**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/07706/2019

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
| --- | --- |
| **On 7th January 2020** | **On 14th January 2020** |

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**CA**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mrs T Srindran, Counsel instructed by Waran & Co Solicitors
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

**DECISION AND REASONS**

1. An anonymity direction was not made by the First-tier Tribunal ("F*t*T"). As this a protection claim, it is appropriate that a direction is made. Unless and until a Tribunal or Court directs otherwise, CA is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies

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amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellant is a national of Sri Lanka. He arrived in the UK in September 2012 and claimed asylum in October 2012. The claim was refused by the respondent for the reasons set out in a decision dated 22 November 2012. An appeal against that decision was dismissed by First-tier Tribunal Judge Osbourne for the reasons set out in a decision promulgated on 17 January 2013. The appellant made further submissions to the respondent and the respondent refused the appellants claim for international protection for the reasons set out in a further decision dated 5 August 2019. The appellant's appeal against that decision was dismissed for the reasons set out in a decision promulgated by First-tier Tribunal Judge Hussain on 3 October 2010.

3. The First-tier Tribunal Judge summarises the claim made by the appellant at paragraph [9] of his decision. The judge heard evidence from the appellant and two witnesses. The judge's findings and conclusions are set out at paragraphs [12] to [28] of the decision. The judge considered the decision and findings of First-tier Tribunal Judge Osbourne to be his starting point. The judge noted that First-tier Tribunal Judge Osbourne had found there to be several discrepancies as to the appellant's claimed involvement with the LTTE and in respect of his general credibility. The judge refers to the evidence of the first witness, [Mr SK], at paragraph [14] of the decision. The judge refers to the evidence of the second witness, [Mr RR], at paragraph [15] of the decision. The judge states, at [15]:

> ".. He too claims to have known the appellant and confirms the appellant's claim of being involved with the LTTE and was granted Asylum status following a successful Asylum appeal hearing. However crucially [Mr RR] submitted a copy of his asylum interview in which the appellant is mentioned as the owner of a bus (used to transport to and from a political event). In addition the appellant has produced a photograph said to show the appellant and [Mr RR] together in 2011. The appellant relies upon this as corroborating his account of events leading up to his detention and ill-treatment."

4. The Judge found the evidence of [Mr RR] to be of no assistance to the appellant. The judge noted, at [17], that [Mr RR] had provided his Home

Office asylum interview record but had failed to provide a copy of the decision of the Tribunal, in which his appeal was allowed. At paragraph [18] of his decision, the judge stated:

> "[Mr RR's] account of events in his interview record is unclear but he states in his witness statement … that the appellant and himself were arrested at the same time on 21.01.12. However, the appellant fails to mention [Mr RR] or anyone else being arrested with him at the same time in his asylum interview. I also do not find the explanation as to how the appellant and [Mr RR] came to be reunited in the UK. The appellant lives in New Malden, Surrey and [Mr RR] lives in Clacton-on-Sea, Essex. However, I do not accept both met randomly at a Temple in East Ham, London. This is because both have more local Temples and no explanation was given as to why both attended this Temple, being several miles away, in East Ham on that particular day. There was no suggestion of any particular event or any specific feature of this Temple that drew both to this Temple in East Ham. Consequently I find that there has been a far greater co-ordination between the appellant and [Mr RR] than suggested to bolster the appellant's claim."

5. The First-tier Tribunal Judge went on to consider the medical report of Dr Francis Arnold that was relied upon by the appellant. The judge noted the report identifies numerous scars that are said to be consistent with the account of ill-treatment given by the appellant. At paragraph [23], the judge stated:

> "… I do not accept that the presence of these scars necessarily leads to the conclusion that the appellant was ill treated as claimed. This is because the appellant has been in the UK since 2012. On his own account he has been detained and mistreated prior to his last claimed detention on 21.01.2012. Indeed his account is that he was detained first time in 1990 and then on a further four occasions, during which time he was mistreated each time. So whilst I accept that the medical evidence demonstrates that the appellant has scars consistent with being beaten they do not show when and how they were sustained. In particular given that the appellant failed to produce a medical report at the time of his initial asylum claim and appeal hearing the ability to identify the age of the scars has been greatly diminished. As noted by FtTJ Osbourne there appeared to be no good reason for not producing a medical report at the appeal hearing on 17.1.2013. Consequently I do not accept that the appellant was detained and mistreated as claimed and certainly not on 21.1.2012.…"

6. The judge rejected the appellant's claim that he suffers from PTSD or is at increased risk of suicide if he is returned to Sri Lanka. The judge

noted that Dr Arnold relied heavily on the account given by the appellant himself and although the appellant is registered with a GP, he only receives treatment for physical musculoskeletal problems by way of course of paracetamol. The appellant seems not to have complained of or received any treatment for any psychological problems.

7. At paragraph [25], the judge concluded:

> "Even if I was to accept that the appellant was previously suspected of being a LTTE member or supporter as claimed I find the appellant does not come within the profile of individuals whom the Sri Lankan authorities have an on-going interest in GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)"

The appeal before me

8. The appellant advances two grounds of appeal. First, the judge failed to properly consider the medical report of Dr Arnold and failed to give sufficient weight to that evidence. Second, the judge made insufficient findings in respect of the evidence given by the two witnesses. In particular, the judge failed to make any finding as to whether the appellant is still wanted by the authorities, and the evidence of [Mr RR] was found to be of no assistance to the appellant because he had failed to provide a copy of the decision in respect of his appeal.

