



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/02095/2015

THE IMMIGRATION ACTS

Heard at Field House

**Decision &
Promulgated**

Reasons

On 16 March 2018

On 21 March 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

M S M H

[Anonymity direction made]

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss M Dogra, Counsel instructed by MBM Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to make that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge Broe promulgated on 27 November 2017 (“the Decision”). By the Decision, the Judge dismissed the Appellant’s appeal against the Respondent’s decision dated 22 January 2015 refusing his asylum and human rights claim.
2. This is the second time that this appeal has been referred to this Tribunal, an earlier decision of First-tier Tribunal Judge Lodge promulgated on 7 October 2016 (also dismissing the appeal) having been set aside by Deputy Upper Tribunal Judge Grimes by a decision promulgated on 2 May 2017 on the basis that the First-tier Tribunal Judge had erred procedurally by determining the appeal in the absence of the Appellant or his representatives. Judge Grimes remitted the appeal to the First-tier Tribunal for re-hearing leading to the Decision under appeal on this occasion.
3. The Appellant is a national of Sri Lanka. He came to the UK in October 2008 with leave as a student valid to 31 October 2011. His leave in that category was extended to 21 November 2012 and then to 28 February 2015. The conditions of that leave prohibited work. On 18 May 2013, he was encountered working and using a forged Tier 1 Post Study Worker visa. He was detained pending removal and claimed asylum three days later.
4. The Appellant claims to be at risk because, in January 2008, the Sri Lankan authorities raided a property owned by the Appellant’s father but in the Appellant’s name and weapons had been discovered. The police arrested the Appellant and his father. The Appellant was detained for ten days and ill-treated but was then released possibly because of his age but also on payment of a bribe by his uncle. His father remained detained and has not been seen since.
5. The Appellant was able to travel to the UK without incident in that same year. Although he says that his mother told him that the police had come looking for him in 2009, the Appellant says that he was assured by a lawyer that he did not remain of interest and he therefore returned to Sri Lanka in 2011 to see his mother. He says that he was arrested at home a few days later, again detained and again released following payment of a bribe. He says he was told to report to the police every fortnight. The Appellant’s uncle is said to have bribed airport officials so that the Appellant could leave Sri Lanka. He left Sri Lanka in January 2012. His mother told him that an arrest warrant had been issued against him in August 2012.
6. The Judge did not accept that the Appellant’s claim is credible for reasons given at [27] to [38] of the Decision. He therefore found that the

Appellant was of no interest to the Sri Lankan authorities and would not be at risk on return.

7. The grounds of appeal challenging the Decision are in short summary that the Judge's adverse credibility findings cannot stand due to errors in the analysis of the evidence and failure to take into account relevant evidence. It is said that, if the Appellant's claim were accepted as credible, applying the country guidance in GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) ("GJ"), the Appellant falls into a category of persons at risk on return.
8. Permission to appeal was granted by First-tier Tribunal Judge Keane in the following terms:-

"[1] The appellant applied in-time for permission to appeal against the decision of Judge of the First-tier Tribunal Broe promulgated on 27 November 2017 in which the judge dismissed the appeal on asylum, humanitarian protection and human rights (Articles 3 and 8) grounds. The grounds disclosed arguable errors of law but for which the outcome of the appeal might have been different. First, although the judge referred to a warrant issued by the Sri Lankan authorities for the arrest of the appellant (paragraph 34 of his decision) and a letter from a lawyer, Mr Marsook (paragraph 37 of his decision) the judge did not accord substantive consideration to either document when assessing the appellant's credibility. The judge arguably might have arrived at a different finding in respect of the appellant's credibility if he had embarked upon a substantive consideration of either document. Second, the judge arguably perpetrated a procedural irregularity but for which the outcome of the appeal might have been differing in alluding to a difficulty with the appellant's credibility to which a judge had referred at an earlier substantive hearing of the appellant's appeal (paragraph 37 of his decision). The application for permission is granted."

9. The matter comes before me to assess whether the Decision does disclose an error of law and to re-make the decision or remit to the First-tier Tribunal for re-hearing. At the conclusion of the hearing, I indicated that I found an error of law in the Decision and would issue a decision setting out my reasons for so finding which I now turn to do.

