar, unlike that from the attorney, was not communicated in writing and the verification report relied on what was claimed to have been said in a phone call". I stated:

> "Given that the respondent was alleging not just unreliability but fraud, the onus was on the respondent to prove fraud and I do not consider that a report simply stating what was said during a telephone call with the registrar's office discharges that onus. There is no explanation proffered by the respondent for why the information said to have been conveyed by telephone was not sent in writing, as one would expect of such a report. I also noted that points raised by the appellant's representatives regarding shortcomings of the DVR had force (inter alia, failure to name the source of the information; failing to disclose the written request for verification; the lack of any written statement from the registrar confirming what is alleged; the lack of information about the person who checked the record and how qualified they were)."

3. In light of the clear difference in view between the parties over the authenticity and reliability of the arrest warrant I directed on 9 November 2017 that the respondent adduce further evidence relating to the alleged inauthenticity of the arrest warrant (whether in the form of an amended document verification report or otherwise); and that the appellant produce further evidence in response. I indicated that, given the accepted fact that Attorney Kamarudeen was a friend of the appellant, the appellant's representative should consider approaching a different attorney to

comment on the arrest warrant and what was known as regards its authenticity.

4. On 15 November 2017 the respondent enclosed an FCO report dated 16 October 2017 stating that an official of the British High Commission conducted a site visit on the same date "to verify what purports to be Court documents which include a warrant of arrest issued by the Puttalam Magistrates Court, to the above-named subject [the appellant] with the reference number B3347/09. The report goes on to say:

> "On arrival I spoke to the Registrar and introduced us as officials from the BHC, Colombo. I explained that we wished to check their records to see what was recorded against court reference B3347/09. The court documents were not with me nor did I divulge any personal details of the subject such as his name or address.
>
> A clerk in the Registrar records room physically located the register and manually searched the records confirming that the reference number provided did not relate to any case heard by the Puttalam Magistrates Court in 2009. He further went on to state that the case references for 2009 went up to 'number 1371' and that there were no case numbers beyond '1371'. The report concluded that 'the documents provided by the subject are not genuine … The case reference number does not exist.'"

5. The appellant's representatives produced a letter from Attorney S I M Hismi dated 29 November 2017. It stated that the method adopted by the author of the DVR "breaches the strict procedures in place" since:

> "No one, not even an official from a diplomatic mission, can verify the securely held court documents in the manner described in the report … There is no way that a Registrar of the court would readily comply with the request of a stranger and freely provide the information as claimed in the report."

The letter also took issue with the timing of the report, it being contended that the court closes at 4.30 and the official could not have got from Colombo to Puttalam before 6.30 (counting back from end of the UT hearing in London earlier that day). The letter went on to say that "I have now verified the authenticity of the arrest warrant via the official channel" and attaches a court receipt "as the proof of my attending and making the official application to verify the arrest warrant".

6. At the resumed hearing before me on 6 August 2018, the appellant gave evidence. Having confirmed that his witness statement of 19 June 2015 was true and correct, he was then tendered for cross-examination. In reply to Mr Bramble's questions he stated that he had been detained nearly eleven months (Jan-Nov 2009) and that following his detention in 2009 during which he was beaten he had scars immediately after. He had straightaway upon release sought the help of a herbal doctor, he had not brought papers relating to this with him; he believed they were with his mother. Asked if he had been found not guilty he said yes, there was not

enough evidence. He had got bail. There was not a decision either way, his case was still pending. Mr Bramble reminded him what he had said in his interview at Q69: ("The court decided I did not sell the medicine to the LTTE") and Q152 ("I was not charged"). The appellant replied that he was granted bail on the basis that they withdrew the charges "against me for lack of evidence". Asked why he had not gone to the UK at the same time as his wife and children, the appellant said that his funds were not sufficient.

7. Mr Bramble asked the appellant if he was still reporting pursuant to his bail conditions between November 2009 and March 2012. The appellant said he did not report between 2009 and May 2010 (he later mentioned five dates on which he had reported), but in May 2010 he was told he did not need to report, although the court case continued. In March 2012 they had said he should report again. At that point he decided to leave and go to Colombo.

8. Mr Bramble asked why would the authorities have been interested in him in March 2012. The appellant said that after the end of the civil war the authorities were keeping an eye out for any resurgence of the LTTE. The appellant said the authorities had reintroduced a law in 2012 making it possible to require suspects to report. Asked about the documents at p.51 concerning a court attendance on 9 August 2011 (which only noted his lawyer as attending), the appellant said he had attended. He said it may have been an error by the translator not to mention that both he and his lawyer attended.

9. Asked why he had decided not to report in March 2012, the appellant said he had heard accounts of a man who had gone missing after reporting.

