Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07445/2019 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre Remotely by Microsoft Teams On 27 May 2021	**Decision & Reasons Promulgated On 16 June 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

SR
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Islam, Fountain Solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Sri Lanka who was born on 18 September 1954.

3. The appellant arrived in the United Kingdom on 11 September 2012 and claimed asylum. The Secretary of State refused that claim on 30 January 2013 and the appellant's appeal to the First-tier Tribunal (Judge McAll) was dismissed on 15 March 2013. His subsequent application for permission to appeal was refused on 3 May 2013. The appellant became appeal rights exhausted on 17 May 2013.

4. The appellant lodged further submissions on 12 August 2013 which were refused on 15 August 2015 with no right of appeal. Further submissions were then lodged on 29 February 2016 and 19 April 2017. These were refused respectively on 3 March 2017 and 26 May 2017.

5. The appellant lodged further submissions on 20 December 2018. On 16 July 2019, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR. The appellant appealed to the First-tier Tribunal. The appeal was dismissed by the First-tier Tribunal but subsequently, on 20 March 2020, the Upper Tribunal (DUTJ Roberts) set aside the First-tier Tribunal's decision on the basis that it had materially erred in law and remitted the appeal to the First-tier Tribunal.

6. That remitted appeal was heard by Judge Ford on 15 December 2020. In a decision sent on 29 December 2020, Judge Ford dismissed the appellant's appeal on all grounds. The judge rejected the appellant's account that he had been detained for three years between September 2009 and July 2012 by the Sri Lankan authorities on the basis that he was believed to be a member of the LTTE or a collaborator who had acted as a driver transporting for the LTTE. The judge did not accept that the appellant had been detained as he claimed or tortured before being released. In addition, the judge did not accept that the appellant's claimed *sur place* activities in the UK with the TGTE were genuinely politically motivated and would expose him to risk on return to Sri Lanka.

The Appeal to the Upper Tribunal

7. The appellant sought permission to appeal to the Upper Tribunal on two grounds. First, the judge had failed to give adequate reasons for his adverse credibility findings and in concluding that the appellant would not be at risk because of his *sur place* activities. Secondly, the judge had failed to give adequate reasons for concluding that the appellant could not succeed under para 276ADE(1)(vi) of the Immigration Rules (HC 395 as amended).

8. On 2 February 2021, the First-tier Tribunal (Judge Keane) granted the appellant permission to appeal. In granting permission, Judge Keane observed that the appellant's grounds based upon inadequate reasons was a "characterisation [which] perhaps fell short of an adequate expression of concerns". Nevertheless, the judge went on and specifically identified two points, not directly raised in the grounds, which he considered to be arguable. Those related to paras 36 and 37 of the judge's decision where the judge had found first, that it was incredible that the Sri Lankan

authorities would have waited three years whilst the appellant was in detention to, as he claimed, torture him and force him to sign a confession before releasing him from prison; and secondly, that it was incredible that the appellant would have sought treatment at a hospital on his release if he was wanted by the authorities. Judge Keane stated that:

> "The judge arguably was substituting the judge's own understanding as to what constituted reasonable conduct, arguably did not embark upon that global assessment which is the essence of an assessment of credibility and the judge's use of the word 'incredible' arguably amounted to a pure rejection of the appellant's claims of fact".

9. On 8 February 2021, the Secretary of State filed a rule 24 response seeking to uphold the judge's decision and, in particular, his adverse credibility findings on the basis that the judge had provided detailed reasons for his decision and that his findings were within the range of conclusions properly open to him.

10. Following directions issued by the Upper Tribunal, the appeal was listed for a remote hearing at the Cardiff Civil Justice Centre. The hearing was conducted remotely by Microsoft Teams. The appellant was represented by Mr Islam and the respondent by Mr Diwnycz, both of whom joined the hearing by Teams.

Discussion

11. Mr Islam essentially relied upon five points derived from the two identified by Judge Keane in granting permission and three based upon the grounds of appeal.

