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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10541/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 October 2018	**On 10 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

SAKAYARAJ [R]
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms V Laughton, Counsel
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with the permission of the Upper Tribunal against a decision of Judge of the First-tier Tribunal Welsh dismissing his appeal against a decision of the respondent, dated 26 May 2017, refusing his protection claim.

2. The appellant is an adult Sri Lankan national. He came to the UK in April 2010 in order to study and he held valid leave as a student until this was curtailed in February 2015. In September 2017 he claimed asylum.

3. The appellant's account was, in summary, as follows. He said he fears the government who were looking for him on account of his involvement with the LTTE. He had become involved with the LTTE in 2006 and he was involved in transporting goods and providing accommodation. He also carried out some banking and computing tasks. His problems began in 2006 when he was detained at a checkpoint. He was questioned by the CID who told him that they knew he was involved with the LTTE. The appellant denied this and was beaten up. The appellant's release was secured by the payment of a bribe paid by his mother. After this experience an agent was found to arrange for his travel to India. He went to India in January 2007 and remained there until he came to the UK. His family told him it was not safe return because the CID were still looking for him. The appellant had joined the TGTE in July 2017 although he had been involved with them for a year before that. He had attended various demonstrations and a sports event as a steward.

4. Judge Welsh found the appellant had not given a credible account. She did not accept he had been involved with the LTTE in Sri Lanka and therefore she did not accept that he had been arrested, detained or abused. She did not accept that the reason he went to India was to escape adverse attention and she did not accept the reason he came to the UK was similar. She did not accept that the Sri Lankan authorities continued to look for him. In relation to the sur place activities, she found that his involvement was limited to observing at a few events and acting as a steward at a sports meeting. He had joined the TGTE but was a "passive member" and his decision to join had not been motivated by genuine interest or commitment but rather had been calculated to bolster his asylum claim.

5. Permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal. It was arguable the judge had erred in relying on her own post hearing research without putting the evidence to the parties. She also arguably erred in her approach to the medical evidence. The grounds which could be argued were not restricted.

6. No rule 24 response has been filed by the respondent.

7. I heard submissions from the representatives as to whether the First-tier Tribunal Judge made an error of law in her decision.

8. Ms Laughton made four points which are helpfully set out fully in her skeleton argument. She prefaced her arguments by suggesting that the adverse credibility findings made by the judge, when analysed, were either peripheral or erroneous. There were no "knockout points". The judge acknowledged that the account given was, in general terms, plausible when set against the background evidence. Therefore, if the decision was based on the accumulation of relatively small points, it

followed that if some of those points were found to be erroneous the decision would stand to be set aside.

9. The first ground of appeal argues that the judge's approach to the medical evidence gave rise to two discrete errors of law. The judge failed to consider the corroborative effect of the medical evidence and she also failed to take it into consideration as a factor when assessing the appellant's evidence. I shall consider these arguments in turn but, before doing so, I shall set out the evidence which was before the judge and what she said about it.

10. The appeal was heard on 13 February 2018. The judge was provided with a letter, dated 12 February 2018, written by the appellant's family doctor, Dr Fernandes, and addressed to the appellant's legal representatives. It stated that he had met the appellant on 9 February 2018 and reviewed his medical problems. The appellant complained he was suffering from insomnia, bad dreams and feelings of guilt in relation to his mother who was in Sri Lanka. He had described anxiety associated with sweating at night and this contributed to his difficulty sleeping. He had been taking citalopram for his anxiety and depression. However, the doctor advised that he change this to mirtazapine. He also suggested the appellant contact psychological services and gave him an information leaflet. Some blood samples were taken in order to exclude physical problems. Attached to the letter was a single page from the GP notes.