10. The appellant confirmed that he had no link with the LTTE; his connection was solely with Dr Mendes.

11. In relation to the appellant's statement at Q41 (that these problems "affected me mentally"), Mr Bramble asked the appellant if he had any treatment for mental health issues. The appellant said a doctor had prescribed him sleeping pills; he could find the records if needed.

12. Asked how and when he had first heard about the arrest warrant, the appellant said his mother had phoned him after the authorities had come to her house in 2012. Mr Bramble put to the appellant that there would be no reason for the authorities to go to his house if he had attended court on 6 March 2012. The appellant said he had not gone for reporting in March. The arrest warrant was issued on 20 October 2012 (the same day). He was not checked at the airport. He left the country in October 2012.

13. The airport authorities were not aware of his case. The people who had come to his mother's house were "white van" plain clothes policemen; no-one knew the way they operated.

14. In re-examination the appellant said that the beatings he had suffered in 2009 were in Ngombo jail, they were in the form of kickings and being hit with batons; when he was subsequently moved to an army camp, they only verbally abused him. Asked why he had not sought a medical report about the scarring, he said he had suffered from the beatings. The appellant said he had just wanted to flee. Asked why he had not sought one when he got to the UK, he said he did not think any doctor would give him one; three years had gone by by then.

Submissions

15. Mr Bramble submitted that if I found the appellant credible, he was entitled to succeed as he would then fall within the **GJ** CG [2013] 000319 (AC) risk categories. However, he said that the respondent's issues regarding the credibility of the appellant's account remained valid. The appellant had failed to produce medical evidence regarding his claimed beatings in detention in 2009 and his explanation for that failure was unsatisfactory. The appellant's account of being issued with an arrest warrant three years after a court had found he had not assisted the LTTE was implausible.

16. Ms Anzani submitted that the appellant's evidence had been broadly consistent, notwithstanding the relevant events had happened a long time ago. The appellant was still able to give clear and concise evidence. As regards the injuries the appellant suffered in detention, it was more than possible they had not resulted in scars and that the medical treatment he received – painkillers – was the appropriate treatment. His evidence that when he came to the UK his scars were no longer visible was not inherently implausible. The appellant had dealt with all the issues raised by the respondent regarding his credibility in the refusal decision.

17. Ms Anzani asked that I find the respondent had failed to prove that the appellant's arrest warrant and the related court and attorney documentation was false. There were serious concerns about the procedures followed by the British High Commission in seeking to establish whether the arrest warrant was authentic or not. The further report was curious in not saying that the arrest warrant was inauthentic. The timing of the second report also raised serious questions since it is not clear how the official concerned could have visited the court and spoken to the Registrar on the same day as the UT hearing in London. Three different attorneys had stated that the procedures described by the DVR would have breached Sri Lankan court rules. Furthermore, all three attorneys had said they had been informed upon proper inquiry that the arrest warrant was authentic. The most recent attorney evidence was also very specific in stating that so far from ending in 1371 the case number for the relevant year went up to 4,007.

My decision

18. In re-making this decision it is clear in light of Mr Bramble's concession that my principal focus must be on whether the appellant has given a credible account of material particulars. The burden rests on the appellant but to the lower standard of proof. I must consider the evidence as a whole, which has been significantly added to by responses from both sides to my directions in relation to the DVR evidence.

19. I must of course assess the weight to be attached to the evidence relating to the 2012 arrest warrant in the context of the evidence as a whole, but it is convenient if I first address the documentary evidence relating to this.

20. Although in his asylum interview the appellant made reference to a letter stating that he was the subject of an arrest warrant, it was not until the first set of appeal proceedings that he produced evidence to support this claim. He produced, inter alia, a certificate of registration of an individual, a letter from an officer in charge, a Puttalam Magistrates Court record cover, a detention order request, detention orders, a bail order, a bond and a warrant of arrest dated 16 October 2012, a letter from Attorney Mr A M Kamarudeen and an ID regarding the letter from the Bar Association of Sri Lanka. Mr Kamarudeen attested in his letter to having obtained certified copies of the court case records relating to the appellant on the instructions of his sister. In August 2015 Judge Clarke did not find the evidence reliable.

21. In concluding that Judge Clarke had erred in law DUTJ Archer noted that:

> "[t]he documentary evidence was extensive, running to over 40 pages. Fabrication of that evidence would have been a significant task. I am satisfied that the judge did not give adequate reasons for rejecting the court evidence".

DUTJ Archer also considered that the judge had not explicitly considered the evidence from the attorney.

22. By the time of the de novo appeal hearing before Judge A A Wilson the respondent had obtained the DVR dated 18 August 2016 concluding that the arrest warrant was inauthentic. Judge Wilson was sufficiently satisfied by that DVR report to conclude that all the appellant's documents were a "false and a fraudulent attempt to obtain international protection".

