



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/13152/2010

THE IMMIGRATION ACTS

Heard at Field House
On 4 February 2014

On 13 February 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MR KANAPATHPILLAI JEEVANATHAN
(No Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Walker of counsel instructed by A P Solicitors

For the Respondent: Ms a Everett a Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a citizen of Sri Lanka who was born on 22 March 1976. He has been given permission to appeal the determination of First-Tier Tribunal Judge G Jones QC ("the FTTJ") who dismissed his appeal against the respondent's decision of 28 May 2010 to give directions for his removal from the UK following the refusal of asylum.
2. In May 2004 the appellant applied for a visit visa which was refused. On 25 December 2008 he entered the United Kingdom using false travel documents and claimed asylum. This was refused in the decision of 28 May 2010.

3. The appellant claimed to be of Sri Lankan nationality and Tamil ethnicity. He said that he was removed from Colombo with other Tamils in June 2007 and placed in a camp in Vavuniya for two days before being released. He then went to Jaffna. He was arrested by the Army on 9 October 2008 on suspicion of being a member of the LTTE. He was taken to a police station and questioned before being identified by a masked man. He was transferred to an Army detention camp where he was beaten and burned with cigarettes. He refused to sign a document admitting that he was a member of the LTTE. A cousin in Canada provided the money to pay a bribe to procure his release on 9 November 2008. On 11 November 2008 the police came to his aunt's house looking for him. They may also have looked for him in Jaffna. The appellant left Sri Lanka on 23 December 2008 using his own passport and flew to India. From there the agent took his passport and provided him with a false one which he used to travel to the UK.
4. The respondent accepted the appellant's identity, nationality and ethnicity but did not believe his account of events or that he would be at risk on return. The appellant appealed and the FTTJ heard his appeal on 10 December 2010. Both parties were represented and the appellant gave evidence. The FTTJ found that the appellant was not a credible witness and did not believe his account of events. He concluded that the appellant would not be at risk on return. He had not established any substantial private life in the UK. The appeal was dismissed on asylum and Articles 2, 3 and 8 grounds.
5. The appellant applied for and was granted permission to appeal. Thereafter the appeal has an unfortunate and convoluted history. It came before First-Tier Tribunal Judge Chana sitting as a Deputy Judge of the Upper Tribunal 2 August 2011. She found that the FTTJ did not err in law and upheld his determination. The respondent took steps to remove the appellant who then sought judicial review. In the judicial review proceedings there was an order that the respondent should not remove the appellant pending an application by him for permission to appeal to the Court of Appeal or for the Upper Tribunal to exercise its powers under Rule 43. The full procedural history and reasoning is set out in the Notice of Decision of Upper Tribunal Craig dated 23 December 2013 in which he set aside the decision of Deputy Upper Tribunal Judge Chana pursuant to Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008. As a result the current position is that I must decide whether the FTTJ erred in law and if so whether his decision should be set aside and remade.
6. Ms Walker relied on the grounds of appeal and submitted that the FTTJ erred in law. What he said in paragraphs 14 to 16 of his determination indicated that he was biased. It showed a predisposition to disbelieve Sri Lankan Tamil asylum seekers. Whilst it would have been open to him to take into account his experience of similar cases this should not lead inevitably to an adverse conclusion. In effect he was applying too high a standard of proof. His criticism that the appellant was not able to supply the names of his cousins in Canada who had provided the money to pay the bribe was based on a misunderstanding of the evidence. The appellant was never asked for their contact details. The FTTJ gave adverse weight to the appellant's claim that they were brothers not cousins whereas there was no inconsistency if they were related to each other as

brothers and to the appellant as cousins. It was impermissible speculation by the FTTJ not based on country evidence to conclude that a masked informant would not identify everyone in front of him as a member of the LTTE. There was no reason to expect the appellant to disclose his scarring at his first interview. It was disclosed at the substantive interview.

