



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

Appeal ref: PA/06057/2019 (P)

THE IMMIGRATION ACTS

**Decided under Rule 34 of the  
Tribunal Procedure (Upper Tribunal)  
Rules 2008  
On 02 July 2020**

**Decision & Reasons  
Promulgated  
On 02 July 2020**

Before

**UT JUDGE MACLEMAN**

Between

**J R**

Appellant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**DETERMINATION AND REASONS**

1. The respondent refused the appellant's asylum claim by a letter dated 31 May 2019. The reasons, in summary, were as follows:
  - [5 - 8] appellant found not credible, and documents found unreliable, in previous proceedings before the FtT and UT;
  - [14] further documentary evidence from Sri Lanka about LTTE links unreliable;
  - [15 - 26] no significant role in Tamil separatism which might draw adverse attention on return;
  - [27 - 35] evidence of PTSD accepted, but does not add weight to claim of risk on return, or bring appellant within a risk category;

[41 – 66] no valid claim on humanitarian protection, article 2 and 3 ECHR, family and private life;

[62-66] no exceptional circumstances, including medical circumstances, for a grant of leave outside the rules under articles 3 and 8;

[67 – 86] no medical grounds for a grant of leave; and

[86-89] no exceptional circumstances under paragraph 353B of the rules.

2. The appellant's grounds of appeal to the FtT, dated 24 June 2019, are rather unclear. They maintain firstly that the SSHD failed to consider the documents provided with the further submissions, but are along lines relevant to a judicial review challenge to certification, rather than to an appeal. They maintain secondly that the SSHD failed to consider the *sur place* claim in context of evidence which showed that involvement with a proscribed organisation, short of membership, was enough.
3. The appellant's appeal to the FtT was listed on 25 July 2019. His counsel obtained an adjournment at the hearing, on the grounds that he was to obtain a report about his scarring.
4. The case came before FtT Judge Aujla for hearing on 17 December 2019, at the beginning of which the appellant was represented by other counsel. The Judge's decision, promulgated on 19 December 2019, records that counsel said that she had been taken by surprise on hearing from the appellant that his previous appeal had been dismissed. She was given time to speak further to the appellant, but on resumption she applied for adjournment to take further instructions. On refusal of that application, she withdrew. The hearing proceeded; see [14 – 17 of the decision].
5. The appellant applied to the FtT for permission to appeal on 3 grounds:
  - [1] misdirection on the correct approach in terms of *Devaseelan*;
  - [2] failure to consider the appellant's evidence in terms of Presidential Guidance on Vulnerable Persons; and
  - [3] failure to consider or make findings on a scarring report, for which the case had previously been adjourned.
6. The grounds of appeal were prepared by counsel who obtained the adjournment on 25 July 2019, not counsel who withdrew on 17 December 2019.
7. The grounds are silent on how or when the report was put to the FtT for consideration.
8. On 17 January 2020 FtT Judge Osborne refused permission, finding none of the grounds arguable. He said:

“There was no scarring report before the Judge even although [it] is dated 13 October 2019; that is a matter between the appellant and his solicitors. As the scarring report was submitted with the grounds [of

*appeal to the UT], the Judge could not consider it and so did not err in not doing so."*

9. The appellant sought permission from the UT, on the same grounds. UT Judge McWilliam granted permission on 26 February 2020. She said:

*"It is arguable that the Judge did not properly apply Devaseelan taking into account all the evidence, including that from Dr Al-Waqeel [the author of the scarring report]. The appellant states that the report was faxed to the FtT on the day of the hearing. It is arguable that it was not put before the Judge."*
10. The grant of permission was issued with the UT's usual directions, including a direction reminding parties of the need for an application to consider any evidence which was not before the FtT.
11. On 21 April 2020, the UT issued a note and directions with a view to determining without a hearing whether the FtT erred in law and, if so, whether its decision should be set aside.
12. The response from the appellant's solicitors is dated 5 May 2020. They do not add to the grounds, except by saying:

*"We ... attach ... a copy of the fax transmission sheet that shows ... the report was sent to the FtT on 16 December 2019."*
13. The report is dated 11 October 2019 on its first page and 13 October 2019 on its last page. The fax includes a copy of a covering letter to the FtT dated 13 December 2019. The covering letter does not state the date of the hearing, and makes no mention of any urgency.
14. The SHHD in response submits as follows (numbering according to the grounds)
  - [1] in terms of *Devaseelan*, previous decision correctly taken as a starting point;
  - [2] FtT was not required to cite the Guidance explicitly; FtT aided appellant to give evidence, see [18] and [34], and took account of PTSD diagnosis, see [39]; evidence found deficient for reason not related to vulnerability of the appellant; and
  - [3] not clear if report before the FtT, but immaterial as its findings "did not go towards establishing a profile of risk on return".
15. While responding to directions, neither party has suggested any reason why a hearing might be necessary to determine whether the FtT erred in law and, if so, whether its decision should be set aside.
16. The UT may now proceed justly to determine those questions without a hearing.
17. Ground [1] does not specify anything to show that Judge Aula misapplied *Devaseelan*, gave the previous decision any more weight than he was

entitled to do, or failed to consider the case before him in the round. His decision is in line with principle.

18. Ground [2] is similarly vague, and does not fairly represent the decision. The 3 passages cited by the respondent, and the decision as a whole, show that the Judge was at pains (the appellant having been deprived of representation) to take him slowly and patiently though his evidence, and to assess it in light of the psychiatric reports.
19. The grounds of appeal make no criticism of Judge Aula for proceeding with the hearing; rightly so, as there was no basis for an adjournment.
20. The grant of permission on ground [3] was plainly on the view that there might have been inadvertent procedural unfairness, without any fault of Judge Aula, if he had not seen the report.
21. It is now clear that the report was not mentioned at the hearing, and did not reach the file until well after the decision was issued.
22. The ground is careless in its absence of specification of whether the report was actually before Judge Aula; but I treat it as raising the issue whether there may have been a mishap, through no fault of the judge, constituting procedural unfairness to the appellant.
23. Appellants in this jurisdiction enjoy more latitude than in others by way of excuse from procedural lapses, given the nature of the issues, and the fact that redress against representatives will often not be a useful remedy. However, there are limits.
24. The appellant had been pursuing his claim, and had been represented, since 2013. The record does not disclose why he raised the possibility of obtaining a scarring report only at the point of his second appeal to the FtT, 6 years later. (It is not now relevant why an adjournment was granted; but that was a generous opportunity.)
25. The report is dated 11 and 13 October 2019. No attempt has been made to explain why the appellant did not send it to the FtT until 13 or 16 December 2019.
26. There is no explanation for not sending the report along with an urgent indication of the imminent date of hearing.
27. The appellant did not apply to have the report accepted, although it was not submitted timeously in terms of the FtT's directions requiring filing and service no later than 5 working days prior to the hearing.
28. The appellant has not sought to remedy that deficiency.
29. The appellant has not applied for the UT to consider evidence which was not before the FtT.

30. The appellant's solicitors do not say whether, while instructing counsel to appear on 17 December 2019, they made her aware of the report (an obvious part of their duties).
31. (It is extraordinary that counsel instructed for that hearing may have been unaware of previous proceedings, which were the starting point of the respondent's decision. Even if so, that does not explain why she was rendered unable to present the case, why she remained at the hearing centre, visible to the appellant through the door but not to the judge, or why she re-entered the room to take notes; see [16-17]. However, the Judge has not been criticised for electing to proceed, despite the difficult circumstances in which he was placed; so none of that affects the resolution of the remaining issue.)
32. Given the lengthy catalogue of shortcomings on his side, it cannot be held that the appellant suffered from a procedural collapse or an unfair hearing through any shortcoming on the part of the FtT.
33. My decision is based on there having been no procedural unfairness; but on materiality, the appellant has advanced no argument by which consideration of the scarring report might have led to another outcome.
34. The decision of the First-tier Tribunal shall stand.
35. The FtT made an anonymity direction. Parties have not addressed the matter in the UT. Anonymity is preserved herein.
36. The date of this determination is to be taken as the date it is issued to parties.

Hugh Macleman

UT Judge Macleman  
Date 02 July 2020

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#### NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent” is that appearing on the covering letter or covering email.