23. In response to my directions following a decision setting aside Judge Wilson's decision, the respondent produced a further DVR dated 16 October 2017, the same date as the hearing before me to consider whether Judge Wilson had erred in law. The appellant in response has produced a number of documents including from attorneys Mr S I M Hismi and Mr M H M Falsur Raahman verifying the existence of the case file B/3347/09 and calling into question the verification described by the respondent.

24. It was made clear by the respondent both at the hearing before Judge Wilson and at the two hearings before me that she considered that the appellant's arrest warrant documentation was false. As I stated in my error of law decision, when the respondent elects to allege fraud the onus rests on her to prove it. Her original attempt to prove it in the form of the DVR dated 18 August 2018 was problematic, not least because there was no written confirmation provided by the Registrar of the Puttalam Magistrates Court for what was said to have been stated over the telephone. It was in light of shortcomings in the original DVR report that I directed the respondent to obtain another.

25. Certain of the criticisms levelled against the respondent's second DVR report do not on their own persuade me that the second DVR report is deficient. It is contended that the British High Commission inquiry breached set procedures for a Sri Lanka court to provide particulars of a case filed with it, but the respondent was clearly not asking for any documents relating to the file or any particulars of the case; only about whether the court Registry held a file under a given number. There is nothing in the evidence before me to indicate that the court in question would be prevented from responding to an inquiry of this limited nature. It is also contended that the British Embassy official could not in fact have got to the court in Puttalam in time on the day the visit is stated to have taken place, but that assumes, without foundation, that the British Embassy official was in Colombo rather than in closer proximity to the court on the day in question.

26. Nevertheless, notwithstanding that my error of law decision noted that one of the shortcomings of the first report was that there was no written document from the Court Registrar confirming that there was no case number matching the appellant's documentation, the second report does not provide this and indeed manifests the same shortcoming. Furthermore, the respondent has not sought to raise any objections to the documentation adduced from the three attorneys who have each attested that they attended the same court to obtain verification of the arrest warrant (the respondent had ample time to have shown this documentation to the embassy official concerned and to have sought a response). I take judicial notice of the fact that background country information shows that court documents can be forged or obtained fraudulently, but, like DUTJ Archer, I cannot ignore that in this case the respondent has made no direct attack on this body of documentation, but has rather relied, in order to disprove its authenticity, on two DVRs relating only to the issue of whether there is a court file number matching that stated in the appellant's documentation. I accept that one of the reasons why the respondent may have chosen not to ask the Registrar to peruse the appellant's file was to ensure confidentiality, but it would have been open to the respondent to ask the appellant's solicitors whether they would have any objection to their own documentation being shown to the Registrar. Absent any written document from the Court Registrar confirming that these documents were false and that the court case

number cited did not exist, I am not able to conclude that the respondent has discharged the burden of proof resting on her to show that the appellant's arrest warrant documentation was false. I do not underestimate the practical difficulties in the way of the British Embassy devoting resources to responses to Tribunal directions, but at the same time I cannot ignore the deficient nature of the two DVRs relied on in this particular case.

27. This finding is not, of course, conclusive in favour of the appellant, as I still have to consider whether this arrest warrant documentation is reliable in the context of the evidence as a whole and in respect of simple reliability the burden of proof is on the appellant.

28. It is difficult, however, to deny that the arrest warrant documentation loom large in assessing the credibility of the appellant's account. Indeed, Mr Bramble went so far as to state at the outset that if I accepted it was reliable, the appellant was entitled to succeed in his appeal.

The claimed 2009 detention

29. The arrest warrant documentation relates to an event in 2012, but it cannot be considered in isolation from the appellant's claim to have been detained in 2009 and subsequently required to report on bail conditions.

30. Notwithstanding his assessment that the arrest warrant documentation (as it was in April 2017) was false, Judge Wilson was still prepared to accept that the appellant was a pharmacist and that he had been detained in 2009 and did not specifically find he had not been ill-treated during that period. Whilst I stated in my error of law decision that "I cannot preserve any of the FtT Judge's findings of fact "(paragraph 8), I did so because of the judge's error in dealing with the DVR evidence and, on my own findings, this evidence fails to demonstrate falsity in the arrest warrant documentation. In such circumstances, I consider it significant that despite rejection of the arrest warrant documentation and despite the respondent's identification of inconsistencies in the appellant's evidence regarding his 2009 detention, a FtT Judge was prepared to accept it was credible.

