



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000462

First-tier Tribunal No: PA/53348/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24 May 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

PS
(Anonymity Order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms U Miszkiel, instructed by KT Solicitors Limited
For the Respondent: Mr Wain, Senior Home Office Presenting Officer

Heard at Field House on 28 April 2023

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse his protection and human rights claim.

2. The appellant is a citizen of Sri Lanka born on 15 March 1966 in Trincomalee, of Tamil ethnicity. He arrived in the UK on 28 March 2008 and claimed asylum the same day. His claim was refused on 24 April 2008 and his appeal against that decision was dismissed on 22 June 2008. He became appeal rights exhausted on 23 September

2008. He did not leave the UK but made further submissions on 3 October 2018 and 18 October 2010 which were refused without a right of appeal on 25 September 2009 and 24 November 2010 respectively. He then made submissions on 21 June 2021 which were refused on 8 August 2022, but with a right of appeal. The appellant exercised his right of appeal and his appeal was heard before the First-tier Tribunal on 15 December 2022 and dismissed in a decision dated 9 January 2023. It is that decision which is the subject of these proceedings.

The Appellant's Claim and Further Submissions

3. The appellant claims to have left Sri Lanka for India as a refugee in 1983, to have graduated there and worked as a teacher and then within the computer industry and to have then returned to Sri Lanka in November 2005 and opened a business called Jeevan Technologies. His claim, as initially stated when he claimed asylum in March 2008, was that on 3 March 2008 five men from the Karuna faction of the LTTE came to his house, that one of them hit him on the head and that they took him to a camp where he was asked to give them money. He told his wife to sell off one part of Jeevan Technologies and she did so, and paid the Karuna group who then released him on 7 March 2008. On 15 March 2008 he found an agent to take him from Colombo to the UK and on 25 March 2008 he left Trincomalee and went to Colombo. He stayed in a guest house in Colombo until 28 March 2008 when he flew to the UK using a false passport. He was caught with the false passport on arrival to the UK. His wife and child were kidnapped by the Karuna group on 28 March 2008. He feared being killed by the Karuna group if he went back to Sri Lanka. The appellant claimed never to have been involved with the LTTE.

4. The respondent refused the appellant's claim, concluding that it was not a genuine and credible claim, given the various inconsistencies in his account in relation to the dates of visits from the Karuna faction people, his detention, the sale of parts of his business and his ownership of the business. The respondent did not accept that the appellant was the managing director of Jeevan Technologies as claimed, and did not accept that he was detained by the Karuna group, that he was wanted by them or that they were holding his wife and child. The respondent concluded that the appellant was at no risk on return to Sri Lanka and believed that he had in fact come to the UK for economic betterment, since he arrived here in possession of his employment history, CV and medical information.

5. The appellant's appeal against that decision was heard on 6 June 2008 by Immigration Judge Rowlands who found his claim to be lacking in credibility and considered that he was at no risk in Sri Lanka, and dismissed his appeal.

6. In his further submissions of 3 October 2008, the appellant claimed that the general country situation in Sri Lanka had deteriorated and that Tamils were specifically being targeted. On 27 March 2009 he submitted further documentary evidence, namely a letter purporting to be from the Divisional Secretary, Town and Gravets, Trincomalee, and a copy of a certificate of residence purporting to be from the President of Karambakkam Council. The respondent, however, did not accord the documents any weight and on 25 September 2009 maintained the decision that the appellant's claim was not a credible one and that he was at no risk on return to Sri Lanka, refusing to treat the submissions as a fresh claim.

7. The appellant's further submissions of 18 October 2010 were made on the basis of new caselaw, a worsening situation in Sri Lanka and a claimed previous affiliation with the LTTE. The appellant claimed that his brother had been kidnapped and killed

by the Karuna faction and the Sri Lankan army on 10 March 2009 after they tried to get information from him about his whereabouts and that of his wife. The respondent noted that the appellant had never previously claimed to be affiliated to the LTTE and did not accept his claim in that respect. The respondent maintained the previous decision.

