



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

Appeal Number: AA/13031/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 28 July 2017**

**Decision & Reasons Promulgated  
On 27 October 2017**

**Before**

**Deputy Upper Tribunal Judge Bagral**

**Between**

**FMN**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

Appellant: Ms A Patyna, of Counsel, instructed by Gurney Harden Solicitors

Respondent: Mr T Wilding, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**ANONYMITY**

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) I make an Anonymity Order. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

## **INTRODUCTION**

1. This appeal has its origin in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 22 October 2015, whereby the claim of the Appellant for refugee status was refused. There was an associated decision to remove the Appellant from the United Kingdom (UK). His ensuing appeal to the First-tier Tribunal (the "*FtT*") was heard on 25 April 2016 and dismissed on 18 November 2016.

## **THE ASYLUM CLAIM**

2. The Appellant is a citizen of Sri Lanka born on [ ] 1983. He is a Tamil speaking Muslim. The material facts comprising the substance of his asylum claim is as follows.
3. He first entered the UK on 14 November 2009 with entry clearance conferring leave to enter as a Tier 4 (General) Student Migrant until 15 November 2011, extended until 30 October 2015.
4. On 5 May 2014 he took some photographs of himself attending a demonstration in London against a Buddhist group in Sri Lanka that campaigns against Muslims, and stored these on his laptop.
5. On 26 July 2014 he travelled to Sri Lanka with the intention of marrying his partner, a Sri Lankan national studying in the UK, whom he met in 2011. They had been living together and she became pregnant. In late 2012 she returned to her family in Sri Lanka.
6. While the couple married Islamically on 10 August 2014, his wife's family did not consent to the union and reported him to the police alleging his involvement in the LTTE. In consequence, he was arrested on 2 September 2014, detained, interrogated and tortured and the photographs stored on his laptop were examined. He was accused of being an LTTE member and accused of insulting the Buddhist culture. He was released after 10 hours following the payment of a bribe on the condition that he returned to the police station on 15 September 2014; a failure to do so would lead to the detention of his wife and child.
7. The Human Rights Commission in Sri Lanka took no action following his report of the torture he endured in detention. He returned to the UK on 12 September 2014 leaving behind his wife and child and claimed asylum at port.
8. The asylum claim was based on the asserted fear that in the event of enforced return to Sri Lanka he would be at risk of mistreatment for failing to report to the authorities regarding an accusation that he is an LTTE member and for insulting Buddhist culture. The claim was supported by

medico-legal evidence and a diagnosis of Post-Traumatic Stress Disorder (PTSD).

9. While the Secretary of State accepted the Appellant had attended demonstrations in the UK and *may* have been arrested by the authorities for reasons other than claimed, fundamentally, the claim that there was a future risk was rejected as untruthful or unreliable.

### **DECISION OF THE FtT**

10. The FtT, in essence, endorsed the Secretary of State's decision for reasons of its own. The FtT accepted the diagnosis of PTSD and accepted the Appellant's account of arrest, detention and torture as a consequence of his in-laws reporting him to the authorities, and that, his release was secured by the payment of a bribe. The FtT nevertheless found that on the Appellant's own admission the authorities were no longer interested in him, and that this was supported by limited questioning he was exposed to at the airport on departure from Sri Lanka. The FtT did not thus accept the Appellant was required to report and rejected the contention that there was an extant arrest warrant for him given the lack of evidence about it and the relative ease by which copies could be obtained. The FtT further considered that the authorities may well have examined the Appellant's laptop and viewed the photographs on it, which may have provoked an adverse reaction giving rise to some of his ill-treatment, but concluded that this was unlikely to be the cause of any further interest on return.
11. Dealing with the medical evidence the FtT observed that the Appellant was fit to give evidence and noted that a course of therapy for 12 months should result in his recovery for his PTSD. The FtT noted the risk of suicide was not adequately reasoned by the medical evidence and that the risk was not present and contingent upon the Appellant not being allowed to remain here. Accordingly, the appeal was dismissed on all grounds.
12. Permission to appeal was granted by the Upper Tribunal on all grounds on 4 May 2017.
13. The Respondent gave notice opposing the appeal for the reasons set out in a rule 24 response dated 22 May 2017.

### **CONSIDERATION AND CONCLUSIONS**

14. I have considered the submissions made by the representatives at the hearing. While Mr Wilding made a valiant attempt to defend an otherwise careful and detailed decision, I am satisfied that the FtT uncharacteristically fell into error. I consider that the central submissions made on behalf of the Appellant are correct and that this is a case in which it has been demonstrated that the delay between the hearing of the appeal and the decision has affected the FtT's analysis of the evidence and issues considering the findings made.

