Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01445/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 October 2019	**On 28 October 2019**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

S A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Lewis, Counsel, instructed by York Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

The appellant is a citizen of Sri Lanka born on 21 December 1985. He appeals with permission against a decision of First-tier Tribunal Judge Herbert OBE promulgated on 1 April 2019 dismissing his appeal against the respondent's decision to refuse his asylum claim dated 29 January 2019.

Factual background

There were two strands to the appellant's claim for asylum. The first related to the claimed risk of violence from his wife's family, who were said to be members of an extremist Buddhist sect, and had objected to their daughter marrying the appellant, a Sinhalese Roman Catholic. The second strand, which formed the focus of the appeal before me, related to the appellant's suspected involvement with the LTTE during the civil war in Sri Lanka.

The appellant claims to have worked as a ticket agent for an airline company in 2005 until late 2009. While working for the travel company, he met David. David was a Tamil from the Northern Province of Sri Lanka. The two became good friends. David left the company in around 2007 to become a freelance travel agent. Shortly after the end of the civil war in May 2009, David contacted the appellant to seek his assistance with arranging travel out of Sri Lanka for various members of the Tamil community from the Northern Province. Many people at that time wanted to leave the country, claimed the appellant, and he saw no reason not to help to arrange that. The appellant claims to have facilitated the travel of around ten to twelve Tamil individuals from the country. David paid him to do this.

The troubles with the appellant's wife's family took place in the period after that, and led to the appellant obtaining entry clearance to this country to study as a student. He arrived here in 2014 and currently enjoys discretionary leave to remain on account of his daughter's ill health.

The basis of the asylum claim advanced by the appellant is that in 2017, the Sri Lankan Army visited his parents' home with information suggesting that his friend David was an LTTE operative. David had been arrested, they said, and had revealed information concerning the appellant's role in the exfiltration of various LTTE operatives towards the end of 2009. David had also claimed that the appellant was active in intelligence regrouping. His father had been required to report to the police station in the appellant's absence. Finding out about these developments led to the appellant making a claim for asylum.

The respondent rejected the claim on the basis of inconsistencies between the appellant's case as it was advanced in an initial statement provided by the appellant, on the one hand, and the information that he provided in his substantive asylum, interview, on the other. Those differences have subsequently been explained by the appellant as being attributable to his former solicitors, against whom he has made a complaint with the Legal Ombudsman. There are copies of the correspondence in the bundle. The inconsistencies between what the appellant said in his original asylum statement and his interview did not form part of the judge's operative reasons for dismissing the appellant's appeal; the judge primarily considered that the account provided by the appellant to have been implausible.

Findings of the First-tier Tribunal

It is necessary to set out the judge's findings in more depth. At [46] the judge said,

> "I find that based on the appellant's evidence before me that the sequence of events set out by the appellant appears implausible".

At [47], the judge noted that the appellant last worked with David in 2007 and last had direct contact with him in 2009. It was, therefore, said the judge at [48], implausible that the authorities would only take action against him in 2017, rather than at an earlier stage. Various documents that the appellant had provided in support of his claim, one from a lawyer in Sri Lanka and another from a priest from his Roman Catholic church in Sri Lanka, were described by the judge as being "self-serving". At [51], the judge said that the fact that the letters had not come to light after the initial asylum claim had been submitted meant that they were, "simply in my view designed to bolster an otherwise weak asylum claim".

Grounds of appeal

Mr Lewis advances essentially two grounds of appeal against the judge's decision. The first is that the judge had impermissible regard to what he considered to be the inherent probability or implausibility of the appellant's case. Secondly, the judge's dismissal of the documentary evidence provided by the appellant in support of his claim as "self-serving" amounted to a refusal to engage with the contents of those documents, and in any event adopted a logic pursuant to which no evidence ever adduced in support of an appeal would be capable of attracting any weight.

