Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12558/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 November 2017	**On 27 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

T M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Harris, Counsel instructed by Nag Law Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Sri Lanka born on [ ] 1997. She arrived in the United Kingdom pursuant to a student visa accompanied by her husband and young daughter on 21 January 2010. The Appellant then overstayed following the expiry of her leave and applied for leave to remain outside the Rules on 19 September 2014, an application which was refused on 17 December 2014. On 26 November 2015 the Appellant applied for residency under the EEA Regulations as a family member of her aunt who lived in France. The outcome of this application was disputed, the Appellant claiming that the application was withdrawn due to

a lack of required documentation and the Respondent asserting that the application was dismissed. The Appellant, her husband and child were served with removal papers as overstayers on 17 February 2016. The Appellant claimed asylum on 10 May 2016 when she attended a screening interview.

2. The basis of her claim is that both she and her husband were suspected of being involved with the LTTE as a consequence of the fact that whilst living in Sri Lanka they had a Tamil employee who had been abducted by the Sri Lankan authorities on 16 December 2008. The Appellant and her husband had witnessed this and reported it to the police but there was no progress. Their employee's wife contacted the Appellant asking for her to provide a statement to the LLRC, that is the Lessons Learned and Reconciliation Committee. The Appellant did so on 11 February 2009. On 14 February 2009 the Appellant asserts that their shop was attacked and its windows smashed and on 21 February 2009 the Appellant's husband was physically assaulted. The couple believed that their assailants were acting under the instructions of the former head of the Sri Lankan armed forces and now Government Minister, Sarath Fonseka and that they had been told this by the Appellant's father who was a retired police officer who had retained contacts within the Sri Lankan police. The couple closed their shop, moved to the Appellant's mother's home in a different part of Sri Lanka and then decided to leave the country.

3. The Appellant's application was refused on 6 November 2016 and her appeal against this decision came before Judge of the First-tier Tribunal Keith for hearing on 12 May 2017. In a decision and reasons promulgated on 1 June 2016 he dismissed the appeal. An application for permission to appeal to the Upper Tribunal was made on 14 June 2017 on three grounds.

4. First, that the judge's approach to the assessment of documents from the court and from an attorney in Sri Lanka was flawed and unfair. Prior to the hearing on 20 December 2016 the Respondent had made an application to adjourn the appeal in order to verify court documents that had been produced by the Appellant, it being asserted that the authorities were interested in prosecuting the Appellant as a consequence of her evidence to the LLRC. However there was no document verification report and at the substantive hearing the Respondent was not in a position to verify the documents or otherwise. The judge was given a copy of the Respondent's country information which indicated at paragraph 2.2.1 that as recently as March 2017 the Secretary of State still indicated that "*decision-makers should note that staff at the British High Commission in Colombo are in a position to respond to requests from UK asylum decision-makers to verify the authenticity of official documents*". The judge in this case failed to engage with the history of that aspect of the appeal. It was further asserted that the judge erred at [61] in his findings regarding the letter from the Appellant's attorney and as to the court documents, in that he failed to provide reasons for not accepting this evidence, particularly bearing in mind that the Respondent had a reasonable opportunity to verify these details but failed so to do. It was asserted that the judge's

finding that the attorney's letter is general and not entirely consistent with the Appellant's evidence is not supported upon a close reading of the letter. It was submitted that the judge erred in attaching more weight to a generic letter from the British High Commission dated 2 November 2015, which asserts that out of 130 verifications carried out since June 2014 there were only two where the documents were genuine. The judge's error was not to engage with any of the criticisms of this evidence made on behalf of the Appellant. Reliance was also based on the judge's approach to plausibility praying in aid the decision in Y [2006] EWCA Civ 1233.

5. The second ground of appeal asserted that the judge erred in failing to consider relevant evidence and that there was an absence of reasoning. This was particularised in relation to [57] of the judge's decision, where the judge considered that the Appellant's affidavit made no express reference to Mr Fonseka and was not witnessed by a human rights organisation, but in so doing failed to consider the entirety of [11] of the affidavit where reference is made to the commander in chief of the army who at that time was General Fonseka. There were further background references to him at [8] of the skeleton argument and [16] of the Appellant's witness statement. At [58] the judge's finding that the affidavit provided no basis for linking the abduction of their Tamil employee with state actors is unsustainable in light of the evidence as set out in the affidavit that the former commander in chief of the army and inspector general of the Sri Lankan Police were believed to be behind that abduction. The finding by the judge that the affidavit was not witnessed in front of a human rights organisation fails to take into account the fact that the Appellant provided evidence to the LLRC. It was submitted as a consequence of the fact that the Appellant has given evidence to the LLRC she fell squarely within the risk categories outlined in GJ & Others [2013] UKUT 00319 at 356(7)(c).