12. First, Mr Islam submitted that the judge had irrationally concluded in paras 36 and 37 respectively of his decision that it was "incredible" that the appellant had been only tortured and released from detention after three years and that he had sought hospital treatment after being released. Mr Islam submitted that these two paragraphs influenced the judge in reaching his adverse credibility finding as a vital part of the appellant's case was that he had been detained and ill-treated.

13. The judge said this in paras 36 and 37 of his determination:

> "36. The evidence shows that the appellant was treated for injuries at a hospital in July 2012. This was 3 years after the war ended. The appellant has given account of being tortured and forced to sign a confession when he was detained and then securing the help of an influential individual to secure his release. But he had been in detention for 3 years by then. If he knew someone of influence then I find it incredible that he would have waited so long to get out of prison.
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> 37. If he was wanted by the authorities then I find it incredible that he should have sought treatment at a hospital on his release. I note that the treatment card refers to him being assaulted by unknown assailants. I would not expect him to disclose if he was assaulted by government agents while in detention but given that he has been detained for 3 years by them and a confession obtained, why was he being assaulted so long after his initial detention? He has not suggested that he held out against signing any confession or disclosing information for 3 years. He mentions being tortured for about 10 and 15 days. It is not credible that he was detained

> for three years and only then did the authorities decide that he was important enough to interrogate and torture. He has not given a credible explanation for the delay in producing this medical card. He says that his family are afraid yet his sister sent his medical card and the Red Cross letter to him. I find that the appellant was treated for injuries that he received in July 2012 but even to the low standard of proof applicable I do not accept that his assailants were in any way connected to the authorities".

14. The latter part of para 37 is a reference to some of the additional documents relied upon before Judge Ford and which were not available at the earlier appeal hearing before Judge McAll. These included a medical card from a hospital showing treatment received by the appellant in July 2012 shortly after his claimed release from detention and a Red Cross letter dated 10 December 2009 relating his mother's visits to their office when he disappeared.

15. Although Judge Keane, in granting permission, criticised Judge Ford for reasoning that both these aspects of the appellant's account were "incredible", what Judge Ford was undoubtedly seeking to identify was that the appellant's account in these two regards was "implausible". In other words, these were aspects of the account which the judge did not consider could reasonably have occurred in the circumstances. As is well-known, judges must exercise caution in concluding that aspects of an individual's account, particularly when it relates to conduct or activities in other countries, was implausible unless there is, for example, other supporting evidence for that conclusion such as country background evidence or other evidence inconsistent with the individual's account (see HK v SSHD [2006] EWCA Civ 1037). In HK Neuberger LJ (as he then was) (and with whom Chadwick and Jacob LJJ agreed) said this (at [29]–[30]):

> "29. Inherent probability, which may be helpful in many domestic cases, can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases. Much of the evidence will be referable to societies with customs and circumstances which are very different from those of which the members of the fact-finding tribunal have any (even second-hand) experience. Indeed, it is likely that the country which an asylum-seeker has left will be suffering from the sort of problems and dislocations with which the overwhelming majority of residents of this country will be wholly unfamiliar. The point is well made in *Hathaway on Law of Refugee Status* (1991) at page 81:
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> > "In assessing the general human rights information, decision-makers must constantly be on guard to avoid implicitly recharacterizing the nature of the risk based on their own perceptions of reasonability."
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> 30. Inherent improbability in the context of asylum cases was discussed at some length by Lord Brodie in *Awala –v- Secretary of State* [2005] CSOH 73. At paragraph 22, he pointed out that it was "not proper to reject an applicant's account *merely* on the basis that it is not credible or not plausible. To say that an applicant's account is not credible is to state a conclusion" (emphasis added). At paragraph 24, he said that rejection of a story on grounds of implausibility must be done "on reasonably drawn inferences and not simply on conjecture or speculation". He went on to emphasise, as did Pill LJ in *Ghaisari*, the entitlement of the fact-finder to rely "on his common sense and his ability, as a practical and

> informed person, to identify what is or is not plausible". However, he accepted that "there will be cases where actions which may appear implausible if judged by…Scottish standards, might be plausible when considered within the context of the applicant's social and cultural background".

