Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02379/2021
[UI-2021-001505]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 April 2022	**On 23 June 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

KE
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Wass, instructed by Nag Law Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Sri Lanka. He appealed to the First-tier Tribunal against the respondent's decision of 13 November 2020 refusing his claim for international protection.

2. The appellant's claim arises from events which he says took place in 2008, at which time he was living in Sri Lanka and working as a pastry chef at a hotel in Colombo and also did work as a part-time tour guide on his days off. He claimed that he met two men, one called Stanislaus from Canada and another, Joseph, from Batticaloa, who wanted to tour around the

country and whom he led on three separate tours in 2008. He said that they had made a fourth tour on their own.

3. The appellant claimed that he was contacted by Stanislaus's wife, who said that he and Joseph had been abducted in a white van. He said that a few days later he was arrested by the army and detained and tortured and interrogated, and during this time he saw Stanislaus in army detention.

4. The appellant provided documentary evidence in the form of a translated police report headed "Extract from the Information Book of Slave Island Police Station". It was dated 13 September 2008 at 14.20. It was a signed statement by the appellant, recorded by an officer who the judge presumed to be an inspector. It recounted how the allegation of being involved in assisting LTTE terrorists was explained to the appellant by the police officer and that he did not accept this. He said that two police officers from Slave Island came to his place of work on 13 September 2008 and he was taken into custody and came out of the hotel with them. An army vehicle was there when he came out. Police officers ordered him to get onto the vehicle and he was handed over to officers attached to the Terrorist Investigation Unit at Panagoda Military Camp.

5. Thereafter, the appellant said that he was ill-treated while in detention by the army, being hung upside down and beaten to the point where he was rendered unconscious. He received medical treatment and remained in custody until he was released into the custody of a court on 8 December 2008. During the time he was in detention he saw Stanislaus in army detention

6. On 8 December 2009 he was charged with helping the two terrorists, remanded to prison, and subsequently was released on bail. He said that after he had first reported, which was a condition placed on his release, he went to the Human Rights Commission with Stanislaus's wife and signed a statement saying that he had seen Stanislaus alive at Panagoda Army Camp. By this stage he had already decided to flee the country because he and his family feared he could be convicted and imprisoned and he feared further torture if detained again.

7. The appellant said that he came to the United Kingdom on a French passport and in a different name. He said that he left Sri Lanka on 22 February 2009. He said that he had travelled on that passport as he believed he would be at risk if he stayed in the United Kingdom with a case pending against him. He said that he had brought his original passport in his own name with him as he considered that to be legal in the United Kingdom he would require it.

8. It was part of the appellant's history that he came to United Kingdom in 2003 to visit family and said that he returned to Sri Lanka subsequently and was in Sri Lanka of course at the time when the events set out above occurred.

9. The judge set out the evidence and his conclusion on it in considerable detail. He came to the conclusion that the appellant's lacked credibility. This was for a number of reasons.

10. He considered that it was only the gradual development in the unravelling of his narrative that the appellant provided any sense of why Stanislaus and Joseph could have been seen to pose any security threat by the authorities. The judge considered that the appellant's descriptions of the trips they carried out developed somewhat during the various stages at which he provided evidence. At the screening interview he referred to visits to the Parliament in Colombo, to airports and some government places. That was referred to in the screening interview in August 2018 and subsequently in the substantive interview of November 2019.

11. In his July 2021 statement the appellant referred specifically to carrying out three tours for the two men including visiting Ratmalana Airport, which the appellant said was an airport managed by the Sri Lankan Army, and that during the third trip they asked to stop to take photographs of what was a military establishment it appeared, the Kosgama Artillery Camp.

12. The judge also considered that it did not appear that there was any need for the two men to have a tour guide in any event as they had an established base in Colombo from which they could be expected to have the knowledge to visit the surrounding regions.

13. A further difficulty in the judge's view was the fact that the Slave Island Police Book extract, on the face of it, completely contradicted the account given by the appellant of his arrest at the hotel where he worked. The extract from the Police Book put him at the police station at the very time that he was supposed to be confronted at the hotel by two police officers who, with the co-operation of Human Resources at the hotel, obliged him to go on formal leave, before handing him over into the custody of the army upon their leaving the hotel.

