Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01928/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 November 2019	**On 22 November 2019**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

M Y
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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 him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Mr P Georget, Counsel, instructed by David Benson Solicitors
For the Respondent: Ms R Bassi, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the appeal by the Appellant against the decision of First-tier Tribunal Judge R Hussain ("the judge"), promulgated on 30 August 2019, in which he dismissed the Appellant's appeal against the Respondent's decision of 21 January 2018, refusing his protection and human rights claims. These claims were "fresh claims" pursuant to paragraph 353 of the Immigration Rules: the Appellant had previously had an unsuccessful appeal before the First-tier Tribunal in 2013 (AA/03322/2013 - Judge Courtney).

2. The Appellant's claim now is broadly speaking what it was previously. He asserted that he had been suspected of assisting the LTTE, the result of which he had been detained and tortured by the Sri Lankan authorities before being released upon payment of a bribe. He then had been able to leave the country and come to the United Kingdom.

3. Subsequent to the unsuccessful appeal in 2013, the Appellant had been informed that there was an arrest warrant against him in Sri Lanka. Documents supporting this assertion were obtained through a Sri Lankan lawyer. These, together with detailed representations were then put forward to the Respondent. Having considered the new material the Respondent accepted that there was a fresh claim giving rise to a right of appeal.

The judge's decision

4. Under the sub-heading "Findings", the judge makes reference to the well-known case of Devaseelan * [2002] UKIAT 00282 and the principles governing subsequent appeals involving the same individual. The previous findings of the First-tier Tribunal were deemed to be the starting point for the judge's assessment of the evidence. New documentary evidence relied upon, namely court documents, an arrest warrant, a letter from the Sri Lankan lawyer in question, and medical reports, are all referred to.

5. At paragraph 18 the judge deals with the report of Consultant Psychiatrist Dr Balasubramaniam, dated 13 October 2018. He made a diagnosis of PTSD with a recommendation of additional treatment. It was said that a negative outcome in respect of the protection claim would be likely to worsen the prognosis than increase a risk of suicide. The judge then finds as follows:

> "However, I do not accept the opinion that the Appellant suffers from PTSD or is at increased risk of suicide if he is returned to Sri Lanka. This is because the report relies heavily on the account given by the Appellant himself and fails to address the many inconsistencies in the Appellant's

> account, either as found by IJ Courtney or by this Tribunal. Furthermore, the report suggests that the Appellant should begin a course of anti-depressants and Psychological treatment, however the Appellant confirmed that to date no treatment was in place or had been pursued."

6. The judge then turns to the issue of the court documents and arrest warrant. In paragraph 19 he concludes that it was not credible that a lawyer would have gone to the trouble to pay a fee to retrieve relevant documents unless he had been specifically instructed and authorised to do so by the Appellant. As the Appellant's evidence was that it was the father that had had dealings with the lawyer and not himself (due to language barriers) and that the lawyer's letter did not make mention of this and nor was there evidence from the father himself, the judge found against the credibility the Appellant and in turn the reliability of the documents.

7. In the next paragraph the judge finds that an additional reason for undermining the reliability of the documents was the evidence relating to their provenance. It is said that the Appellant's evidence was that his United Kingdom-based solicitor had requested the documents from the lawyer, although an e-mail from those solicitors suggested that the Appellant had already received the documents from that lawyer. There was, therefore, an inconsistency in the evidence.

8. The judge goes on to deal with the evidence of an individual called Mr F (said to be the Appellant's brother-in-law). The judge found that the Appellant was not linked to Mr F as claimed, and that this individual's circumstances had no material bearing on the Appellant's case.

9. At paragraph 24 the judge purports to make an alternative finding by stating:

> "Even if I was to accept that the Appellant was perceived as an LTTE member as claimed I find that Appellant does not come within the profile of individuals whom the Sri Lankan authorities have an on-going interest in (GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)."

