



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05853/2017

THE IMMIGRATION ACTS

Heard at: Field House
On: 21st January 2019

Decision & Reasons Promulgated
On: 30 January 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

BK
(anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellants: Mr Spurling, Counsel instructed by S.Satha & Co Solicitors
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Sri Lanka born in 1988. He appeals with permission the decision of the First-tier Tribunal (Judge NMK Lawrence) to dismiss his appeal on protection and human rights grounds. Permission to appeal to this tribunal was granted on the 27th November 2018 by First-tier Tribunal Grant-Hutchinson.
2. The protection claim advanced before the First-tier Tribunal was that the Appellant has a well-founded fear of persecution in Sri Lanka for reasons of his political opinion and his Tamil ethnicity. In terms of the facts, there were two limbs to the

Appellant's case. First that he had a history of political involvement, and persecution for reasons thereof, in Sri Lanka. This included association with the LTTE, lengthy detentions and ill-treatment. This history of involvement with the Tamil separatist cause in Sri Lanka begins in 2002 and ends in 2016 with an assault by members of the security services. The second limb was that the Appellant has, since his arrival in the United Kingdom in 2016, been actively involved with the 'Transitional Government of Tamil Eelam' (TGTE), that is to say the primary political grouping operating in the Tamil diaspora in the United Kingdom. This *sur place* activity, it was submitted, served to enforce and validate the Appellant's account of long-term political activism, but it also gave rise to a discrete risk even if the historical account narrated under limb one was rejected.

3. The First-tier Tribunal rejected the evidence going to the first limb. It found the Appellant's account to contain material discrepancies and omissions, such as his inability to recall dates and names when first asked. His claim to have been tortured was not credible given that he had no physical injuries or scars: "it defies physiology" [§22]. It was "simply not credible" that he did not know the amount paid by his uncle to secure his release from detention [§23]. Where his account was consistent with country background evidence this was immaterial, since information such as the names of detention camps is in the public domain [§26]. A letter produced from the Appellant's father attracts no weight because it is "self-serving" [§28]. Overall the Tribunal concludes that the account of events in Sri Lanka was a fabrication.
4. In respect of the second limb the Tribunal notes - and appears to accept - the Appellant's evidence that he has taken part in demonstrations in the United Kingdom including an event outside the Sri Lankan High Commission in London where a Brigadier of the Sri Lankan Army was observed to make a "throat cutting" gesture at the protesters. The Tribunal notes however that scores of people attend such demonstrations, and the Appellant has failed to provide a cogent explanation as to why it would be likely that he would be identified from the images gathered by spies.

The Grounds of Challenge

5. The Appellant submits that the decision of the First-tier Tribunal is flawed in the following material respects:
 - i) The credibility findings made in respect of the historical account are unreasoned and unsafe. *In particular*
 - a) The determination contains a complaint about the conduct of the Appellant's solicitors which is unfounded and could reasonably give rise to a reasonable suspicion of bias on the part of the Judge, the Appellant perceiving that he may not have received a fair hearing;

- b) The Tribunal's conclusion that the lack of scarring "defies physiology" was not one open to a Tribunal with no medical expertise;
 - c) The evidence of the Appellant's father cannot rationally be dismissed simply on the grounds that it is "self-serving";
 - d) The determination fails to mention the evidence that the Appellant had been referred for counselling. In circumstances where his mental health issues were attributed to his history of persecution this amounted to a failure to take material evidence into account and assess all relevant matters in the round;
 - e) Further the Tribunal failed, in this regard, to treat the Appellant as a vulnerable witness;
 - f) The determination contains errors of fact;
 - g) The risk assessment contains no findings on the 2016 incident which is claimed to have led to the Appellant's departure from Sri Lanka.
- ii) The analysis in respect of the *sur place* activity is confined to consideration of the Appellant's attendance at demonstrations in London. No consideration was given to the unchallenged evidence that he is a *member* of the TGTE (a membership card was produced at hearing), a matter which read with the country guidance material was capable in itself of giving rise to a real risk of harm: see UB (Sri Lanka) v Secretary of State for the Home Department [2017] EWCA Civ 85.