8. On 29 January 2021 the appellant's solicitors wrote to Mr Thilakan Kanakarathnam, an Attorney-at-law in Colombo, Sri Lanka asking for information about the appellant's family following the appellant's claim that his wife and daughter had been arrested on 7 August 2020 and released on bail and that his wife had told him that a warrant had been issued for his arrest. The appellant's solicitors had been told by the appellant that Mr Kanakarathnam was representing his family in Sri Lanka. Mr Kanakarathnam's response of 2 February 2021 confirming that they had been arrested and released was then followed by email communication between the appellant's solicitors and Mr Kanakarathnam resulting in confirmation from Mr Kanakarathnam that he had located the appellant's court file in the Magistrates Court in Colombo and was sending them a certified copy of the court documents and the arrest warrant.

9. On 26 April 2021 the appellant underwent a psychiatric assessment, via video link in the UK, with Dr Balasubramaniam who produced a scarring and independent psychiatric report dated 27 April 2021. Dr Balasubramaniam confirmed in his report that the appellant had a scar on the left side of the top of his head which was consistent with the appellant's claim to have been hit with the butt of a rifle or an accidental fall, and a scar on his left knee which was again consistent with the appellant's claim to have been beaten with a stick or consistent with an accidental fall, both of which were consistent with the appellant having memory problems. Dr Balasubramaniam also diagnosed the appellant with PTSD.

10. The appellant's solicitors then made further submissions on his behalf, on 15 June 2021, relying upon the email correspondence between themselves and the attorney-at-law Mr Kanakarathnam, a copy of Mr Kanakarathnam's Sri Lankan bar association membership card, letters from Mr Kanakarathnam enclosing the certified copy of the court file and arrest warrant, Dr Balasubramaniam's psychiatric report, the appellant's GP records and Daily Mirror Articles regarding deportees being handed over to CID in Sri Lanka. The submissions also relied upon country information for Sri Lanka which was said to support the credibility of the appellant's account. It was asserted that the appellant's claim was supported by the scarring report and the psychiatric assessment as well as by the correspondence between themselves and Mr Kanakarathnam confirming the case against him and enclosing the court documents and arrest warrant accusing him of involvement in terrorist activities. The appellant's solicitors relied upon the case of PJ (Sri Lanka) [2014] EWCA Civ 1011 in regard to the weight to be given to lawyer-to-lawyer correspondence and documents obtained by lawyers in Sri Lanka and the case of QC (verification of documents; Mibanga duty) China [2021] UKUT 33 in relation to the respondent's obligation to verify documents. It was submitted on behalf of the appellant that he would be on a "stop list" and would be arrested on arrival in Sri Lanka, and further that he would be questioned on return to Sri Lanka because he would not be travelling on his own passport and would be required to tell the authorities about his previous detention by the Karuna group. The appellant's solicitors relied upon the country guidance in KK and RS (Sur place activities, risk) Sri Lanka (CG) [2021] UKUT 130 in regard to the risk of persecution in detention in Sri Lanka and submitted that the appellant was entitled to refugee status. Reliance was also placed upon Article 3 of the ECHR in regard to the appellant's mental health.

11. The respondent agreed to consider the appellant's submissions as a fresh claim, but refused the claim on 8 August 2022, finding no reason to reverse the decision of Judge Rowland. The respondent gave no weight to the arrest warrant and did not consider that Dr Balasubramaniam's report showed that the appellant was subjected to torture in detention. The respondent maintained the view that the appellant's account of being detained and tortured was not a genuine account and that he was not at risk on return to Sri Lanka.

Appeal before the First-tier Tribunal

12. The appellant's appeal against that decision came before First-tier Tribunal Judge O'Keefe on 15 December 2022. The appellant's representatives provided a skeleton argument and the respondent provided a respondent's review. The appellant gave oral evidence before the Tribunal. The judge was satisfied, on the basis of Dr Balasubramaniam's report, that the appellant was a vulnerable adult, and she agreed that he be treated as such for the hearing. The appellant's representatives made it clear that the appeal was pursued on protection grounds only and not in relation to Articles 3 or 8. The respondent confirmed that if the appellant's account was accepted as credible, then he would be at risk of persecution. However it was not accepted by the respondent that his account was credible.