11. The judge noted the medical evidence at [35] to [37] of her decision. At [49] she returned to it under the heading of her approach to the assessment of credibility and, although she noted that the only evidence related to a visit to a GP over a year after the interview and the appellant had not taken any medication prior to November 2017, she said that she kept in mind that the appellant had told his interviewer that he was suffering from psychological fear and worries. She said that, if his account were true, he had suffered a terrible experience and this might be difficult to talk about. At [64] she concluded the medical evidence did not provide any independent support for the credibility of the appellant's account.

12. I have carefully considered the arguments put forward by Ms Laughton but I do not agree with her that the judge applied an erroneous approach. It is not a fair criticism in this case to suggest the judge imposed her own expertise over that of the doctor. The evidence was, by any standards, both slim in quantity and superficial in content and the judge was perfectly entitled to consider that it did not deserve significant weight. She was entitled to note that the appellant had not sought treatment until November 2017. The letter from Dr Fernandes was not intended as a medico-legal report in which an expert's reasoned opinions are put forward by reference to the Istanbul Protocol criteria. It is plain that Dr Fernandes accepted what the appellant said

about himself. There is nothing unusual about that. However, it is right to say, as the judge observed, that the evidence is "limited".

13. I do not consider the judge erred by diminishing the weight to be given to the report simply because it was a retelling of the appellant's evidence. Reference to cases such as *Y and Z (Sri Lanka) v SSHD* [2009] EWCA Civ 362 and *AM v SSHD* [2012] EWCA Civ 521 is not instructive in this case because, as said, the single letter produced was not comparable to a medico-legal report. Nor is the general guidance on reports set out in *JL (medical reports – credibility) China* [2013] UKUT 00145 (IAC), relied on by Mr Tufan as well, particularly helpful because that case was also based on consideration of a report from the Medical Foundation. The judge recognised that the brief letter from Dr Fernandes, apparently based on an initial appointment, whilst consistent with what the appellant had told the interviewer about himself and his fears, could not carry significant weight as corroboration for the reasons she gave.

14. For similar reasons, I see no error in the judge failing to go further in recognising the appellant's mental health may have affected his ability to answer questions. Ms Laughton argued the judge erred by not treating the appellant as a vulnerable witness in accordance with the Joint Presidential Guidance Note No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance. I reject that submission because, although the appellant's representatives made a written request to that effect, the record of proceedings of the oral case management review hearing suggests it was not raised by counsel. No reasonable adjustments or ground rules for the hearing were discussed. That is entirely consistent with the fact that, at the date of the case management review hearing, there was no medical evidence at all. The letter from Dr Fernandes is not sufficient to show that Judge Welsh erred by failing to treat the appellant as a vulnerable witness, particularly as this does not appear to have been suggested by counsel. There is no error in the manner in which the judge proceeded.

15. Ms Laughton's second ground consists of a list of pieces of evidence which she said the judge had overlooked. She argued the judge had not given sufficient consideration to the evidence such that her findings were unsafe. These arguments amount to little more than disagreement with the decision and an attempt to reargue it. Read as a whole, it is perfectly clear that this judge had close regard to the evidence before her, understood the case and made findings based on the evidence. It is a thorough and logically reasoned decision.

16. It is argued the judge ignored the explanation given by the appellant at his interview of his reasons for supporting the aims of the LTTE. I have looked at questions 39 to 42 of the interview transcript. It is correct that the appellant explained that he supported the Tamil cause but did not want to join the LTTE. However, the judge's point was that

this might not be sufficient to lead to the LTTE to try to recruit him, as he claimed. The judge's reasoning here may not be the strongest but it is certainly not eroded by the challenge as put forward.

17. Arguments that the judge erred at [55] by placing reliance on what the appellant failed to say at his interview about providing accommodation to the LTTE and in so doing the judge failed to recognise that the interview was led by the interviewing officer do not get very far given the appellant appears to have had the opportunity to give lengthy answers if he wanted to. Moreover, the judge relied mainly on the points set out in [54] that the appellant failed to mention until prompted important things which he had said at the screening interview.

