Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02559/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 December 2018	**On 23 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

NIRMAL MASHIKA WALIKANDEGEDARA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Shah, of 786 Law Associates
For the Respondent: Ms K Pal, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals, with permission, against a decision of Judge of the First-tier Tribunal Garratt, who in a determination promulgated on 3 April 2018 dismissed his appeal against a refusal of asylum made on 31 January 2018.

2. The appellant is a citizen of Sri Lanka born on 9 June 1987. He entered Britain as a student in 2010 with his wife as his dependant, as indeed she is his dependant in this appeal. An application for a further extension of stay as a student was refused in December 2013, with the refusal being

maintained in August 2014. That refusal was appealed and the appeal was dismissed in October 2014. The appellant subsequently claimed asylum in November 2016. The basis for the appellant's claim was that he was Sinhalese and had married a woman of Tamil ethnicity and that had led to him and his wife receiving death threats made in the main by the appellant's father. The appellant claimed that, despite the fact that he had been out of Sri Lanka for seven years, he would be killed by members of his family who disagreed with his relationship with his wife. The application had been refused by the Secretary of State on the basis that it was not credible and it was considered that the dependant's evidence was muddled. Section 8 was also relied on by the respondent.

3. At the hearing the appellant gave evidence as did his wife. The judge noted the terms of the statements provided, noting that the appellant had said at first he did not know who was trying to kill him but that he had later found that it was his father's friends, and he had not been allowed to go out of the family home when his father was there but he could do so when he was not. The appellant's evidence was that even though they were married he and his wife had lived in separate houses until four months prior to arriving in Britain. He asserted that he had been married in secret although his mother had been invited to the wedding.

4. The appellant's wife had confirmed that she and the appellant had been living together with her husband's extended family member, who was a Swiss national since 2017. It was noted that the appellant's wife's evidence was that her father was Tamil but her mother was Sinhalese. Her father had left her mother when she was 2 years old but her mother's wider family had not helped them because she had married to Tamil. She said that she had suffered because of her family name but nevertheless had become a national athletics champion at the age of 11 and that had enabled her to become very popular at school and within her community although others marked her out for her Tamil surname. She had therefore changed her name when the headmaster started to help with the sports equipment she required. She said that only both mothers and cousins had attended their marriage registration ceremony and said that she had received letters from her husband's relatives saying they would throw acid in her face.

5. In paragraphs 22 onwards the judge set out his findings and conclusions. He referred to the lower standard of proof before dealing with issues of credibility. He noted the terms of the judgment in the appellant's first appeal and referred to the **Devaseelan** guidelines, stating that he regarded the determination of **Devaseelan** as stating that the earlier determination should be a starting point and that if an appellant relied on facts that were not materially different from those put to the first judge and proposed to support the claim by what was, in essence, the same evidence as that available to the appellant at that time, the second judge should regard the issues as settled by the first judge's determination and make his findings in line with that determination rather than allowing the

matter to be re-litigated. He said that he could only depart from that principle if there was some very good reason why the appellant's failure to adduce relevant evidence before the first judge should not be held against him.

6. He did, however, state in paragraph 28 that:

> "I approach the decision in the first judge's determination with some caution bearing in mind that the appeal related to the respondent's refusal to extend the appellant's stay as a student rather than an international protection claim."

He went on to say:

> "However, the human rights claim in that appeal raised Article 3 issues concerning risk on return based on the appellant's wife's ethnicity and the appellant's father's opposition to that relationship. One of the main credibility issues referred to in the first determination is also present in this appeal namely whether or not the parties were living together after their marriage. The same contradiction in evidence which appears in this appeal was present in the first as well as consideration of the issue of serious harm emanating from the appellant's wife's Tamil ethnicity. The first judge examined and rejected those claims for the reasons set out in paragraph 18 of the determination."

7. In paragraph 30 he emphasised that he had treated the first judge's findings with some caution. However, while bearing in mind that the appeal before him was based on asylum and humanitarian protection grounds in addition to human rights he could find no reason to depart from those findings for the reasons which he then gave. In paragraph 31 onwards he set out in very considerable detail those reasons, referring again to the first judge's finding that the appellants were not credible. He stated that he could not accept that the appellant's mother would attend the party after the registration ceremony without learning that it was a party to celebrate the marriage and that the parties' evidence about keeping the marriage secret was damaged by contradictory accounts that each had given about cohabitation after the wedding. In the statement of 2014 the appellant had said that he and his wife had lived together before they came to Britain and yet they had later both denied that that was so. He stated that these were important inconsistencies because they did not enable him to conclude that any opposition to the marriage of the parties was so serious that it had to be kept secret. He stated:

> "I am certainly unable to conclude that the appellant's father was so incensed by the relationship and the marriage that he made death threats against the parties. In this respect I regard the additional documentary witness statements which have been submitted as no more than self-serving rather than an indication of a higher level of opposition to the relationship by the appellant's father."