16. However, the need for caution does not mean that a judge cannot properly infer that an aspect of an appellant's account is not plausible and take that into account as *a* factor in assessing whether the appellant's account to be believed. In Y v SSHD [2006] EWCA Civ 1223, having cited Neuberger LJ's view in HK, Keene LJ (with whom Ward and Carnwath LJJ agreed) said this at [25]–[27]:

> "25. There seems to me to be very little dispute between the parties as to the legal principles applicable to the approach which an adjudicator, now known as an immigration judge, should adopt towards issues of credibility. The fundamental one is that he should be cautious before finding an account to be inherently incredible, because there is a considerable risk that he will be over influenced by his own views on what is or is not plausible, and those views will have inevitably been influenced by his own background in this country and by the customs and ways of our own society. It is therefore important that he should seek to view an appellant's account of events, as Mr Singh rightly argues, in the context of conditions in the country from which the appellant comes. The dangers were well described in an article by Sir Thomas Bingham, as he then was, in 1985 in a passage quoted by the IAT in Kasolo v SSHD 13190, the passage being taken from an article in Current Legal Problems. Sir Thomas Bingham said this:
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> > "'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. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possibl[y] 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."
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> 26. None of this, however, means that an adjudicator is required to take at face value an account of facts proffered by an appellant, no matter how contrary to common sense and experience of human behaviour the account may be. The decision maker is not expected to suspend his own judgment, nor does Mr Singh contend that he should. In appropriate cases, he is entitled to find that an account of events is so far-fetched and contrary to reason as to be incapable of belief. The point was well put in the Awala case by Lord Brodie at paragraph 24 when he said this:
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> > "… the tribunal of fact need not necessarily accept an applicant's account simply because it is not contradicted at the relevant hearing. The tribunal of fact is entitled to make reasonable findings based on implausibilities, common sense and rationality, and may reject evidence if it is not consistent with the probabilities affecting the case as a whole".

He then added a little later:

> "… while a decision on credibility must be reached rationally, in doing so the decision maker is entitled to draw on his common sense and his ability, as a practical and informed person, to identify what is or is not plausible".
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> 27. I agree. A decision maker is entitled to regard an account as incredible by such standards, but he must take care not to do so merely because it would not seem reasonable if it had happened in this country. In essence, he must look through the spectacles provided by the information he has about conditions in the country in question. That is, in effect, what Neuberger LJ was saying in the case of HK and I do not regard Chadwick LJ in the passage referred to as seeking to disagree."

17. As was emphasised in both decisions of the Court of Appeal, the assessment of whether an individual's account is truthful – is "credible" – requires an holistic assessment of all the evidence including that of the appellant, any supporting evidence, any expert evidence and any background evidence. However, providing a judge exercises due caution and does not fall into the trap identified in HK, it is permissible for a judge, as part of their reasoning that an appellant's account is not to be accepted, to conclude that aspects of the account cannot stand up to a common sense yardstick as being "plausible".

18. In my judgment, in paras 36 and 37 Judge Ford did not fall into the trap identified in HK. It was open to Judge Ford as a matter of reasonable inference to take into account that it was implausible or, put another way, unlikely that the appellant would have been detained for three years only to be tortured and forced to sign a confession and then released as a result of the intervention of an influential person - three years after having been initially detained – whom he could have intervene earlier. As the judge pointed out, it was no part of the appellant's case that he had been resisting the Sri Lankan authorities over that period and the emphasis of his evidence was upon the events that he said occurred to him in detention after some three years and shortly before his release. I see nothing irrational, perverse or Wednesbury unreasonable in the judge inferring that that account was not plausible or not likely to be true.