13. The appellant relied upon his witness statement in which he claimed to have joined the LTTE and to have trained people for the LTTE prior to going to India, and to have continued working for the LTTE after returning to Sri Lanka in 2005. He claimed that when he was abducted by the Karuna group he was held for one week and was forced to work for them and not for the LTTE, to which he agreed in order to save his life. He stated that when he did not keep his promise the Karuna group targeted his family who were then arrested and only managed to escape with the payment of a bribe. The appellant claimed not to have given the full account of his involvement with the LTTE previously as he had been advised by friends not to do so and he apologised for not having provided a credible account previously. He claimed that his wife and daughter were detained when returning to Sri Lanka from India on 7 August 2020 and that, whilst his daughter was released after four hours, his wife was not released until 12 August 2020. They both then left Sri Lanka for India. His wife was told, when she was detained, that there was an arrest warrant for his arrest and after informing his solicitors of that they contacted the attorney Mr Kanakaratham and obtained the arrest warrant.

14. Judge O'Keefe took the decision of Judge Rowlands as her starting point, pursuant to the principles in Devaseelan [2002] UKIAT 00702 and noted that there was new evidence before her which had not been before Judge Rowlands, namely the report from Dr Balasubramaniam, the arrest warrant and statements from the appellant and his wife. The judge found the appellant's explanation for not mentioning his alleged previous involvement with the LTTE to be lacking in credibility and considered that he was simply embellishing his account. The judge noted other discrepancies and inconsistencies in the evidence which undermined the appellant's credibility. She found that the report from Dr Balasubramaniam added little weight to the appellant's claim and she did not place reliance upon the document purporting to show that an arrest warrant existed for the appellant. She did not accept the appellant's account and concluded that he would not be at risk on return to Sri Lanka. The judge accordingly dismissed the appeal on all grounds.

15. The appellant sought permission to appeal against that decision on three grounds. Firstly, that the judge's assessment of the reliability of the arrest warrant was

unreasonable and irrational and lacked anxious scrutiny since the arrest warrant was obtained independently of the appellant by lawyer to lawyer correspondence and since the UN Special Rapporteur's report dated 23 July 2018 supported his account of an arrest warrant being issued against him in 2016 as it highlighted that Tamils with perceived links with the LTTE were being detained and tortured at that time. Secondly, that the judge had failed to consider the submissions regarding the risk on the basis of the appellant's illegal departure from Sri Lanka. Thirdly, that the judge had made unreasonable findings regarding Dr Balasubramaniam's scarring and psychiatric assessment.

16. Permission was granted in the First-tier Tribunal on the first part of the first ground only, and refused on the second part of ground one and the other grounds.

17. The matter then came before me.

Hearing and Submissions

18. As a preliminary matter at the hearing, Ms Miszkziel advised me that the appellant had never been issued with a Form IA68 when permission was granted on limited grounds only, which was the usual procedure when permission was refused, and there had therefore been no opportunity for an application to be made the Upper Tribunal for permission to appeal on those other grounds. She requested that, in the circumstances, she be permitted to argue all grounds. Mr Wain opposed that request. However I decided that, in the interests of fairness, all grounds could be argued and I gave Mr Wain some time to prepare to address the other grounds.

19. Ms Miszkziel also raised the matter that Mr Wain had been the Home Office Presenting Officer in the appeal before the First-tier Tribunal. She raised the matter in the context that if there was any question of Mr Wain providing details from his knowledge about the proceedings before the First-tier Tribunal and thus in effect acting as a witness, the proceedings would have to be adjourned. Ms Miszkziel did not otherwise have any objection to Mr Wain appearing for the respondent and did not raise any issues on the matter either during the proceedings or after they had concluded. Indeed I confirm that there were no issues arising such that Mr Wain's appearance as a representative was prejudicial to the appellant.

20. Ms Miszkziel then made her submissions. With regard to the first part of the first ground of appeal, upon which permission had been granted by the First-tier Tribunal, she submitted that the arrest warrant ought to have been considered as a reliable document because of the way in which it was obtained, namely by way of lawyer-to-lawyer correspondence. She submitted that Judge O'Keefe had, at [43], accepted the paper trail between her instructing solicitors and Mr Kanakarathnam and had accepted Mr Kanakarathnam's Bar Association card, and that there had never been any objection by the respondent at the hearing to Mr Kanakarathnam's credentials nor any suggestion of discreditable conduct by Mr Kanakarathnam, although she also conceded that neither had there been any concessions by the respondent. Ms Miszkziel submitted that the arrest warrant had not been provided to Mr Kanakarathnam for his verification but, on the contrary, he had had to search the court registry for three to five days before he located it and had then had to make an application for a certified copy of the document which he then sent to the UK solicitors, in the envelope copied in the appeal bundle. There was therefore a complete paper trail and, in the light of the corroborative documents, there needed to be more reasons provided by the judge for rejecting the reliability of the document. The appellant's credibility itself was an irrelevant consideration as the document had not been obtained, received or supplied

by him. There needed to be verification by the Secretary of State. Accordingly the appellant would be on a 'stop list' and, as confirmed in KK and RS, would be at risk of being detained and subjected to persecutory treatment.