15. The Appellant's challenge to the FtT's decision are two-fold. It is not necessary to traverse them in detail as I consider the following is sufficient to vitiate the decision.
16. I have carefully considered the jurisprudence set out in the grounds that relate to the issue of delay and have done so in the light of the decision in RK (Algeria) [2007] EWCA Civ 868.
17. The decision of Sambasivam v Secretary of State for the Home Department [2000] Imm AR 85 is referred to in the decision of RK (as cited). That was the case where an asylum seeker unsuccessfully appealed to the Court of Appeal after a delay in promulgation of four months after the hearing. In that case the Appellant referred to a statement made by the IAT in Mario [1988] Imm AR 281 at 287 stating;

“In an area such as asylum, where evidence requires anxious scrutiny, the Tribunal will usually remit the case to another adjudicator where the period between the hearing and the dictation of the determination is more than three months.”
18. This is being referred to as the “rule of thumb” approach where there is a delay in promulgation.
19. At paragraph [16] of Sambavisam, Potter LJ referred to this as “no more and no less than a useful statement of guidance to practitioners upon the usual attitude and likely decision of the IAT in a case where an issue essential to the disposition of the claim for asylum depends upon a careful weighing of the credibility of the applicant and yet it appears that the delay between hearing date and the preparation of the determination exceeds three months.” He went on to state:

“in the absence of special or particular circumstances, that is plainly a useful and proper rule of thumb which, in the experience of the Tribunal, it is broadly just to apply, the twin reasons that substantial delay between the hearing and preparation of the determination then does the assessment of credibility issues unsafe and that such a delay tends to undermine the loser's confidence in the correctness of the decision once delivered.”
20. He went on to state “in cases of delay of this kind, the matter is best approached from the starting point that, where important issues of credibility arise, a delay of over three months between hearing and determination will merit remittance for rehearing unless, by reason of particular circumstances, it is clear that the eventual outcome of the application, whether by the same or a different route, must be the same.”
21. There is no dispute that the judgement of Potter LJ needs to be read in the light of the judgement of the Court of Appeal in RK and it is important to

note that the factual circumstances in RK were different to the present appeal- credibility was not an issue and did not require consideration of oral evidence given by a witness(es).

22. In my judgement, the decision in RK requires a nexus to be established between any undue delay and any defect in the evaluative process.
23. Having considered the decision in the light of the submissions, I am satisfied that there is such a nexus established. This was a case that centred upon the Appellant's credibility. While it is the case that the FtT accepted key elements of the account, it is equally clear that it rejected others. Central to the FtT's conclusion that the Appellant was not at risk on return to Sri Lanka was its disbelief that the authorities interest in the Appellant was ongoing. The FtT placed reliance on the Appellant's admission at interview that he was not of interest to the authorities. While the FtT was entitled to take that evidence into account, it is silent as to whether the Appellant's claim in his later witness statement of the authorities searching for him and the harassment of his wife's uncle to ascertain his whereabouts following his arrest in September 2014, was factored into that assessment. While the recital of the evidence is extensive, the assessment of the evidence is by comparison relatively short, and I cannot be satisfied from the decision that it can be inferred that the FtT took this evidence into account. While the challenge is narrow, I am persuaded that the omission could have been as a consequence of the delay which infected the decision thus rendering it unsafe.
24. My conclusion is informed by the second ground which I also consider is made out. The FtT considered protection under Article 3 based on a risk of suicide, but did not consider the appeal on the basis of whether there would be a risk to the Appellant on return at the airport in light of his acceptance of his arrest, ill-treatment and diagnosis of PTSD and, whether this gave rise to a real risk of further questioning and detention and consequent ill-treatment in-line with extant country guidance and updated background evidence suggesting, inter alia, that returnees were likely to be questioned on arrival. The argument was made in counsel's skeleton argument before the FtT and has been mistakenly overlooked. I consider that this further demonstrates that the delay infected the decision-making process.
25. Thus, for those reasons, I am satisfied that the Appellant has made out the grounds and I have reached the conclusion that the decision involves the making of an error on a point of law. The decision is thereby set aside.
26. As to the remaking of the decision, both representatives submitted that if both grounds were made out, the correct course to adopt in a case of this nature would be for the appeal to be remitted to the First-tier Tribunal because it would enable a judge to consider further evidence and make findings thereon.

27. In the light of those submissions, I am satisfied that this is the correct course to take. I therefore set aside the decision of the First-tier Tribunal and the appeal will be remitted to the First-tier Tribunal to hear afresh by a different judge.

**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 her or any member of her family. The direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Deputy Upper Tribunal Judge Bagral  
2017

22 October