For the respondent, Mr Lindsay contends that the judge reached findings which were open to him on the facts. He contends that the judge's brevity is to be commended. Properly understood, the judge's reference to "implausibility" meant simply that he was not persuaded that the appellant had satisfied the burden of proof to which he was subject. The judge gave sufficient reasons for finding that the appellant's case was implausible, by reference to the country guidance case of GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). In that case, a number of risk categories were found by this Tribunal to characterise those who continue to be of interest to the Sri Lankan authorities. At [7] of the headnote, those risk categories are:

> "(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:
>
> (a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka.
>
> (b) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government.
>
> (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.
>
> (d) A person whose name appears on a computerised "stop" list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant."

Mr Lindsay submitted that, at its highest, the appellant's case does not fall into any of those categories, and the judge was correct, therefore, to dismiss his appeal. The judge set his plausibility-based findings against that background, enabling him to reach legitimate conclusions that the appellant's overall account was not credible, as he assessed the appellant's narrative by reference to the scenarios which the country guidance found reasonably likely to engage the attention of the authorities. Secondly, even if the appellant had been of some interest to the Sri Lankan authorities in 2017, he would nevertheless not be at any risk on account of his situation not falling within any of the pre-identified risk categories.

Discussion

Mr Lewis's submissions have considerable force. It is well established that judges in this jurisdiction should be slow to bring their own subjective assumptions about what is likely to be plausible or probable to their analysis of asylum claims. Claimants for asylum are often from very different parts of the world, and cultures, to judges in this jurisdiction, and assessing the claimed experiences of an appellant by reference to what a judge here considers to be plausible is an unreliable way to assess a case where, as here, there was little by way of accompanying analysis.

In Y v Secretary of State for the Home Department [2006] EWCA Civ 1223 Lord Justice Keene said, at [25]:

> "A judge should be cautious before finding an account to be inherently incredible, because there is considerable risk that he will be over-influenced by his own views on what is or is not plausible, and those views will inevitably have been influenced by his own background in this country and by the customs and ways of our own society."

Lord Justice Keene continued to quote an extrajudicial writing of Sir Thomas Bingham, as he then was, in the journal *Current Legal Problems*. Sir Thomas Bingham said:

> "An English judge may have, or think that he has, a shrewd idea of how a Lloyds broker or a Bristol wholesaler, or a Norfolk farmer, might react in some situation which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ships' engineer, or a Yugoslav banker… No

> judge worth his salt could possibly assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even - which may be quite different - in accordance with his concept of what a reasonable man would have done."

Similarly, in HK v Secretary of State for the Home Department [2006] EWCA Civ 1037 Lord Justice Neuberger, as he then was, endorsed *Hathaway on the Law of Refugee Status* (1991) at page 81, where Professor Hathaway stated the following:

> "In assessing the general human rights information, decision makers must constantly be on guard to avoid implicitly recharacterising the nature of the risk based on their own perceptions of reasonability."

I consider that the judge in the present matter fell into precisely the trap that Lord Justice Keene, Sir Thomas Bingham and Lord Justice Neuberger said that judges should avoid.

To the list of professions in very different cultures that Sir Thomas Bingham said judges should be slow to assume they have some knowledge or experience of, one could readily add the occupation of a Sri Lankan travel agent, this appellant's profession at the relevant time. The judge purported to have insight and knowledge into the circumstances under which a Sri Lankan travel agent, in the immediate aftermath of the civil war, would have acceded to a request from a former colleague from the Northern Province for assistance.

What is likely to have been inherently plausible or probable in the present matter should have been assessed by reference to the background information. The judge did not assess David's LTTE background by reference to the findings in GJ that all people from the Northern Province are likely to have had some form of involvement in the civil war; had he done so, that may have led some credence to the appellant's claim to have been asked by a Tamil from the Northern Province to assist with something that, the appellant now claims, was linked to LTTE activity. See the headnote to GJ at [8].

Rather than engaging in a conventional analysis of the internal consistency of the appellant's case, the consistency of the number of different accounts that the appellant had provided of it, and the consistency of the appellant's evidence before the Tribunal with those accounts when tested under cross examination, the judge rather brought his own assumptions as to what is likely to have happened in Sri Lanka at the relevant time to his analysis, and reached a conclusion which depended upon his own subjective assumptions, rather than on the evidence that was before him.