Discussion and Findings

6. I am unable to find any evidence of bias, or closed-mindedness, on the part of the Judge. At paragraph 3 of its decision the First-tier Tribunal criticises the Appellant's former representatives for the way in which an earlier adjournment application was drafted. The Tribunal clearly took a dim view of that application and comments that this "discrete matter should be referred to the Resident Judge". Quite whether the Tribunal itself made such a referral is unclear, but what is apparent is that it regarded the matter as an entirely separate issue from the merits of the appeal before it: hence the use of the word "discrete". Mr Spurling submitted that the nature of the credibility findings overall were indicative of a Tribunal that had "closed its mind" to the possibility that the Appellant was telling the truth. He invited me to read paragraph 3 of the determination, and the grounds critiquing it, in that context. I am unable to accept that this raises even an arguable case of bias. The fact that a Judge reaches negative credibility conclusions about a witness before him is not a basis upon which to challenge that Judge's impartiality. It would obviously make a nonsense of the appellate structure if determinations could be set aside because they

contained negative credibility assessments. There is nothing in the materials before me to indicate that there was any bias here.

7. I would add that at paragraph 24 of its decision the Tribunal interpolates the following comment, when describing events outside the Sri Lankan High Commission in February 2018 when the Brigadier made his “throat-cutting” gesture: “the impunity with which the Brigadier publicly made the gesture confirms, if needed, war crimes, and crimes against humanity, were committed by the Sinhalese government against the Tamils of Sri Lanka”. That is hardly the comment of a Tribunal that has ‘closed its mind’ to the possibility that the events described in this claim are true.
8. That said, I am quite satisfied that this determination must be set aside for the following reasons:
 - i) The Tribunal does not engage with the substance of the Appellant’s submissions in respect of the second limb of his case. It is the unchallenged evidence that the Appellant is a member of the TGTE. The relevance of that was that if he were to be returned to Sri Lanka he would likely be asked questions about whether he had participated in political activities in the diaspora (paragraph 308 of GJ & Ors Sri Lanka CG [2013] UKUT 319 (IAC) refers); applying the principles in RT (Zimbabwe) v Secretary of State for the Home Department [2012] UKSC 38 he could not be expected to lie, and since the TGTE is a proscribed terrorist organisation in Sri Lanka he would be reasonably likely to face serious harm as a result. The determination does not address any of that; it confines itself to considering whether the Appellant would be recognised by government spies watching demonstrators outside the High Commission. That omission is a material error of law.
 - ii) No findings of fact are made in respect of the 2016 incident which allegedly caused the Appellant to flee Sri Lanka. That omission is a material error of law.
 - iii) The Appellant had relied on a letter from the Bishop of Jaffna who personally attested that he has known the Appellant since birth, known him to have had association with the LTTE and drawn the adverse attention of the security services as a result. That letter, potentially important corroborative evidence, is nowhere acknowledged or assessed. That failure to take evidence into account amounts to a material error of law.
 - iv) The letter from the Appellant’s father is given no weight at all on the grounds that it is “self-serving”. That is not a rational basis upon which to reject evidence, since most, if not all, evidence adduced by a party will be “self-serving”:
 - v) The Appellant’s bundle contained evidence demonstrating that he had been referred, by the Medical Foundation, for counselling. That

evidence was relied upon as lending weight to the Appellant's claims to have experienced ill-treatment in Sri Lanka, and to some degree in response to criticisms of his evidence (for instance regarding his inability to immediately recall, when asked, the details of events that took place in 2006). That evidence is not weighed in the balance. That failure to take evidence into account amounts to a material error of law.

- vi) The Tribunal was not medically qualified and as such its comments that the Appellant's lack of external injury "defied physiology" were not rationally open to it (the Appellant claimed to have been kicked and beaten in 2006 but not to have received medical attention afterwards because his injuries were internal pains rather than external wounds).
9. I note for the sake of completeness that Mr Diwnycz made no submissions in defence of the determination. Both parties agreed that the most appropriate disposal, in light of the extent of judicial fact finding required, would be remittal to a judge of the First-tier Tribunal other than NMK Lawrence. I agree.

Anonymity

10. This appeal concerns a claim made under the Refugee Convention. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

"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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions

11. The decision of the First-tier Tribunal is set aside.
12. The hearing is to be re-heard de novo in the First-tier Tribunal.
13. There is a direction for anonymity.

Upper Tribunal Judge Bruce
21st January 2019