6. The third ground of appeal asserted that the judge failed to consider and apply the judgment of the Court of Appeal in MA (Pakistan)[2016] EWCA Civ 705 when making findings of fact in respect of the Appellant's daughter who had resided in the United Kingdom for more than seven years. It was submitted that the judge's findings in respect of the Appellant's daughter lacked reasoning and were speculative. There was no consideration of her own wishes as outlined in her letter to the court in the second Appellant's bundle at page 23 and a failure by the judge to balance or consider the evidence in support of her residence in the UK including from a Reverend from the Church of England (page 61 of the Appellant's second bundle), her primary school (page 65 of the Appellant's second bundle) and references from the community. The error was material because the guidance set out in MA (Pakistan) had not been considered as part of the proportionality exercise and the judge further erred in failing to consider Section 117B(6) of the NIAA 2002, namely that the public interest did not require the Appellant's removal where it would not be reasonable to expect her child to leave.

7. Permission to appeal was granted by Judge of the First-tier Tribunal Grant-Hutchison on 20 September 2017 essentially only in relation to the third ground of appeal i.e. the manner in which the judge had assessed the reasonableness of the Appellant's daughter leaving the United Kingdom.

8. The Appellant's representatives then sought to make a renewed application for permission to appeal to the Upper Tribunal and in a decision dated 11 October 2017 Upper Tribunal Judge Lindsley granted permission to appeal on all grounds:

> "*It is accepted that the Appellant witnessed the abduction of her employee at paragraph 59. The asylum grounds are arguable, although consideration should be given to VT (Article 22 Procedures Directive – confidentiality) Sri Lanka [2017] UKUT 368 when considering what role the Secretary of State properly had to verify the documents provided to her*."

Hearing

9. At the hearing before me the Appellant was represented by Ms Harris of Counsel. She sought to rely on all the grounds of appeal submitting in respect of ground 1: this was based on the judgment in PJ (Sri Lanka) 2014 EWCA Civ 1011 which was not referred to by the judge at all. The duty upon the judge was to consider the consequences and prejudice to the Appellant of the Respondent's failure to seek to verify the documents from Sri Lanka *viz* the court documents and the affidavit from the Appellant's lawyer. The judge further erred in asserting that there was an inconsistency when there was none in respect of the letter from the Appellant's lawyer and in attaching weight to the generic evidence from the British High Commission which was already over eighteen months old at the date of the hearing and was very limited in its scope. There was an absence of evidence as to the information as to what happens to the verifications nor as to how verifications are conducted and whether it was via the intelligence services, i.e. the very people the Appellant fears persecution from. Ms Harris relied upon [10] of the grounds which relates to [59] and [61] of the judge's decision and the judge's approach to the issue of plausibility.

10. Ms Harris asserted in relation to the second ground of appeal that the judge had failed to take account of a material fact and that is the reference indirectly to Commander Fonseka in the Appellant's affidavit at page 16, paragraph 11 and consequently there was no inconsistency. She submitted that it is clear from the country guidance decision in GJ that those who have given evidence to the LLRC are considered to be at risk. Consequently the Appellant fits within 356(7)(c) of GJ and there will be a high likelihood of the risk of detention and torture. The judge failed to provide any reasons why he did not accept the Appellant would be at risk on return to Sri Lanka.

11. In relation to the third ground, Ms Harris submitted that the judge simply failed to apply MA (Pakistan) or even refer to the Court of Appeal's guidance in that case. Whilst at [23] the judge recorded the child was now over 8 years old and again at [66] and there is reference to Section 55 of the 2009 Act, there was no recognition that the Appellant's daughter had resided in the UK for longer than seven years and no weight was consequently attached to that factor. There was further no evidence in support of the judge's contention at [67] that the Appellant's daughter was in contact with her grandparents in Sri Lanka. This was simply not an issue in respect of which evidence was given, thus the judge's finding was entirely speculative.