8. He then referred to the Section 8 issue and the delay in claiming asylum and pointed out that the appellant's wife had changed her surname to improve her situation and therefore had a Sinhalese name and said that clearly the appellant's wife was prepared to take steps to avoid difficulties

when she had sporting ambitions whilst still a student. He did not accept that the appellant's wife was not resilient or adaptable enough to overcome any such difficulties in the future. He therefore concluded that the opposition to the appellant's relationship was not such that he should accept that the appellant's father would seek him and his wife wherever they went in Sri Lanka on their return and subject them to serious harm. There was no reason to suggest that they would have any serious difficulty in relocating. The judge found that the appellant was not a refugee and that his wife was also not entitled to international protection. He found that there was no reason why the appellant's Article 8 rights would be infringed by their removal.

9. The grounds of appeal stated that the judge had fettered his discretion because the first appeal "had nothing whatsoever to do with asylum or humanitarian protection". It was stated that the judge had not taken into account the Amnesty International Reports relating to Sri Lanka as relevant to the appellant's asylum and humanitarian claim and that he had adopted a preconceived view of the case.

10. It was also stated that the judge had based his decision on the appellant's past and "legally unrelated appeal" and the judge, it was asserted, had expressed unwillingness to allow the appellant's appeal to be litigated on the basis that it had been litigated previously.

11. It was argued that the judge should have found that the appellant's Article 3 rights would be infringed and that he had not properly considered the evidence of supporting witnesses that the appellant's father continued to make threats.

12. At the hearing of the appeal before me Mr Shah stated that the judge was wrong to apply the principles in **Devaseelan** and that he had ignored evidence in the appellant's bundle which post-dated the previous decision. He stated that if I accepted that that evidence had not been considered by the judge then I could consider it myself.

13. Ms Pal argued that the judge was correct to rely on the first decision, that credibility issues had been made and there were clear findings therein that the appellant would not suffer Article 3 ill-treatment. There was no error of law in the determination.

Discussion

14. I consider that there is no material error of law in the determination of the First-tier Judge. The central and possibly only point raised before me was an argument that the judge was wrong to use as a starting point the decision in the previous determination. I consider that there is no merit in that argument. The reality is that that determination related almost entirely on the issue of the appellant's rights under the ECHR and his and his wife's concerns about returning to Sri Lanka because of the threats by

the appellant's father. The first judge had found, and gave clear reasons for finding, that the appellant was not credible with regard to that claim. I consider that the judge was entirely right to conclude that that finding - that there was a lack of credibility in the appellant's claim - was a finding which had not been refuted by the appellant's evidence before him. In any event, it is very clear from the determination that the judge was cautious in his approach to the first determination. He says so in terms in paragraphs 28 and 30. It is clear that he did properly consider all the relevant facts himself. He was entitled to find for the reasons he gave that the appellant was not credible.

15. Similarly, I consider that the judge, where in paragraph 32 he says that he has taken into account the additional documentary witness statements which had been submitted and that they were no more than self-serving, gave sufficient consideration to those documents. I have looked at them myself, as Mr Shah invited me to do. The reality is that those statements (at pages 11 onwards of the exhibit bundle) do not advance the appellant's claim. I note that the first affidavit from Mr Ajantha De Silva dated 10 March 2018 does refer to the appellant being threatened by his father but he states that the appellant's father's threat was either to commit suicide himself or kill both of the appellant and his wife. I consider that the judge was entitled to find that little or no weight should be placed thereon.

16. The other statements refer to threats to stop the relationship or to kill both the appellant and his wife but again, applying the determination in the case of **Tanveer Ahmed**, I consider that no weight can be placed on those. In any event, the reality is that there is simply no evidence to indicate that there would not be a sufficiency of protection for the appellant and his wife on return. I asked Mr Shah if there is any evidence in the papers that a father would be able to kill his son with impunity but he could not point to such evidence.

17. In all, I consider that the conclusions of the First-tier Judge were fully open to him and that he did properly consider in detail the evidence before him and that he was fully entitled to consider the determination in the first appeal, given that Articles 8 and 3 issues were also referred to therein.

18. I therefore find that, there having been no material error of law in the determination of the First-tier Judge, his determination shall stand. This appeal is therefore dismissed.

Notice of Decision

The appeal is dismissed on asylum and human rights grounds.

No anonymity direction is made.

Signed  Date: 30 December 2018

Deputy Upper Tribunal Judge McGeachy