Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07772/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral determination given following hearing	
On 4 December 2017	**On 28 February 2018**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

[M M]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Anzani, Counsel instructed by Nag Law Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant who was born in April 1986 is a national of Sri Lanka whose application for asylum was refused by the respondent on 4 August 2017. He had entered the UK in 2010 with entry clearance as a student which leave was curtailed. He was subsequently granted further leave to remain which was curtailed yet again. His applications for a residence card in

accordance with the EEA Regulations had also apparently been refused twice, the last occasion being 17 May 2017. The appellant having been encountered and detained on 13 May 2017 made representations which were refused and certified as clearly unfounded on 13 June 2017. He subsequently claimed asylum and it was this application which was refused.

2. The appellant appealed against this decision and his appeal was heard before First-tier Tribunal Judge Fox, sitting at Harmondsworth on 18 September 2017 but in a decision and reasons promulgated the following day Judge Fox dismissed the application. The appellant now appeals to the Upper Tribunal permission having been granted by First-tier Tribunal Judge Keane on 9 October 2017.

3. There are a number of grounds of appeal but it is only necessary for the purposes of this appeal to consider one of them, which was the first ground of appeal contained within the grounds. The judge records at paragraph 35 that the submissions made on behalf of the appellant included the following:

> "*GJ* applies. The appellant was not asked about LLRC. It was not addressed in cross-examination. The appellant's evidence should be accepted if not challenged in cross-examination."

4. The judge, having recorded this submission then failed completely to deal with this aspect of the appellant's case in his findings. There is absolutely no reference to the evidence relating to what the appellant had told to the LLRC (which is the Lessons Learned and Reconciliation Commission which had been established in Sri Lanka in 2010).

5. I record what is said about the LLRC, and people who have given evidence to that commission in the country guidance case of *GJ & Others (post civil war: returnees) Sri Lanka CG* [2013] UKUT 00319, which is still current country guidance for Sri Lanka. The country guidance is set out within the head note, which repeats what is contained at paragraph 356 of the substantive decision in that case. At paragraph 356(7) it is stated as follows:

> "7. The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, are: ...
>
> (c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses."

6. The appellant has made statements as to what he had said to the LLRC in his screening interview, his asylum interview and in his witness statement. At paragraph 4.1 of his screening interview he stated that he had witnessed the kidnapping of a friend of his by the army in 2008 and had reported this to the LLRC and that "the army tried to blackmail applicant to withdraw kidnapping of friend statement". The appellant expanded on this in his answers in his substantive asylum interview. He mentioned at his answer to question 13 that in 2010 he had made a complaint to the LLRC. In his answer to question 50 he said that he had started receiving threatening phone calls a week after he had made the complaint [to] the LLRC in 2010. In answer to question 51 he said that, "they told me to withdraw the complaint I made to LLRC or they will kill me as I was the eye witness".

7. At paragraph 8 of his witness statement, which was before Judge Fox (and concerning which he had apparently not been cross-examined at the hearing), the appellant stated as follows:

> "It is stated that as to why I logged a complaint about my friend 'Theepan' after 2 years of kidnapping. But I wish to state that I gave a statement to the LLRC in 2010 because the commission was formed in 2010. This is very clearly stated in the questions 40 and 41 of my asylum interview. Mr Manoharan told me that they have set up an organisation in search of the missing people and asked me to go with him to make a complaint and I said I will do it for the sake of my friend. LLRC was informed in 2010 after the conclusion of war and this question was asked from me several times. LLRC commission was concluded in November 2011."

8. The appellant then goes on to say how he had also complained to the police station about the abduction and that subsequently "the authorities, instead of finding the missing person they started coming behind me. If they could catch me, the same thing would have happened to [me] as well and most probably I would not be among living by now." He then continues that, "with all these comments it is quite apparent that the authorities are behind the abduction".

9. Clearly, as the appellant would on the face of it appear arguably (if his evidence was credible) to be amongst those at risk on return following the guidance given within *GJ* he is, on his own case, someone who has given evidence to the LLRC implicating the authorities in the kidnapping of one particular person. He has identified himself by giving such evidence (obviously, if he did do so) and he would accordingly be known to the Sri Lankan authorities and might therefore be "at real risk of adverse attention or persecution on return as a potential or actual war crime witness" (extrajudicial kidnapping being amongst what might be properly categorised as a war crime).

10. On behalf of the respondent, Mr Lindsay fairly accepts that as this Tribunal had noted that there was a total absence of consideration of the evidence relating to the alleged reporting of the incident by the appellant to the

LLRC, “there is not a lot I can say in the absence of any specific reference to the LLRC by the judge”. However, Mr Lindsay nonetheless invites this Tribunal to draw the inference from the decision as a whole “that the judge considered all the evidence and roundly rejected it because of his reasons for rejecting credibility”.

11. While it is undoubtedly the case that there are reasons why it may have been open to the judge to make some adverse credibility findings, this did nor relieve the judge of the obligation to make findings as to the core element of the appellant’s claim. The fact that this appellant may not be wholly reliable does not mean that his evidence on any specific point is necessarily false. The appellant consistently (after making his claim for asylum if not before) maintained that he would be known to the authorities as someone who had given evidence to the LLRC and that this in itself puts him at risk upon return. It was incumbent upon the judge to make a finding first as to whether or not he accepted that the appellant had, as he claimed, told the LLRC about the kidnapping of his friends and secondly, if he did, whether this factor would put him at risk. This Tribunal cannot simply infer from the fact that adverse credibility findings were made that the judge would have been bound to reject his evidence on this core element of his claim.

12. It follows that because this aspect of the claim is so central that this is a material omission and for this reason Judge Fox’s decision will have to be set aside and remade. In these circumstances, because there will have to be a fresh hearing at which all his evidence will have to be reconsidered, the appropriate course is to remit this appeal back to the First-tier Tribunal for a hearing before any judge other than First-tier Tribunal Judge Fox and I shall so order.

Notice of Decision

I set aside the decision of First-tier Tribunal Judge Fox, dismissing the appellant’s appeal, as containing a material error of law and remit the appeal back to the First-tier Tribunal sitting at Hatton Cross (or Harmondsworth or such other venue as is directed) by any judge other than First-tier Tribunal Judge Fox.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 22 February 2018