12. In his submissions Mr Melvin asserted that the judge had dealt adequately with the documents before him i.e. the letter from the Appellant's attorney and from the court and this was at [56] onwards. The judge was entitled to rely on the evidence from the British High Commission as to the verification process and the judge had in effect applied the decision in Tanveer Ahmed and looked at all the evidence in the round. Mr Melvin submitted that in respect of the Appellant's affidavit submitted to the LLRC the judge had dealt adequately with that evidence at [55] to [58] of the decision. He submitted that the submission of an affidavit to the LLRC does not mean that the Appellant would automatically fall within the GJ risk categories, particularly given that the LLRC have not pursued the Appellant's complaint about the abduction of her Tamil employee further in light of the fact that the Appellant failed to provide further details when asked for them. Mr Melvin submitted that the judge's conclusions at [59] were open to him to make.

13. In relation to the third ground of appeal Mr Melvin submitted that it was clear that the judge had considered the best interests of the child i.e. the Appellant's daughter, their son being only 3 years of age. The judge's findings were open to him and were adequate in order to deal with the Article 8 issue.

14. Ms Harris briefly responded to Mr Melvin's submissions.

Decision

15. I find material errors of law in the decision of First-tier Tribunal Judge Keith. I announced my decision at the hearing. I now give my reasons.

16. In my considered view the matters set out in the grounds of appeal in respect of which permission was ultimately granted on all grounds raise errors of law in the judge's decision. In particular, the judge fell into error in the manner in which he considered the documents from Sri Lanka. On the face of the judge's findings at [56] through to [61] the judge conducts a balancing exercise. At [57] however the judge questions the circumstances in which the Appellant had provided her statement on the erroneous basis that there was no reference to Mr Fonseka within the Appellant's affidavit to the LLRC. However, as [11] of the grounds of

appeal makes clear, the judge in so doing overlooked the reference by the Appellant in [11] of that affidavit to the commander in chief of the army who was, at that time, General Fonseka. The judge at [58] found that, given that the Appellant did not provide a more detailed statement, the extent to which the LLRC would have placed reliance on her initial affidavit is likely to have been extremely limited. However in so finding the judge fails to take account of the fact that the material issue is the perception of the Appellant by the Sri Lankan authorities given that she was prepared to make a statement to the LLRC in the first place and in so doing may have fallen into the category of risk set out at 356(7)(a) of the decision in GJ (Sri Lanka).

17. At [59] the judge expressly accepted that the Appellant had witnessed the abduction of her Tamil employee. He then went on to consider the court documents including a warrant for the Appellant's arrest issued in March 2011. At [61] the judge noted that the court documents specifically named the Appellant. He then considered the letter from the Appellant's attorney, Ms Nayana Nirantha at page 3 of the Appellant's bundle and found that it was generalised and was not entirely consistent with the Appellant's account in terms of the sequence of events. The judge therefore attached limited weight to the letter and weighed against it the generic evidence from the British High Commission. In respect of the court documents he held:

> "*I did not regard the court documents as reliable evidence even to the lower evidential standard of the Appellant being the subject of an arrest warrant or prosecution*"

and said:

> "*It was not plausible that the Appellant having not responded to a request from the LLRC to provide a detailed statement in November 2010, the Sri Lankan authorities would then have progressed prosecution in March 2011*".

I find the judge's reasoning process in respect of these key documents to be inadequate in light of the potential effect of those documents and the fact that when considered cumulatively, clearly provide corroboration of the Appellant's claim. The judge's approach rather was to consider them individually and reject them individually.

18. Lastly, I turn to the failure by the judge to apply the guidance in MA (Pakistan) [2016] EWCA Civ 705 in relation to the fact that the Appellant's daughter has resided in the United Kingdom for more than seven years. Ms Harris also submitted, and I accept, that the judge also failed to consider Section 117B(6) of the NIAA 2002. This aspect of the decision is at [66] and [67] where the judge took into account section 55 of the 2009 Act and noted that the Appellant's daughter was 8 years of age. There was in fact no consideration of the reasonableness of her return whatsoever. That is a clear and fundamental error of law in the decision of

the judge. Consequently I find the matters raised in all three grounds of appeal to be made out.

D*irections*

(1) The appeal is remitted back to the First-tier Tribunal sitting at York House for a hearing *de novo*.

(2) The hearing should be listed for two hours with a Sinhalese interpreter.

(3) Whilst the hearing is *de novo* I preserve two of the findings of fact which survive the errors of law in the judge's decision viz that the Appellant witnessed the abduction of her Tamil employee and that she gave evidence in the form of an affidavit to the LLRC dated 11 February 2009.

Notice of Decision

The appeal is allowed and remitted for a hearing *de novo* before the First tier Tribunal.

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. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Rebecca Chapman Date 24.11.17

Deputy Upper Tribunal Judge Chapman