Discussion and conclusions

10. I deal first with those of the Appellant's submissions which I reject. At [35] of the Decision, the Judge dealt with the Appellant's ability to enter and exit Sri Lanka on not one but two occasions at a time when he claimed the authorities had already shown an interest in him. The Judge dealt with this part of the claim as follows:-

"[35] He claims that he was detained at his mother's home a matter of days after he arrived. He was taken to the police station and again released after the payment by his uncle of a bribe. I note that there is no evidence from his uncle. He was detained, according to the documents he relies on, for "suspected connection with terrorist

activities”, by any measure a serious allegation. Despite that he was able to pass unhindered through the airport on his departure for this country. He says that this was because his uncle again paid a bribe, this time presumably to officials at the airport. I find this to be inconsistent with his account of passing through the airport as a normal passenger. He presented his own passport to whoever was in position and followed the other passengers. He was not helped to bypass the checks and was not told to deal with anyone in particular. I do not find it credible that his uncle would have been able to pay a bribe which would have affected the security system in its entirety.”

11. Ms Dogra pointed out that the reason why the Appellant has not produced evidence from his uncle is that his uncle has (inexplicably) withdrawn his support for the Appellant. Whether or not the Judge was entitled to rely on the lack of evidence from that source, however, the Judge’s finding at [35] was open to him. The Appellant was not accompanied by his uncle when he left Sri Lanka and passed through the airport. It is not said that he was told by his uncle to ask for any particular named official who had been bribed to allow the Appellant to pass notwithstanding the authorities’ interest in him. As the Judge observed, the Appellant’s case is that he left along with the other passengers passing through two or three checks before boarding the plane. As the Judge observed, if this part of the claim is to be found credible, then on the Appellant’s account, the uncle would have had to bribe either all the airport officials so that any one of them would have allowed the Appellant to pass or to have bribed a sufficiently senior official who could have instructed all the officials to allow him to pass. The Judge was entitled to find the account implausible. The fact that, as Ms Dogra observed, the country guidance makes reference to corruption being rife is not an answer to the implausibility of the Appellant being able to leave in this way.
12. The other ground which I reject is the second one on which reliance was placed by First-tier Tribunal Judge Keane when granting permission, namely Judge Broe’s reference to an earlier decision which had been set aside on appeal. This ground was not pressed by Ms Dogra but I deal with it for completeness. At [37] of the Decision, the Judge said this:-

“[37] I have given careful consideration to the documentary evidence provided by the Appellant. I note that the letter from Mr Marsook is dated 26 June 2012 yet refers to events in 2013. The Appellant says that this is a typing error. His mother has attempted to contact Mr Marsook but he cannot be found. This is a hearing de novo and no findings in the earlier determination affect my decision but I note that problem with this letter was raised at the hearing in September 2016. The Appellant has had a year to address the problem but has failed to do so. I am therefore able to attach little weight to that document and only limited weight to the other documents provided by the Appellant.”
13. As is clear from what the Judge there says, he has carefully excluded reliance on the earlier decision which had been set aside. That he was required to exclude from his consideration the substance of that earlier decision does not mean, however, that he was also required to exclude it

as part of the background chronology in this case. The Judge was entitled to have regard to the identification of the problems with the lawyer's letter over a year earlier and to the Appellant's failure to provide an adequate explanation or evidence in this regard.

14. This brings me on to what is really the Appellant's principal ground of challenge, namely the Judge's treatment of the letters from two separate lawyers and the arrest warrant dated August 2012.
15. Dealing first with the letter from Mr Marsook which does find mention at [37] of the Decision, this refers on its face to a date of "26.06.2012" ([AB/15]). As the Judge correctly points out at [37] of the Decision, the letter refers however to events which occurred after that date in 2013. At [AB/16] of the bundle, there is a DHL envelope in which the letter is said to have been sent which shows a date of delivery of 8 April 2015 but that does not take matters further. Ms Dogra pointed out that there is a letter on file from the Appellant's solicitors dated 10 March 2017 which does confirm that they were trying to contact Mr Marsook for confirmation about the date but were awaiting a response. There is also a letter dated 23 February 2017 in which the same solicitors indicate that the Appellant's previous solicitors had provided an additional letter from Mr Marsook confirming that the date should be "26.06.2013". Ms Dogra confirmed however that there is no copy of such a letter before the Tribunal and none was before Judge Broe.
16. In light of the lack of evidence as to the date, the Judge was entitled to give less weight to the letter from Mr Marsook. However, what he was not entitled to do was to discount altogether the letter from the other lawyer, Mr Seneviratne, and the arrest warrant without considering the substance of those documents. Even if the letter of Mr Marsook was not accepted as genuine because of the error appearing on its face, that did not inevitably mean that all the other documents produced by the Appellant could not be accepted. The Judge needed to consider whether the other two documents were genuine and/or what weight could be placed on them. I am satisfied that this amounts to an error of law which undermines the adverse credibility finding based on the documentary evidence.
17. Ms Dogra also directed my attention to a number of other errors made by the Judge within the section dealing with the credibility findings. At [33] and [34] of the Decision, the Judge considered the reasons why the Appellant had not claimed asylum at an early stage. The Judge was clearly entitled to take into account the delay particularly when the Appellant claimed to have been at risk when he arrived on both occasions in the UK but had not claimed until he was encountered working in breach of his conditions about eighteen months after his second entry to the UK and nearly five years after the first occasion.
18. However, as Ms Dogra pointed out, the Judge has failed to take into account all of the reasons why the Appellant said he had not claimed earlier. Of particular importance was what the Appellant said when