9. Permission to appeal was granted by First-tier Tribunal Judge Landes on 22nd November 2019. The matter comes before me to determine whether the decision of the First-tier Tribunal judge is tainted by a material error of law.

10. At the outset of the hearing before me, Ms Isherwood accepted that the First-tier Tribunal judge had been provided with a copy of the SEF interview record for [Mr RR] and during that interview [Mr RR] had made reference to the appellant. He had claimed that the 'army and CID' had attended the appellant's house. [Mr RR] said that he and the appellant had been blindfolded and taken in a van to an army camp. In his witness statement that was before the FtT, [Mr RR] had confirmed that he was arrested on 21/01/2012 at the appellant's house and the

appellant was also arrested at the same time. Ms Isherwood accepts the judge makes limited reference to that evidence in paragraph [18] of his decision, but without reasons, appears to have rejected [Mr RR's] evidence simply because the appellant himself had failed to mention [Mr RR] or anyone else being arrested with him at the same time in his asylum interview. She accepts the judge did not make an adverse credibility finding against [Mr RR] or indeed {Mr SK], but appears to have concluded that the evidence of [Mr RR] is of no assistance to the appellant, simply because he had failed to provide a copy of the decision and reasons for his successful appeal.

11. The focus of the decision of the FtT Judge in reaching his decision that the evidence of [Mr RR] is of no assistance to the appellant appears to have been upon the Court of Appeal decision in <u>AA (Somalia) -v- SSHD</u> [2007] EWCA Civ 1040. The extract of the Court of Appeal judgement that is referred to at paragraph [16] of the decision of First-tier Tribunal Judge Hussain is in fact part of the dissenting judgment of Lord Justice Hooper. In fact, at paragraph [17] of the judgement of the Court of Appeal *(from which the extracts at paragraph [16] of the FtT decision are taken)*, Lord Justice Hooper was referring to the decision of the Vice President in the AIT. Lord Justice Hooper noted that the AIT, in the passages referred to by the First-tier Tribunal Judge, was making it clear that, in cases involving different parties, the earlier decision is not binding and that "in the general interests of good administration" the earlier decision should be taken as no more than a starting point. Lord Justice Hooper found the reasoning of the Vice President very persuasive. Lord Justice Carnwath, with whom Lord Justice Ward agreed, held that the guidelines in the case of <u>Devaseelan v SSHD [2003</u>] Imm. A.R. 1, on the weight to be attached in immigration appeals to an earlier finding of fact, also applies to cases where the earlier decision involved different parties but where there was a material overlap of evidence.

12. I have carefully considered the decision of the First-tier Tribunal Judge for myself. It is now well established that although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if

the decision as a whole makes sense, having regard to the material accepted by the judge. The evidence of [Mr RR] regarding the arrest and detention of both himself and the appellant in January 2012 was at least capable of corroborating the account given by the appellant. The judge does not make any finding as to the credibility of [Mr RR], but appears to proceed upon the premise that his evidence is of no assistance to the appellant because of his failure to provide a copy of the decision and reasons in his appeal. It would no doubt have been preferable for that decision to have been before the FtT, but the First-tier Tribunal did have before it, the SEF interview in which [Mr RR] had expressly referred to the appellant. The judge refers to that evidence at paragraph [15] of the decision, but fails to consider the extent to which that evidence is capable of corroborating the appellant's account in the absence of the Tribunal decision.

13. As to the medical evidence, the First-tier Tribunal Judge referred to the appellant's failure to produce a medical report during his claim for asylum and at the hearing of his appeal in 2013. In fact, First-tier Tribunal Judge Osbourne had found that given the short timescale "*... there may be an acceptable reason why no medical evidence was adduced with respect to scarring on the appellant's body.".* FtT Judge Osbourne considered that as the appellant was not credible, in the absence of corroborative medical evidence, his appeal could not succeed. In his decision, First-tier Tribunal Judge Hussain, at paragraph [25], appears to proceed upon the basis that FtT Judge Osbourne had found there to be no good reason for not producing a medical report at the hearing of the appeal in January 2013. The evidence of scarring, identified by Dr Arnold as being consistent with the account of ill-treatment given by the appellant, was again capable of corroborating the appellant's account of events when taken together with the other evidence before the Tribunal. Although the weight attached to the evidence is a matter for the judge, the judge appears to have proceeded upon a mistake as to fact in his understanding that FtT judge Osbourne had said there was no good reason for not producing a medical report at the appeal hearing in January 2013. A careful evaluation of all of the evidence before the Tribunal was required, but is not apparent from the decision.

14. Having considered the concession made by Ms Isherwood, and the decision for myself, I am satisfied that the decision of First-tier Tribunal Judge Hussain is tainted by a material error of law and should be set aside.

15. As to disposal, the assessment of a claim for asylum such as this is always a highly fact sensitive task. In all the circumstances, I have decided that it is appropriate to remit this appeal back to the F*t*T for hearing afresh, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. The nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

## Notice of Decision

16. The appeal is allowed. The decision of F*t*T Judge Hussain promulgated on 3rd October 2019 is set aside, and I remit the matter for re-hearing de novo in the First-tier Tribunal, with no findings preserved.

Signed Date 7th January 2020

Upper Tribunal Judge Mandalia

## FEE AWARD

No fee is payable and there can be no fee award

Signed Date 7th January 2020

Upper Tribunal Judge Mandalia