14. A further concern of the judge's was that thought the appellant claimed that there was an arrest warrant which had been served upon his lawyer Mr Imam in Sri Lanka, that had not been provided. In a letter Mr Imam said that he understood that the appellant had been arrested on 13 September 2009 and was subsequently produced at court and released on bail, and that subsequently, having left the country, an arrest warrant was issued by the court relating to the support of terrorist organisations under aiding and abetting. At a directions hearing the appellant was given four weeks to obtain the warrant, having told his barrister that since lockdown had been lifted in Sri Lanka he could obtain the warrant, but it was said that during lockdown a reduced staff only was undertaking extremely urgent work in the court system in Sri Lanka, and hence the appeal bundle had been prepared without the warrant. A friend of the appellant was asked by the appellant's mother to send legal documents to the appellant in England but said that due to COVID restrictions his mother was unable to get the letter from Mr Imam.

15. The judge commented that the letter from the appellant's friend left in complete confusion why lockdown would have prevented the mother of the appellant or his friend contacting Mr Imam, whether by post, email, or telephone, to arrange for him to send any legal documents such as the arrest warrant directly to the United Kingdom for the attention of the appellant and his legal representatives.

16. The judge also referred to there being a gaping evidential void concerning the lack of evidence of criminal proceedings that Mr Imam and another lawyer, Mr Samad, had been involved in concerning the appellant, and his failure to provide the statement he made to the HRC and the LLRC which, the judge considered, would have been accompanied by the associated statement of Stanislaus's wife, and also what he considered must seem to be readily available evidence from Human Resources at the hotel in Sri Lanka. The judge considered that this was all documentation that it could be expected would not only confirm the appellant's account of being arrested at the hotel in September 2008 but also his presence in Sri Lanka at that time.

17. The judge also disbelieved the appellant's account of having been tortured, on the basis that it did not appear consistent with the background evidence concerning the degree of brutality involved in ill-treatment of suspects by the Sri Lankan authorities in contrast to what appeared to be the relatively mild treatment meted out to the appellant.

18. The judge summed up his findings at paragraphs 167 onwards in his decision. He referred to the fact that the appellant had asserted from the very outset of his asylum claim that he would be providing evidence for what he had had to undergo in Sri Lanka and no credible explanation had been provided for why this had not been forthcoming other than the Slave Island Police Book extract. No credible explanation had been provided by the lawyers as to why they had not provided evidence of the criminal legal proceedings against the appellant, not least the warrant of arrest. Nor had there been evidence from his family, who would presumably have lost the 300,000 rupees sum they had put up in bail for him, nor the evidence from his friend Mr Kumarasinghe, who had sent him photographic evidence of his employment at the hotel although, as the judge commented, the location and date were not capable of verification. This, the judge considered, was considerably compounded by the lack of evidence from the HRC and the LLRC of the statement made to them by the appellant. He considered that the claim that the provision of evidence had been made impossible because of the pandemic did not stand up to examination because of the numerous other means of communicating with the different sources for such documentary evidence during a lockdown period and there not having been any evidence of attempted communication with the courts, HRC, LLRC, Stanislaus and/or his wife in Kotahena or indeed in Canada. The background evidence indicated that the documentary evidence of arrest and court proceedings could be obtained by family members of accused persons.

19. A further issue, which is one that appears emerged only at the hearing, is that of whether indeed the appellant had ever left the United Kingdom after coming here in 2003. The judge considered that it would have been quite apparent to the appellant and his representatives that the core of his asylum narrative required his presence in Sri Lanka in 2008/09 and no attempt had been made to access any ostensibly readily available evidence establishing that that was where he was living at that time. The judge considered that evidence could have been provided to show his employment at the hotel in Colombo between 2003 and 2009 on the basis that it would have been readily available from Human Resources at the hotel that he was working there at that time. The judge said that there would also have been the regular evidence of a social life with family, friends and colleagues at work, as evidenced by the isolated photograph of 19 men in chef whites said to be at the hotel but which was impossible to date. The judge referred also to evidence of other obligations attached to living life as an employed person over that period, such as tax liability and other financial transactions as could be evidenced in bank statements. He considered that there would have been email correspondence of the appellant within the circle of his life between 2003 and 2009 and there was an absence of evidence from close family members of the appellant who would have been expected to know that he had returned to Sri Lanka after his visit.