21. Ms Miszkiel submitted, with regard to the second part of the first ground of appeal, that the UN Special Rapporteur's report of 23 July 2018 referred to Tamils with perceived links with the LTTE being detained and tortured in 2016. That had been mentioned in the skeleton argument before the judge and therefore should have been considered by the judge, who was wrong to find, at [52], that the appellant's account that a warrant was issued for him in 2016 was inconsistent with the country information. With regard to the second ground, Ms Miszkiel submitted that the judge had failed to consider the risk to the appellant because of his illegal departure from Sri Lanka which was evident from the false passport handed in to the immigration service when he arrived in the UK, and was a matter confirmed in the CPIN report of 2022 at paragraph 7.1.2. In accordance with [308] of GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319, the appellant would be questioned on return to Sri Lanka and could not be expected to lie and so would have to reveal that he had left the country illegally. That was a risk factor that was independent of the appellant's credibility and had not been considered by the judge. As for the third ground, Ms Miszkiel submitted that the judge had failed to give anxious scrutiny to Dr Balasubramaniam's report and that the reasons she had given for according the report little weight were inadequate. She submitted that the judge had wrongly referred to the diagnosis as being one of depression rather than PTSD and that the error made by the judge was material since it affected the appellant's credibility.

22. Mr Wain submitted that the judge had given adequate reasons in relation to the arrest warrant, for the purposes of [41] of PJ (Sri Lanka). With regard to the appellant's reliance upon QC (China), the respondent was not required to verify the documents and was entitled to question the reliability of the documents. The judge properly considered the documents in the round, in accordance with the principles in Tanveer Ahmed [2002] UKIAT 00439, taking account of the various inconsistencies in the appellant's evidence as a whole. Mr Wain submitted that the reliance in the grounds upon the UN Special Rapporteur's report was only relevant if the appellant was accepted as having been involved with the LTTE, which he was not. Ground two was only relevant if the appellant's account of his previous experiences was accepted, but it was not. As for the third ground, Mr Wain submitted that the judge was entitled to accord the weight that she did to Dr Balasubramaniam's report.

23. Ms Miszkiel, in response, reiterated the submissions previously made.

Discussion

24. Ms Miszkiel, on behalf of the appellant, relies upon the guidance in PJ in regard to the weight to be given to lawyer-to-lawyer communication and submits that the arrest warrant sent to her instructing solicitors by Mr Kanakaratham ought to have been accepted by the judge as genuine, given the manner in which it was obtained. However it seems to me that the appellant's reliance upon PJ is based upon an over-simplified view of the guidance in that case and that there is nothing in the guidance in PJ which obligated the judge to reach the conclusions advocated for by Ms Miszkiel.

25. Firstly, it is relevant to have regard to the fact that the Court of Appeal, at [29] of PJ, made it clear that the involvement of lawyers did not create a rebuttable presumption that the documents produced in that situation were reliable. Secondly, whilst the Court in PJ at [41] found that the process by which the documents in that

case were obtained, namely through the involvement of two independent lawyers in Sri Lanka, was a significant and weighty matter, the reason for setting aside the Upper Tribunal's decision was not simply because there had been such a process, but because there had been no proper analysis of, or explanation for rejecting, the validity of the documents in such circumstances by the Tribunal. Thirdly, it is relevant to note that the Court found it of particular significance in that case that not only was the relevant document obtained from the court in Sri Lanka by two independent lawyers but also that it was accompanied by a letter from the Magistrate of the relevant court to the Controller of Immigration and Emigration which stated that the appellant was in the United Kingdom and that he was to be arrested on his return to Sri Lanka. Clearly, that was not a matter that featured in this appellant's case. Fourthly, what was material in PJ was that the Court considered that the documents in question had been obtained by the two lawyers in Sri Lanka completely independently of the appellant: at [9] in PJ the point was made that the lawyers were unknown to the appellant and had been contacted by his UK solicitors. However that was not the case with this appellant as Mr Kanakaratanam was a person whose details were given by the appellant to his solicitors as someone who was already involved with his family, as the judge noted at [43]. Although Ms Miszkiewski relied upon Mr Kanakaratanam's Bar Association membership card and the lack of any challenge by the respondent to his credentials, she also accepted that there had not been any concession made by the respondent in that regard. In the circumstances, and given the other significantly adverse findings on the reliability of the appellant's evidence, the judge was not required, without more, to accept the information provided by Mr Kanakaratanam.