19. Likewise, the approach of the judge in para 37 was reasonable and not irrational in assessing the appellant's own evidence and the evidence which he put in to support his claim that he had been tortured, namely that he had gone to hospital shortly after he was released from detention. The judge accepted, in the end, that to the "low standard of proof" the appellant had established that he had been treated for injuries in July 2012 but not that those injuries were caused, in the way he claimed, during his detention by the Sri Lankan authorities. The judge's conclusion that the link between his injuries and claimed detention was not established was not based solely on his view that it was implausible that the appellant would have sought treatment at a hospital on his release. The judge did refer to that point at the beginning of para 37 of his determination but the judge gave multiple reasons for not accepting the claimed connection between detention and injury in reaching his overall adverse credibility finding and rejection of the appellant's underlying account. His reasons are not restricted to those in para 37.

20. Of course, the judge was, in this appeal, taking as his "starting point", following Devaseelan [2003] Imm AR 1, Judge McAll's findings that the appellant had not established he had been arrested and detained in Sri Lanka and that he had not been suspected of assisting the LTTE. Read as a whole, para 37 does not irrationally or unreasonably focus upon the fact that the appellant had sought treatment at a hospital on his release but, in any event, I do not accept that it was not within the range of reasonable inferences that the judge was entitled to draw on the evidence that it was implausible that the appellant would have sought assistance in this way if his account was true that he had been released from detention by the authorities shortly after having been tortured.

21. That, then, deals with points 1 and 2 relied upon by Mr Islam which I conclude do not establish any arguable error of law.

22. The third point relied upon by Mr Islam in the grounds and his oral submissions was that the judge was wrong in paras 41 and 46 of his decision to reject the appellant's account that he was at risk on return as a result of his *sur place* activities in the UK. There, the judge said this:

> "41. In relation to his *sur place* activities, the only evidence I have of his involvement is some photographs of him attending a Tamil protest or protests in the UK on unknown dates and the TGTE letter.
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> ....
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> 46. He has supplied his Tamil Eelam card and I have taken this into account. He has shown some evidence of *sur place* activities, but those ended in 2018, he supplied the letter from the TGTE very late in the day without any reasonable explanation for the delay, and the description of the appellant's activities for the TGTE and his profile does not fit with his own account and seems greatly exaggerated. Even if the author of the letter is accurate in his description of the extent of the appellant's activities, I am not satisfied that those activities (selling some tickets for a fundraiser and attending a limited number of protests) will be known to the Sri Lankan authorities or be of any interest to them. The appellant is not a person of any influence in the TGTE. I find that given the timing and the level of his involvement with the TGTE, his activities for the group are entirely self-serving and not motivated by any genuine commitment to the cause of an independent Tamil state. He gave no account of any activities over the last two years and says he has difficulty travelling due to his sight problems. I am not satisfied that he does have such difficulties. I am not satisfied that he has an adverse profile with the Sri Lankan authorities, that he has a history of detention, that the authorities will wish to question him on his return or that even with the scars he bears, he will encounter any problems. Even if he is challenged about those scars, I can see no reason why he can't refer to the hospital record of treatment following assault by unknown assailants".

23. Then at para 47 the judge concluded:

> "I do not accept that this appellant is genuinely politically motivated".

24. The judge's finding has to be seen in the context of his overall rejection of the appellant's account that he had been detained and tortured as a result of being suspected of activities supporting the LTTE. That had been the judicial finding made by Judge McAll in 2013 and was also the finding made by Judge Ford in the instant appeal. In the light of that, the appellant was relying upon claimed *sur place* activities in the UK despite the fact that it was not accepted that he had any LTTE involvement before coming to the UK. In addition, the judge noted that the evidence of the TGTE had also to be seen in the context that the appellant had not shown any activities since 2018 in the UK. The judge set out the letter from Tamil Eelam at para 24(e) of his determination. That letter was produced at the appeal hearing and the appellant told the judge that he had obtained it from the TGTE on the day it was written, namely 3 December 2020 which was some ten days before the hearing. In those circumstances, it was reasonably and rationally open to the judge not to accept that the appellant was genuinely politically motivated based upon his claimed *sur place* activities in the UK. In those circumstances, it was open to the judge consistently with the country guidance decision in GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) and MP (Sri Lanka) v SSHD [2014] EWCA Civ 829 to conclude that the appellant had not established that he was on a stop list and had not established that he was known to the Sri Lankan authorities or was likely to be questioned on return. Of course, if he were questioned, the appellant could not truthfully say that he was an LTTE supporter and had previously been detained by the Sri Lankan authorities or that he had engaged in genuine *sur place* activities.