Turning to the judge's analysis of the letter from the appellant's priest and his Sri Lankan attorney, I accept Mr Lewis's submissions that the judge's description of these documents as self-serving does very little to demonstrate why weight should not be ascribed to them. In the case of R (on the application of SS) v Secretary of State for the Home Department ("self-serving"

statements) [2017] UKUT 00164 (IAC) Upper Tribunal Judge Peter Lane, as he then was, held the following at [1] of the headnote:

> "The expression self-serving is, to a large extent, a protean one. The expression itself tells us little or nothing. What is needed is a reason, however brief, for that designation. For example, a letter written by a third party to an applicant for international protection may be 'self-serving' because it bears the hallmarks of being written to order, in circumstances where the applicant's case is that the letter was a spontaneous warning."

In the present matter, the judge did not consider the circumstances in which either letter was written, and instead simply disregarded the prospect of a member of the Sri Lankan Bar as ever being able to write a letter which could be regarded as reliable. Similarly, there was no engagement with the circumstances in which the priest's letter was written. Rather, the approach of the judge was simply to say that if an appellant adduces evidence in his support, because it has been adduced by him, then, by definition, it lacks reliability.

I find that that was an erroneous approach. The proper approach should have been to analyse the documents by reference to the overall credibility of the appellant's case in the round, pursuant to Tanveer Ahmed (Documents unreliable and forged) Pakistan * [2002] UKIAT 00439. That is not to say these documents should necessarily have attracted weight, but the approach of the judge was to dismiss their probative value without engaging in any analysis of their contents by reference to his overall assessment of the credibility of the appellant's case (which, in any event, was flawed for the plausibility-based reasons set out above).

I consider that the risk categories in GJ provide no support for the judge's rejection of the plausibility of the remaining aspects of the appellant's case. The risk categories at [7] of the headnote concern those who are presently at risk from the authorities in Sri Lanka. It must be read alongside [4], which held that,

> "If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection."

The origins of the above finding appear to lie in the concession by counsel for the respondent in GJ at [168]:

> "[Counsel for the Secretary of State] accepted that individuals in custody in Sri Lanka continue to be at risk of physical abuse, including sexual violence, and that such risk is persecutory. Evidence before the Tribunal confirmed that, pursuant to an amendment to the Prevention of Terrorism Act (as amended) (PTA), the authorities could lawfully detain individuals for 18 months without any judicial oversight or remedy. The 11,000 LTTE cadres, who underwent the re-education process known as "rehabilitation", were detained for at least two years, and some for as long as four years. Mr Hall accepted that there appeared to be no statutory underpinning for the rehabilitation

> process: to the extent that "rehabilitation" was based on the detention powers in the PTA, even without any evidence of physical or sexual abuse, he accepted that detention without judicial supervision for such lengthy periods amounted to persecution."

Therefore, for these reasons, I find that the decision of the First-tier Tribunal involved the making of an error of law and that that error of law was material. It is material because, if it is the case that the authorities continue to have an interest in the appellant as recently as 2017, then there are grounds to conclude that it would be reasonably likely that they would continue to have an interest in him upon his return. I make no finding as to whether or not the authorities do have such an interest in him, other than a finding that the judge's analysis of this issue was flawed.

The judge also purported to dismiss the appeal on Article 8 grounds, without conducting any Article 8 analysis. In any event, it is not clear why the judge did so, as the appellant currently enjoys discretionary leave to remain, and the sole issue in the case was the appellant's claim for asylum.

The only remedy appropriate in these circumstances is for the decision of Judge Herbert to be set aside and for the matter to be remitted to the First-tier Tribunal for a complete rehearing with no findings of Judge Herbert preserved. It is to be listed before a judge other than Judge Herbert.

Notice of Decision

The appeal is allowed on asylum grounds.

The case is remitted to the First-tier Tribunal with no findings of fact preserved, to be heard by a judge other than Judge Herbert.

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.

Signed *Stephen H Smith* Date 25 October 2019

Upper Tribunal Judge Stephen Smith