18. The challenge to the judge's reliance on the appellant's failure to mention being released by means of a bribe at the screening interview is also without merit. The judge expressly noted that comparisons with the screening interview record should be dealt with cautiously because of the "brief nature of the preliminary interview". Furthermore, the judge's point was not simply that the appellant had not mentioned the bribe before but that the later account and the earlier account were, in her view, incompatible.

19. At [59] the judge noted the appellant travelled to India and then the UK, after transiting in Sri Lanka, without being apprehended. The grounds seize on this as the judge ignoring the country guidance, which explained that the prevalence of bribery and corruption meant that leaving Sri Lanka without difficulty was not probative of a lack of adverse interest (see *GJ and Others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC), at paragraph 170). However, the ensuing paragraphs of the judge's decision show she was fully cognisant of the point but had other reasons for doubting the appellant's account. The argument is simply not made out.

20. The last matter concerns the judge's finding that the appellant's involvement with the TGTE was not based on genuine commitment and was passive. Ms Laughton queried what was meant by 'passive' but I consider it clear that the judge had in mind someone who would be perceived as a mere 'hanger-on' by any interested person, as described by Sedley LJ in *YB (Eritrea)* [2008] EWCA Civ 360 (see paragraph 18). The grounds suggest the judge failed to have regard to the appellant's evidence in his witness statement that he wanted to help the Tamil cause. However, it is plain the judge recognised what the appellant's case was because she rejected it. Her reasons for doing so are cogent and fully explained in [66].

21. The third ground is the main one on which UTJ Kekic' granted leave. At [63] the judge considered and rejected the appellant's account that he left India in 2010 because he was told by the police that all Sri

Lankans had to leave. At subparagraph 63(3) the judge set out the results of her consideration of the respondent's 2010 COIR report. This information appeared to contradict the appellant's account because the UNHCR report showed that many refugees were returning voluntarily to Sri Lanka and a few were still arriving in India. Thousands remained in India.

22. In the Presidential decision in *EG (post-hearing internet research) Nigeria* [2008] UKAIT 00015, Hodge J said as follows:

> *"5. It is, however, most unwise for a judge to conduct post-hearing research, on the internet or otherwise, into the factual issues which have to be decided in a case. Decisions on factual issues should be made on the basis of the evidence presented on behalf of the parties and such additional evidence as the parties are aware of as being before the judge. To conduct post-hearing research on the internet and to base conclusions on that research without giving the parties the opportunity to comment on it is wrong. If such research is conducted, and this determination gives absolutely no encouragement to such a process, where an immigration judge considers the research may or will affect the decision to be reached, then it will be the judge's duty to reconvene the hearing and supply copies to the parties, in order that the parties can be invited to make such submissions as they might have on it."*

23. Ms Laughton argued the judge had fallen squarely into this error. The point had not been taken against the appellant in the reasons for refusal letter. Neither party had submitted the 2010 COIR report and no opportunity was given to the parties to comment on it. This was "grossly unfair" (referring to Schiemann LJ's judgment in *Maheshwaran* [2002] EWCA Civ 173).

24. The challenge is a powerful one as far as it goes. Mr Tufan rightly acknowledged that a judge should not rely on her post decision research to make an adverse credibility finding. It is a classic error. However, despite this, I do not consider it is enough to set aside the decision. That is because it is only one item on a list of three reasons given by the judge at [63] for finding that this part of the appellant's account lacked credibility. Her other two reasons (that the appellant was in India legitimately in order to study, not as a refugee, and, that nothing in the background evidence which had been submitted supported the appellant's evidence) are sound ones. The second reason shows that there was evidence before her on the issue of returns from India. In other words, the issue was already in the contemplation of the parties.

25. It is also right to see this finding in the context of the preceding paragraph in which the judge found the appellant's account of being unable to fly directly to the UK from India doubtful.