10. The protection claim is dismissed on all grounds and it was concluded that there was nothing in the Article 8 claim.

The grounds of appeal and grant of permission

11. The somewhat lengthy grounds of appeal were drafted by Counsel who appeared at the First-tier Tribunal hearing (not Mr Georget). In essence it is said that:

    (i) The judge erred in his assessment of the medical evidence;

(ii) This error was relevant to the Appellant's history, his ability to recall events in a consistent manner and also the reliability of the court documents and arrest warrant.

12. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchison on 10 October 2019.

The hearing

13. At the hearing before me, Mr Georget relied on the grounds. In seeking to refine them somewhat, he submitted that the judge's error as regards the report of Dr Balasubramaniam went to the overall issue of the Appellant's credibility. This in turn had an impact on the judge's assessment of what the Appellant had said about, amongst other matters, the procurement of the court documents and arrest warrant.

14. Ms Bassi submitted that the reasons provided for rejecting the diagnosis of PTSD were adequate. She further submitted that the reasons set out in paragraphs 19 and 20 for rejecting the reliability of the relevant documents were also sufficient. The PTSD issue was, she submitted, irrelevant to the reliability of the documents in question.

15. At the end of the hearing I reserved my decision.

Error of law decision

16. Having considered this matter with care, I conclude that the judge has materially erred in law. I say this for the following reasons.

17. Having recognised Dr Balasubramaniam's expertise (and therefore his ability to assess the Appellant for mental health conditions), the judge was bound to provide sufficiently good reasons for rejecting a core conclusion reached by the expert. Paragraph 18 of the judge's decision contains the three reasons offered.

18. The first of these is that the report relied heavily on the account given by the Appellant. In and of itself, this is inadequate. It is the case that to an extent any mental health assessment must be based upon a history given by the subject. However, as is clear in Dr Balasubramaniam's report, he had in addition to considering the Appellant's own account, applied his professional judgment to the Appellant's circumstances as a whole, including presentation and the answers given to specific (and clinically relevant) questions put during the assessment interview. In addition, whilst the judge fails to state this in terms (I have some concerns as to whether it actually factored as a relevant issue at this stage), the Appellant had of course been believed in respect of a detention and

torture by the Sri Lankan authorities in March 2012 (see paragraph 40 of Judge Courtney's decision).

19. The second reason is the apparent failure by Dr Balasubramaniam to address the "many inconsistencies in the Appellant's account" in relation to Judge Courtney's decision or, as I read paragraph 18, the judge's current decision. This reason is also flawed. It is not the role of an expert to "address" inconsistencies in terms of factual findings made by a Tribunal, at least not as a form of commentary. This would be stepping into forbidden territory, as it were. If Dr Balasubramaniam had sought to follow that path he may well have been open to the criticism that he was trespassing upon the Tribunal's fact-finding role. Further, on one reading of the second reason the judge appears to be criticising Dr Balasubramaniam for not having addressed inconsistencies found by the judge himself. If that were the case, it would of course be impossible for the author to have pre-empted any adverse credibility issues deemed by the judge to exist. There is a further point here, which is that whilst the "many inconsistencies" are stated to have existed, there is no actual identification of what these were. Finally, Dr Balasubramaniam's report does in fact contain an opinion that the Appellant's poor concentration, deemed to be a symptom of the PTSD, may result in him being unable to provide a clear recollection of events. This conclusion would have been directly relevant to the issue of the "many inconsistencies" said to exist in the Appellant's account.

20. The third reason is the lack of additional treatment undertaken by the Appellant following the report. It is the case that there has been no such treatment and this final reason would on the face of it be sound, but for the flawed nature of its associates.

21. I therefore conclude that the judge has erred in respect of his rejection of a court aspect of the medical evidence.

22. The next issue is whether this error is material to the Appellant's case as a whole. It would be very unlikely to be material in respect of any Article 3 and/or Article 8 claim. It would not be material to the issue of whether the Appellant had ever been detained or tortured in the past, as these events had already been accepted by Judge Courtney. However, and with a degree of hesitation, I conclude that there is sufficient merit in Mr Georget's submission that the PTSD issue did go to the Appellant's overall credibility, which in turn created a Nexus with the assessment of the evidence going to the issue of the court documents.