7. Ms Walker made an application to add further grounds of appeal. In paragraph 9 of the determination the FTTJ found it was not credible that the appellant was suspected of being involved with the LTTE in 2007 when he was removed from Colombo to a camp in Vavuniya. This was an error because the appellant never claimed to have been suspected of involvement with the LTTE in 2007. Secondly, in paragraph 20, what the FTTJ said were inconsistencies between what the appellant said in reply to questions 53, 67 and 97 in his main interview were not on close examination inconsistent at all. Thirdly, in paragraph 28 there was no proper assessment of the risk which the appellant would still face if he was released on payment of a bribe. The FTTJ's reasoning was not supported by any evidence.
8. Ms Walker submitted that there were errors of law such that the decision should be set aside in which case it should be remitted for rehearing in the First-Tier Tribunal.
9. Ms Everett did not oppose the application to amend the grounds of appeal to the Upper Tribunal and I granted leave for this to be done.
10. Ms Everett accepted that there was merit in some of the grounds of appeal and some problems with the determination. Apart from arguing that it was open to the FTTJ to conclude that the appellant was not entitled to asylum even if his claim was taken at its highest, she made no further submissions. I reserved my determination.
11. Although I do not go so far as to conclude that the FTTJ showed bias I find that he erred in law by treating matters which were at worst no more than neutral as damaging to the appellant's credibility. If the FTTJ was aware from his own judicial experience of a number of Sri Lankan asylum seekers who had claimed to have relatives resident in the United States or Canada who were able to provide funds for claimants to pay bribes for example to obtain release from custody or to pay an agent to leave Sri Lanka, then this would not on its own be damaging to this appellant's credibility. The FTTJ made no reference to any evidence before him which might indicate that such claims were always or even frequently inherently implausible and I can see no reason why they should be. By the very nature of asylum claims from particular countries they are likely to display similar characteristics which, if supported by reliable country information, are more likely to mean that those circumstances are genuine rather than not. The whole tenor of paragraphs 14 to 18 of the determination indicates that the judge regarded as implausible and damaging to the appellant's credibility the fact that he claimed to have obtained funds from cousins in Canada. The error is exacerbated by the fact that in paragraph 14 the FTTJ states that the appellant claimed "to have a cousin, whose identity was not then divulged and whose address was never given, resident in Canada...." Whilst the appellant speaks of a cousin in

Canada in reply to question 50 at his main interview the FTTJ should not have relied on a statement that the appellant was not able to provide that person's name when in reply to question 68 the appellant gave the full names of both cousins. As to reliance on the alleged failure to disclose the address of the cousins I can find no indication that the appellant was ever asked for this information. Phrases used by the FTTJ such as "who just happen to provide money", "a generous cousin resident in Canada" and "to have the good fortune to have a relative resident in Canada... who just happens to be contactable and able and willing to remit funds" would have been better avoided because they give the impression of that cynicism which the FTTJ disclaims in paragraph 16.

12. In paragraph 18 the FTTJ gives the impression that those who the appellant claimed provided funds could not have been cousins and brothers. There is of course no reason why they should not have been related to each other as brothers and to the appellant as his cousins.
13. I find that in the absence of relevant country information it was impermissible speculation for the FTTJ to conclude that it was not plausible that a masked informer would not identify every individual in some sort of identity parade as a member of the LTTE.
14. In paragraph 26 the FTTJ said; "if, as the appellant claimed, one year later at his substantive interview, he had been burned with cigarettes, it is astonishing that he did not see fit to mention that during the screening interview and to draw attention to the scars which should then have been present." This sits uneasily with what the FTTJ said later in the same paragraph; "in saying that, I bear in mind that a screening interview was just that, and that considerable detail is not normally required. Nonetheless, one might expect a person to mention one of the main forms of mistreatment rather than simply saying that he had been beaten whilst in detention. Equally the appellant had the opportunity to exhibit his scars, if they existed at that time. He did not do so." One of the statements which would have been read to the appellant at the beginning of his screening interview states; "The questions I am about to ask you relate your identity, background and travel route to the United Kingdom. At this stage you will not be asked to give more than very brief gave details of your asylum claim - this is simply for administrative process." Against this background I find that the FTTJ erred in relying on the appellant's non-disclosure of the claim that he had been tortured by burning with cigarettes and was scarred as damaging to his credibility particularly as he did say, in answer to question 10.1 that he was beaten by the military who suspected him of being an electrician for the LTTE. He did refer to this torture and scarring in reply to questions 44 and 45 at his main interview.
15. In paragraph 9 the FTTJ erred in treating as damaging to the appellant's credibility a finding that when he was moved from Columbo to Vavuniya in 2007 he was suspected of assisting the LTTE. The appellant never claimed to have been suspected at this stage.

16. In paragraph 20 the FTTJ erred in treating as damaging to the appellant's credibility what he concluded was inconsistent evidence as to whether the officer who procured the appellant's release and took him in a jeep spoke to the appellant's agent at that place and time. Examination of the answers to questions 97 to 99 indicate that the appellant did not claim to know when or where the officer and the agent spoke to each other, only that his agent later told him that they had done so.

17. I find that these errors of law mean that the adverse credibility finding cannot stand and the determination must be set aside. I do not consider that it would be safe or just to try and determine the appeal on the basis of whether the appellant would be at risk if his account of events was accepted at its highest. In the absence of clear and reliable findings of fact and in the light of the Senior President's guidance the appellant has not had an effective hearing before the First-Tier Tribunal with the result that his appeal should be re-determined there.

Signed:.....
Upper Tribunal Judge Moulden

Date: 9 February 2014