26. I find the judge made an error of law in relying on her post decision research but, in the particular circumstances of the case, it has not been shown that the error was a material one in that the outcome of the appeal might have been different had the judge not erred.

27. The final ground challenges the judge's treatment of the issue of the risk on return arising from the appellant's sur place activities with the TGTE. She found at [73] that he was a mere observer at three events and a volunteer steward at a fourth. Even if observed by the Sri Lankan authorities, these activities were not indicative of someone who was a threat to the integrity of Sri Lanka, which I take to be an intended reference to the country guidance given at paragraphs 336 and 354 of *GJ and Others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC). The judge gave cogent reasons for regarding his membership as passive in [66] of her decision.

28. Ms Laughton's challenge was that the judge misunderstood the Court of Appeal's decision in *UB (Sri Lanka) v SSHD* [2017] EWCA Civ 85. She erred because she failed to have regard to the evidence set out in that case.

29. In *UB (Sri Lanka)* the Court of Appeal considered the duty of the respondent to have disclosed to the tribunal her own policy guidance document (a COI report entitled *Tamil Separatism*, issued on 28 August 2014), to which were annexed letters from the British High Commission in Sri Lanka. Those letters stated that the TGTE was a proscribed organisation and that government sources had stated that individuals belonging to that organisation would face arrest under anti-terrorism laws. There had been no arrests to date but returnees may be questioned on arrival about involvement with such diaspora groups. This was "normal practice". A returnee may be detained after questioning. The court found there was "the clearest obligation" on the respondent to serve relevant material and ensure it was before the tribunal. It was not sufficient to say that the material was available online.

30. The issue in this appeal was the consequence for the appellant of being questioned on arrival about diaspora activities and, specifically, activities with a proscribed organisation which expressly seeks Tamil independence. He could not be expected to lie when questioned (*RT (Zimbabwe)* [2012] UKSC 38).

31. The judge's decision contains a very clear recognition of the argument being mounted, set out at [73] to [75]. However, having found for reasons which are not successfully challenged that the appellant was merely a passive member, she found the appellant fell within the category of persons described in paragraph 24 of Irwin LJ's judgment in which he gave reasons for finding the evidence which had not been disclosed was material. He said as follows:

> "24. In truth, consideration of the risk to the Appellant turns not merely on him showing that he was actually a member of the TGTE, but relies on his membership being detected on arrival in Sri Lanka. There is no suggestion that this Appellant is on any list of individuals of interest to the authorities in Sri Lanka. The objective findings by the FTT are clear that any activity by the Appellant in this country, even if observed or recorded, was low level and not likely to carry risks. That activity itself would not demonstrate membership of the TGTE. In addition, I bear in mind the very clear findings that the Appellant lied and exaggerated in alleging mistreatment during his last visit to Sri Lanka, and thus his credibility is low."

32. Ms Laughton pointed out that the Court of Appeal found, notwithstanding these reservations, that a different outcome remained a possibility and therefore allowed the appeal, quashing the tribunal's decision. No findings had been made by the First-tier Tribunal about whether the appellant in that case was a member of the TGTE (although it was found he had undertaken military service with the LTTE). The issue of materiality was distinct from guidance as to risk factors.

33. However, on my reading of the case, it is plain that the court was intending to show that mere membership of the TGTE was not always enough to show a real risk on return and, therefore, I consider it was open to the judge to regard the appellant as falling within a category of TGTE members who were not at risk.

34. In any event, I note that the judge went on to consider the position in case she was wrong about the appellant not being on a watch list. She found that the *RT (Zimbabwe)* argument would not apply because the appellant had nothing to lie about (see [77]).

35. The fourth ground does not disclose a material error of law either.

36. There are no other grounds. The appellant's appeal is dismissed.

NOTICE OF DECISION

The Judge of the First-tier Tribunal did not make a material error of law and her decision dismissing the appeal shall stand.

Signed Date 3 October 2018

Deputy Upper Tribunal Judge Froom