questioned about this in interview that he was not aware of the arrest warrant at an earlier stage. This leads on to a further error identified at [34] of the Decision. The Judge there found it not to be credible that the Appellant would return to Sri Lanka in 2011 for a number of reasons. The first of those is that “[i]f the Appellant’s account is right he left Sri Lanka in fear for his life and before he returned the authorities found out that he had escaped and issued a warrant for his arrest. Despite that he chose to return in 2011.” As Ms Dogra pointed out, that misunderstands the chronology. The arrest warrant was not in fact issued until after the Appellant left Sri Lanka on the second occasion.

19. Another of the reasons given by the Appellant for the delay is that he still had continuing leave and so did not consider it necessary to claim asylum earlier. The Judge makes no reference to that reason. On its own, that is not a particularly compelling reason not to claim, particularly where, as here, the Appellant was reliant on a forged visa showing his ability to work (and presumably was not studying in accordance with the genuine visa he did hold). His status was therefore precarious and one might have thought that if he had a genuine fear of return, he would have claimed at least after his second exit from Sri Lanka. However, taken together with the other reason why the Appellant did not claim (ie that he was not aware of the risk arising from the arrest warrant), this amounts to an error of law which undermines the credibility finding arising from the delay in claiming asylum.
20. Ms Dogra also says that the Judge’s misunderstanding of the chronology regarding the arrest warrant has similarly infected the finding at [35] of the Decision. That is the finding set out at [10] above. However, I do not read that finding as containing any error. Although the reference in quotation marks appears to relate to the charge as set out in Mr Marsook’s letter, that does not mean that the Judge thought that the arrest warrant was in being by that stage. In any event, on the Appellant’s own account, as the Judge observed, the Appellant had been arrested and detained for those activities and clearly thought that he would be of interest on that account alone as otherwise his uncle would not have found it necessary to pay a bribe to allow the Appellant to leave Sri Lanka. For that reason, I do not find any error of law disclosed by [35] of the Decision.
21. For the above reasons, I am persuaded that there is an error of law disclosed at [33], [34] and [37] of the Decision relating in particular to the documents relied upon by the Appellant and the reasons given for his delay in claiming asylum.
22. I accept that the errors are material because, as Ms Dogra submitted, if the arrest warrant is genuine, the Appellant is likely to fall within the category of persons on a “stop list” at the airport in Sri Lanka. He would therefore be likely to come to the attention of the authorities on return and to be detained on account of that interest. Based on what is said in GJ, that is likely to lead to a finding of risk on return.

23. For those reasons, I set aside the Decision. Although I have found that some findings were open to the Judge, I am persuaded that it is not appropriate to preserve any findings as credibility will need to be reconsidered in the round.
24. Both representatives were agreed that the appeal should be remitted to the First-tier Tribunal and that this is the case notwithstanding that the appeal has already been heard by the First-tier Tribunal on two occasions.
25. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:-
- “[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”
26. In this case, I have found that the adverse credibility findings are not sustainable. Accordingly, the Appellant’s credibility will need to be reconsidered at the next hearing. That issue will need to be re-determined afresh and findings made in light of all the evidence. No findings are preserved. Accordingly, and in the interests of a fair and just disposal of the Appellant’s protection claim, I am satisfied that it is appropriate to remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judges Broe or Lodge

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Broe promulgated on 27 November 2017 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judges Broe or Lodge.



Signed
Upper Tribunal Judge Smith

Dated: 19 March 2018