25. Given Judge McAll's earlier finding that the appellant had not established he was at risk as a result of *sur place* activities, the judge was legally entitled to find, taking that as his 'starting point', that the evidence in this appeal did not establish that the appellant would be at risk on that basis on return.

26. Finally as regards the appellant's asylum claim, Mr Islam took issue with the judge's finding that the risk factor was not established that the appellant had illegally left Sri Lanka on a false passport was contrary to the appellant's evidence given in para 4 of his witness statement dated 19 December 2018 and the judge had given no adequate reason for not making a finding in line with that evidence. The difficulty with this argument is that the judge did not accept the appellant's account or that he was a truthful witness. The judge rejected the appellant's evidence. In the light of that, the basis upon which the appellant said that he had left Sri Lanka illegally on a false passport with the aid of an agent fell away. As, of course, was the effect of the judge's adverse credibility finding given the finding, as with Judge McAll previously, that the appellant was not telling the truth as to his circumstances in Sri Lanka and why he left Sri Lanka. The reason why the judge did not accept the appellant's evidence that he had illegally left Sri Lanka using an agent, on a false passport was simply that.

27. It follows that I reject each of the points relied upon by Mr Islam challenging the judge's adverse credibility finding and his dismissal of the appellant's international protection appeal.

28. Standing back, the judge's determination is, in my judgment, read as a whole a fair and careful assessment of the appellant's claim based, before Judge Ford, upon additional documentary evidence, given the adverse credibility finding made in 2013 by Judge McAll rejecting the appellant's account. The judge's reasons at paras 22–50 (setting out the documentary evidence with commentary, the relevant country evidence relied upon and reaching factual findings and conclusions) were cogent and adequate to sustain his ultimate adverse finding which was not irrational, perverse or otherwise unreasonable.

29. That then leaves the final point relied upon by Mr Islam and in relation to the judge's assessment of Art 8. In his oral submissions, Mr Islam criticised the judge in para 53 for stating that the appellant had made a "false asylum claim" and with which he had "persisted ... for 7 years" and he had "abused the immigration system in the UK". Mr Islam submitted that was not the case. However, as I pointed out to Mr Islam during the course of his submissions, the judge in this appeal, as had the judge in the earlier appeal, found that the appellant had fabricated his account and that it was not true. Given that finding, which the judge was entitled to carry over into his assessment under Art 8, it was not inaccurate to describe the appellant as having made a "false asylum claim" with which he has persisted since he arrived in the UK in 2012. In any event, the judge's observation was properly factored in when carrying out the proportionality assessment as identified in para 54 as the public interest in the "maintenance of immigration control". Mr Islam did not seek to put forward a contention that the appellant had a strong Art 8 claim but merely said that the claim was borderline. The judge's reasons at paras 51–54 are relatively brief. However, and the contrary was not argued by Mr Islam, it was properly open to the judge to find that the appellant had not established that there were "very significant obstacles" to his integration on return to Sri Lanka where his family lived and with whom he was still in touch. Likewise, given his immigration history it was inevitable that the public interest would outweigh any interference with his private life in the UK which, as I have said, Mr Islam did not seek to put forward as a claim of strength.

30. For these reasons, the judge did not err in law in dismissing the appellant's appeal on international protection grounds and under the ECHR.

Decision

31. The decision of the First-tier Tribunal to dismiss the appellant's appeal did not involve the making of an error of law. That decision, therefore, stands.

32. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
2 June 2021