26. In any event, as Mr Wain submitted, this was not a case where the judge had failed to undertake any detailed analysis of the evidence or failed to give any explanation for according the documents limited weight, as the Court found to be the case in PJ. Judge O'Keefe was fully aware of what was considered in PJ and she assessed the evidence accordingly. She had regard to the guidance in QC on the verification of documents and gave proper reasons for concluding that there was no requirement for the respondent to verify the documents. She followed the test in Tanveer Ahmed and considered the reliability of the documents as part of the evidence as a whole, as the Court of Appeal in PJ considered at [29] to be the appropriate course. The judge noted at [45] that, whilst the appellant had asserted that his wife was tortured when arrested, the letters from Mr Kanakaratanam did not mention such an occurrence, a matter she was fully entitled to take into account when assessing the weight to be given to the evidence provided by Mr Kanakaratanam. More generally, the judge considered other matters adverse to the appellant. At [50] she had regard to the fact that he had accepted that the version of his claim given to the respondent on arrival was not true and that he had previously been found to be untruthful. She noted that even taking the appellant's claim at its highest, he had had no involvement with the LTTE since 2008, and that there therefore appeared to be no reason why an arrest warrant would have been issued against him. She noted that the appellant's account had been found by Judge Rowlands to be lacking in credibility and that it had, in addition, changed since the hearing before Judge Rowlands, with a new assertion of involvement with the LTTE contrary to the previous claim to have had no such involvement.

27. In such circumstances, the judge was perfectly entitled to regard the arrest warrant and its claimed provenance with circumspection. There was nothing in her assessment of that evidence that was contrary to the principles in PJ and I reject the assertion in the first ground that her assessment was lacking in anxious scrutiny or was unreasonable. The UN Rapporteur's report relied upon at [7] to [10] of the grounds, even if arguably overlooked by the judge, added nothing to the appellant's

case, given the judge's rejection of his claim to have had (or been perceived to have had) previous links to or involvement with the LTTE.

28. As for the second ground, nothing material arises from Ms Miskiel's reliance upon the guidance at [308] of GJ that the appellant could not be expected to lie when questioned on return to Sri Lanka, given that his account of past persecution had not been accepted and that there was nothing in the country guidance to support a claim that any person having left Sri Lanka illegally would be at risk on return on that basis alone.

29. There is, likewise, no merit in the third ground which challenged the judge's assessment of the medical report from Dr Balasubramaniam. Contrary to the assertions made in the grounds, the judge gave full and careful consideration to the report at [38] to [42] and provided cogent reasons for according it the weight that she did. She considered Dr Balasubramaniam's opinion on the appellant's two scars and was perfectly entitled to find that his conclusion on the causation of the scars lacked clarity and detail and was of limited weight. The point made by the judge at [39] about Dr Balasubramaniam's assessment being by video-link was not a criticism of the process itself, as Ms Miskiel's submission appeared to suggest, but of Dr Balasubramaniam's failure to explain how that impacted upon his ability to undertake a proper assessment. The grounds assert further that the judge erred by finding Dr Balasubramaniam's diagnosis of depression to be inconsistent with the appellant's GP records when his diagnosis had only been of PTSD and not depression. However the judge's finding was entirely consistent with [13(c)] of Dr Balasubramaniam's report where he referred to the appellant requiring anti-depressants. The judge's observations at [40] to [41] were drawn from the evidence before her and she was entitled to conclude as she did.

30. For all these reasons I find no merit in the grounds. The judge undertook a careful and detailed assessment of the evidence. She provided cogent reasons for according the weight that she did to the evidence and was entitled to reach the conclusions that she did. The grounds do not identify any errors of law in her decision. Accordingly I uphold her decision.

Notice of Decision

31. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The decision to dismiss the appeals stands.

Anonymity

The anonymity direction made by the First-tier Tribunal is maintained.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 May 2023