31. It is also true to say that the appellant has been broadly consistent in his evidence about having run a pharmacy in Puttalam, having been detained on suspicion of supplying drugs to the LTTE via a doctor associate (Dr Mendes) and having been released on bail. I say "broadly consistent" because there were some discrepancies in his evidence about his pharmacy qualifications, but like Judge Wilson I do not consider these were sufficient to disbelieve his account of being a pharmacist. The appellant also gave inconsistent answers regarding what he had been told by the authorities about which drugs the boy (K Baskorm) had been carrying when stopped at the Trincomalee army checkpoint and how long he had been detained and questioned, but again, like Judge Wilson, I do not

consider these sufficient to undermine his account of 2009 events. Mr Bramble has submitted that the appellant has failed to substantiate his claim to have been ill-treated when in detention in 2009, even though he had opportunities to produce medical evidence both from Sri Lankan doctors and doctors in the UK. This failure is a significant shortcoming, but I accept that the length of time since his detention occurred has made it more difficult to support it by way of medical evidence and, even though the appellant himself referred to "scarring", the injuries caused by the beatings he described appeared to have been more temporary and his account of seeking medical help from a herbal doctor straight afterwards also points to his injuries having been bruising and swelling rather than what is strictly meant in UK medical parlance by "scarring".

32. Mr Bramble has argued that the appellant's account of the court proceedings and of his being believed by the court that he was not involved with the LTTE was not coherent or plausible, since if the court had concluded he had not supplied drugs to the LTTE, there was no reason to impose reporting conditions. However, albeit somewhat confusing, the appellant's evidence was that the court had said there was not enough evidence and he had never said in terms that he had been acquitted. His consistent account has been that for one reason or another they did not dismiss the charges against him. In the absence of precise background information about how criminal proceedings are conducted in Sri Lanka, one must be wary of assuming proceedings follow a UK pattern.

33. In assessing the credibility of the claimed 2009 events it is also fair to say that the appellant was able to provide a very specific amount of detail, in terms of dates, names and the sequence of what occurred.

The appellant's situation between 2009 and 2012

34. Mr Bramble highlighted the respondent's concerns about the lack of a coherent account of what happened between 2009 and 2012, in particular the implausibility of his account that he should wait almost two years before sending his wife away to the safety of the UK in 2011. However, the appellant's claims that he believed he was not in danger during this period and that he was experiencing financial difficulties were not inherently implausible.

March 2012 – October 2012

35. The appellant claimed that he only decided he was at risk after receiving a letter in March 2012 telling him that he had to sign at the local police station. Following receipt of that letter the appellant then contacted his wife in the UK to arrange dependent visas for him and the two children to join her in the UK. I have some difficulty with understanding why he would delay six months, but the sequence of events he described in going about getting the visas was likely to take that amount of time and, unlike other possible options, it offered him a safe destination outside Sri Lanka where

they could reside lawfully. On his own account he was keeping a low profile during the relevant period; hence this delay is not inherently improbable.

October 2012

36. According to the appellant the Sri Lankan authorities issued an arrest warrant against him dated 16 October 2012. This followed his failure to appear at a bail hearing fixed for 15 March 2012, thereby breaching his "bail conditions". It is the respondent's position that this warrant is inconsistent with his claim that the court had accepted that he had not sold medicines to the LTTE. However, as already noted, it was the appellant's consistent account that the court had not dismissed the case against him and that it had believed him. If the case against him had not been closed and he had been bailed, then it is not inconsistent or implausible that the authorities might have decided to take further action against him when he failed to appear to meet his bail hearing on 15 March 2012. Whilst it is not probable that the authorities would issue an arrest warrant pursuant to section 3(a), 5(a) and (b) of the Prevention of Terrorism Act No 48 of 1979 (aiding and abetting terrorists), I do not consider that it fails the lower standard of reasonable degree of likelihood, since if as a result of the original court proceedings the charges against him had not been dismissed, an arrest warrant for a failure to report was not an unusual step for the Sri Lankan authorities to take in the context of this legislation.

37. There are limited other shortcomings in the appellant's account, in particular to do with lack of documentation regarding the reports he claimed to make to international human rights bodies, but viewed in the round the appellant has made considerable efforts to document key aspects of his claim. In general terms I am prepared to accept the explanations he has given for failure to provide all relevant documents bearing on his claim. Having considered the main aspects of the appellant's claim under chronological headings I am persuaded that he has done just enough to the lower standard to establish a credible account.

38. In light of Mr Bramble's concession that if I found that the appellant's account of there having been an arrest warrant issued against him in 2012 is credible then he is entitled to succeed, applying the country guidance set out in **GJ**, it is unnecessary for me to proceed to assess the issue of risk on return further. On my above findings, and in light of Mr Bramble's concessions, the appellant is entitled to succeed in his appeal against refusal of his claim for international protection.

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant

and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 12 October 2018

Dr H H Storey
Judge of the Upper Tribunal