20. As a consequence of these adverse findings, the judge concluded that the appellant had in fact not shown that he had left the United Kingdom in 2003 and that therefore the entire account was untrue.

21. The appellant was granted permission to appeal on four grounds, each of which was relied upon and developed by Ms Wass in the hearing.

22. Ground 1 concerns the argument that the judge had concluded as he did on credibility on an unreasonable/irrational basis. In referring to the "unravelling" of the appellant's narrative in respect of the services he provided to Stanislaus and Joseph, it was argued that in fact he had been asked very few questions about that and at one point when he tried to set out what had happened he was interrupted in the interview, at question 17. Only a few questions related to his actions in Sri Lanka prior to his detention by the authorities. He could not therefore reasonably have been expected to have provided every detail of his claim when asked the general question "what was the incident". He was asked no follow-up questions concerning the details of the exact tour services he provided, or on how many occasions this happened. The first opportunity he had to this was in his appeal statement.

23. Likewise, he was asked minimal questions concerning Stanislaus and Joseph and therefore the criticism of his account that he did not mention that he was used as a cover for them until he made his witness statement was, again, an unsound finding.

24. With regard to finding that there was no credible evidence that the appellant had claimed asylum in 2009 and that in fact he had been an

overstayer since 2003, the point was reiterated that this matter had only been raised at the hearing. Ms Wass argued that the matter had not been referred to either in the refusal decision or in the respondent's review. The appellant could not be expected to have provided documents in respect of an issue which was only raised at the hearing and the conclusions in this regard as a consequence were materially flawed.

25. In the second ground it was argued that the judge had speculated in making findings about the appellant's credibility. This was specifically with regard to his conclusion that records would have been kept by the Human Resources Department at the hotel in Colombo where the appellant claimed to have worked. This was entirely speculative, particularly bearing in mind that it was over ten years since he had worked there. There was further speculation at paragraph 22 where the judge speculated with regard to the appellant's email address as to whether the inclusion of the numbers 2003 was possibly commemorative of his 2003 entry. It was argued to be speculative that there would have been email correspondence of the appellant within the circle of his life between 2003 and 2009.

26. The judge had further erred, as contended in ground 3, in describing the attorney's letter as being printed on a blank sheet of paper without letterhead. It was clear that both pages of the letter clearly displayed the letterhead including office and residential details and this error was material as the judge had found that this document could not be relied on.

27. With regard to the judge's finding that the Slave Island extract, on the face of it, had to be taken as completely contradicting the account given by the appellant of his arrest at the hotel and that it put him at the police station at the very time he was supposed to be confronted at the hotel, it was argued that this sought to make concrete evidence which the appellant had provided but which was in fact heavily caveated. He had clearly been pushed on a number of occasions in cross-examination and he was far from certain as to the exact time, just that the arrest occurred in the afternoon.

28. The findings were also flawed by the fact that the judge found it was incredible that the appellant would have received such "mild" treatment as he described, having only described being tortured on one occasion. This was inconsistent with the background evidence which referred to torture being endemic and common, which entirely accorded with the appellant's account.

29. The final ground was in respect of risk categories. There it was argued that since the appellant's account was that there was an extant arrest warrant against him in Sri Lanka as a result of his breaching his reporting conditions he fell into a further risk category in GJ.

30. It was also relevant to note that the lawyer in a letter sent shortly before the hearing had referred to difficulties in obtaining the arrest warrant due to COVID difficulties.

31. A final point was that the judge had erred both in respect of the matters set out in each ground and cumulatively, and it was not possible to separate out findings as they all had to be read together.