23. The reliability of the court documents, and in particular the arrest warrant, was of central importance to the Appellant's claim. Without them, it would clearly have been very difficult indeed to establish a significantly adverse profile to bring him within a relevant risk category. At paragraph 19 the judge did not believe that the Sri Lankan lawyer would have taken the step of retrieving the documents unless he had been specifically instructed and authorised to do so. This adverse finding was underpinned by the lack of

corroborative evidence. Corroborative evidence is never of course a requirement in protection claims. Whilst the absence of potentially readily available evidence can be a relevant factor, in this case the flawed assessment of the medical evidence and its effect on the Appellant's overall credibility does provide a causal link to the judge's consideration of the Appellant's evidence on the obtaining of the court documents, as I have already found. In addition, the letter from the lawyer dated 23 May 2014 clearly states that those documents had been sent to the Appellant directly. Whilst the letter does not state in terms that the lawyer had been in contact with the Appellant's father, the fact that the documents had been sent to the Appellant himself provides a fairly clear evidential platform that the lawyer had acted on behalf of the Appellant: why else would he have sent the documents directly to the Appellant?

24. The further reason given by the judge for finding that the documents were not reliable is the manner in which they were obtained from Sri Lanka. Having looked at the judge's Record of Proceedings with care, I note that the Appellant had been questioned about who had requested certain documents at certain times. As I read the record, it appears as though the Appellant's evidence that his United Kingdom-based solicitors had requested documents from the Sri Lankan lawyer in fact referred to a request made by them for additional identification documents from the lawyer, namely his Bar membership certificate. The questions did not relate to any request by the solicitors for the court documents themselves. Indeed, the e-mail from the solicitors at page 18 of the bundle, dated 6 May 2014, confirms that the court documents had previously been sent to the Appellant and that the request being made was for identification documents only. The upshot of this is that I am satisfied that the judge has misunderstood the evidence or potentially confused one aspect of it for another when giving his reasons in paragraph 20 of his decision.

25. Therefore, the judge's overall assessment of the crucial court documents is unsustainable.

26. The errors are not rendered immaterial by the judge's purported alternative conclusion on the Appellant's case. What is said in paragraph 24 does not take into account the existence of an arrest warrant against the Appellant. It is not therefore a true reflection of the Appellant's case "at its highest".

27. For the reasons set out above, the judge's decision must be set aside.

Disposal

28. Having found there to be material errors, I have gone on to consider the issue of disposal. In the ordinary course of events this matter would be retained in the Upper Tribunal for the decision to be remade. However, this is a case which involves a number of factual issues, including not least

the question of the court documents. The extent of the fact-finding required leads me to the conclusion that this appeal should be remitted to the First-tier Tribunal to be heard afresh. In saying that, the Devaseelan principles continue to apply to Judge Courtney's 2013 decision. They are a starting point, but a starting point only.

29. I would add a further point. The judge's findings in respect of Mr F have not been specifically challenged. There is an argument that the findings set out in paragraphs 22 and 23 should be preserved. However, in remitting this appeal there is a real danger of creating difficulties for the judge who will be hearing this appeal again if specific findings are preserved. In all the circumstances, no such findings are preserved.

Notice of Decision

The First-tier Tribunal's decision involves a material error of law and I set it aside.

This appeal is remitted to the First-tier Tribunal.

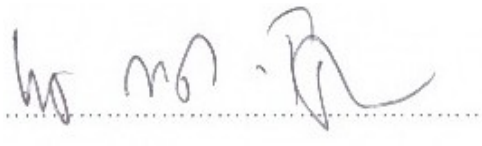
Directions to the First-tier Tribunal

(1) This appeal is remitted to the First-tier Tribunal to be heard afresh, with no findings from Judge Hussain's decision preserved;

(2) The remitted hearing shall not be heard by First-tier Tribunal Judge R Hussain;

(3) The time estimate for the remitted hearing shall be 3 hours;

(4) A Tamil interpreter will be required for the remitted hearing.

Signed  Date: 19 November 2019

Upper Tribunal Judge Norton-Taylor