32. In his submissions, Mr Melvin relied on and developed the points in his Rule 24 response. The judge had addressed every aspect of the appeal. It had been said that the warrant would be produced but this was never done and there was no credible explanation for this though the appellant had an attorney in Sri Lanka. He had not produced evidence of being in Sri Lanka at the material time and the judge was entitled to conclude as he did. There was a lack of evidence of his work in the hotel and the lawyer could relatively easily have carried out enquiries with the hotel and the judge was entitled to find that records of the appellant's work would have been available. Paragraphs 174 and 175 were to be read together and the findings were open to the judge. Even if he had erred in respect of the attorney's letter it was the content of the letter that was important where it was said that there was a warrant but there was no follow-up or explanation. The core of the claim was that he was on a stop list and at risk of persecution. The judge was entitled to find as he did about torture in Sri Lanka. Ground 4 depended on the earlier findings being flawed and the judge disbelieved the existence of the arrest warrant.

33. By way of reply, Ms Wass referred to the fact of the attorney's explanation under cover of a letter of 26 November 2011 as to why the documentation in Sri Lanka could not be provided because of the pandemic and a backlog of hearings and that it was stored in a manual system and priority was given to urgent cases.

34. I reserved my decision.

Discussion

35. As regards ground 1, it does seem to me that the appellant had the opportunity at interview to set out the full account of the services he provided to Stanislaus and Joseph and the reason why that ended up placing him at risk as he claimed. He was asked questions relating to them and gave some response as to what the "incident" was, and I consider the opportunity was there for him to set that out.

36. The other main point in ground 1 is the argument that the respondent only raised at the hearing her view that the appellant had not shown that he had left the United Kingdom after the 2003 visit and therefore was not in Sri Lanka when the events complained of occurred.

37. It is right that this matter was not specifically referred to in the decision letter or in the respondent's review. Nevertheless, in light of the challenge to the credibility of the claim, in my view, the matter could and should have been anticipated by the respondent's representatives and addressed.

38. If I am wrong in that regard, however, I consider that in any event, leaving entirely aside the judge's findings as to the availability and possibility of evidence being provided to show that the appellant was in fact in Sri Lanka

at the material times, I consider that the adverse findings on credibility are in essence sound. There are certainly matters where on the findings there are elements of flawed consideration, for example the error with regard to the attorney's letter and the question of whether or not it had a letterhead, and also with regard to finding lacking in credibility the appellant's receiving only what was described as "mild" treatment as claimed in detention. I agree with Ms Wass on both of those points.

39. However, of particular relevance is the significant absence of supporting evidence for the appellant's claim. I consider the judge was entitled to find that the Slave Island extract is inconsistent with the account he gave of his arrest at the hotel. Though there was an element of uncertainty in his evidence, in essence it was fully open to the judge to find that the extract put the appellant at the police station at the time he was supposed to be confronted at the hotel and that is a fundamental difficulty with his evidence.

40. A further problematic matter is the failure to produce the arrest warrant which he said existed. I do not agree that it was not open to the judge to find that the explanation provided for its absence was inadequate. It does not appear that any further adjournment was sought for the evidence to be provided , and, though there is the explanation given by the lawyer as to post-COVID difficulties, nevertheless the judge in essence addressed this explanation in effect and I consider that it was open to him to have concluded as he did with regard to the existence of the arrest warrant.

41. It was also relevant to note the absence of evidence from the HRC and the LLRC of the statement made to them by the appellant. The judge was entitled to note the absence of any independent corroborative evidence. He did not insist upon there being corroborative evidence but properly noted its absence. It was also open to him to conclude that there was no credible evidence that the appellant had claimed asylum at any time in 2009.

42. Bringing these matter together, I consider that though there are flaws in the judge's reasoning, those matters can be clearly separated from the material matters which caused him not to accept the essence of the appellant's claim. As a consequence, I consider that no material error of law in the decision has been identified, and his decision dismissing the appeal is as a consequence maintained.

Notice of Decision

The appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 29 April 2022

Upper Tribunal Judge Allen