IN THE UPPER TRIBUNAL

R (on the application of DN) (Sri Lanka) v The Secretary of State for the Home Department
IJR [2015] UKUT 00097 (IAC)

Field House,
Breams Buildings
London
EC4A 1WR

20 February 2015

Given orally at Field House on 20 February 2015

BEFORE

UPPER TRIBUNAL JUDGE PETER LANE

Between

THE QUEEN
ON THE APPLICATION OF

DN (SRI LANKA)

Applicant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Ms S Jegarajah, instructed by A & P Solicitors, appeared on behalf of the applicant.

Mr Z Malik, instructed by the Treasury Solicitor, appeared on behalf of the respondent.

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JUDGMENT

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JUDGE PETER LANE: This is an application by Mr DN for a judicial review of the decision of the respondent taken on 23 October 2013 not to treat his submissions of 22 February 2010 as a fresh asylum or human rights claim. Permission was granted by the Upper Tribunal on 15 August 2014 following an oral hearing.

Immigration history

2. The immigration history of the applicant is set out in the detailed grounds of defence. It is essentially as follows. In June 2006 the applicant arrived in the United Kingdom and claimed asylum. His application was refused on 10 July 2006 and he received a right of appeal under what is known as the Fast Track Procedure. Under that procedure his appeal was heard by an Immigration Judge, but dismissed on 21 July 2006. By 27 July 2006 the applicant had become appeal rights exhausted.

3. A previous judicial review brought in November 2006 was refused on the papers. In April 2007 permission was refused at a permission hearing. In June 2007 an allegation of torture was sent to the respondent's caseworkers and later in that month the applicant lodged a further application for judicial review. On 15 November 2007 permission to apply for judicial review was refused on the papers. On 15 April 2008, the applicant not having been removed in the meantime, the respondent was notified that the applicant had applied to the European Court of Human Rights pursuant to rule 29 of their Procedure Rules, so as to prevent his removal from the United Kingdom. On 22 February 2010 the applicant made further submissions, to which I have made reference.

4. Delays then occurred; it is possible in part because of the applicant's failure to report. In any event, on 23 October 2013, the applicant received the decision which is the subject of these proceedings.

Determination of the applicant's appeal

5. The determination of the Immigration Judge who heard the applicant's appeal in July 2006 needs to be considered in some detail. As I have indicated, it was an appeal that was heard under the Fast Track Procedure Rules. An application was made to adjourn which was refused. The judge, however, does not record any application being made for the case to be taken out of the Fast Track.

6. In refusing the application to adjourn, the judge considered that he had all the evidence that was needed in fairness in order for him to make a determination. The applicant pointed out to the judge various scars on his body, which he said had been caused as a result of conflict in Sri Lanka. He did not, however, understandably, point out any scar to his penis; of which more later.

7. The applicant told the judge that he had been born and brought up in Vavuniya. In 1998 or 2000 he had been arrested for the first time in that area. He was released with the help of the principal of his school. He was then arrested a second time in 2002, again in Vavuniya, by members of the EPRLF and detained with other people for fifteen days at an EPRLF camp. There he was identified by a masked man as an LTTE member, beaten and subjected to what he described as smoke treatment. However, the applicant refused to admit that he was a member of the LTTE. He became weak as a result of his experiences and was taken to hospital but discharged after two days.

8. He then carried on with his studies to GCE A level standard but did not go on to university. He remained in Kilinochchi where he obtained employment in a hotel. He then became a full member of the LTTE, who sent him for military training. In this capacity, amongst other things, he passed on information about guests at the hotel to his superior. He was later required to carry out work for the LTTE investigation group. This sent him to Vavuniya in September 2005, when there was a

bomb blast. The applicant was arrested during a resulting round-up. He could not recall which day in September it was. He was found in possession of an LTTE identification tag. First he denied being a member of the LTTE. He was hung upside down, his head in a bag of chilli flakes, beaten on the legs with canes; and as a result of this he confessed that he was a member of the LTTE and identified a number of people as members of that organisation. He was:

> "released and allowed to escape" one day in early January 2006 as a result of a bribe paid by his father. He went to Vanni but could not remain there as he had identified LTTE members who lived there."

9. The applicant returned to his job at the hotel in Kilinochchi and lived together with the LTTE until May of 2006. Then, according to his account, as given to the judge:

> "he came under suspicion by the LTTE investigation unit who started surveillance on him. He feared that they would find out that he worked against them. His father arranged for an agent to take the appellant to a safe country which he learnt on arrival was the UK."

10. The judge made adverse credibility findings, beginning at paragraph 31 of the determination. Having described the applicant's account as "superficially consistent" the judge nevertheless held that it contained:

> "glaring discrepancies and implausible claims such that I am unable to accept any material self-serving assertion by the appellant which his not supported by other evidence."

11. The matters which concerned the judge were set out at paragraph 32. There were problems regarding dates and even years of the arrest which led to the applicant's first period of detention. There were discrepancies in his accounts of the occasions when he had been arrested. There was an inconsistency regarding the place to which he had been taken when detained by the EPRLF. The judge noted that on the

applicant's own account he had been released on payment of a bribe after assisting the authorities, which the judge considered inconsistent with any real risk of further detention and ill-treatment by them.

12. The judge considered that returning to live amongst the LTTE was inconsistent with the applicant's asserted fear of punishment by that organisation for allegedly giving information to the authorities. The applicant was also said to have given conflicting explanations for his scars. In order to understand that we look at paragraph 11 of the determination. There the judge noted that, in respect of the scars claimed to have been caused by torture, the applicant had denied in answer to question 117 that he had sustained any injuries from the beatings or scars but that he had swellings on his body and blood clottings. When asked about the injuries from shelling in 1997 the applicant pointed to his forehead and scalp and said "I was attacked by a piece of shell on my head and also I have an injury to my leg". This led the judge to record that he did not consider it likely that the medical report could materially assist the credibility of the applicant.

13. The judge concluded at paragraph 34 of the determination by finding that the applicant "has fabricated key elements of the core of his claim. I do not accept that the appellant was arrested, detained and ill-treated as claimed". At paragraph 35 the judge found that the scars, such as they were, not likely to attract the adverse attention of the authorities on return.

The applicant's submissions

14. The nature of the fresh claim submissions is essentially as follows. They comprised a medical report from Dr Josse, a medical practitioner with long experience including working for the Metropolitan Police. There were also witness statements from two individuals whom I will describe as NS and MT. They both submitted short witness statements attesting to the truth of the applicant's involvement with the LTTE and

asserting knowledge that as a result thereof the applicant had been detained and ill-treated; and had finally left Sri Lanka for the United Kingdom.

The respondent's response

15. The respondent's decision of 23 October 2013 deals with these evidential materials. The decision does so by beginning with, and building upon (that is taking as its starting point) the determination of the judge. The decision set out reasons by reference to background evidence why it was not considered that as at October 2013 the applicant had a genuine fear of the LTTE. Essentially, that organisation had ceased to be a force on the ground in Sri Lanka some time earlier.

16. Reference was then made to the case of GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319, the country guidance findings of which were set out in some detail. In particular, I observe that at paragraph 6 of the country guidance the Tribunal in GJ found that there were no detention facilities at the airport and only those whose names appeared on a "stop list" would be detained from the airport. According to GJ, any risk for those in whom the Sri Lankan authorities are or become interested exists, not at the airport, but after arrival in their home area, where their arrival will be verified by the CID or police within a few days.

17. The determination in GJ then went on to consider the current categories of persons thought to be at real risk of persecution or of serious harm on return to Sri Lanka, whether in detention or otherwise. These comprised individuals who are or are perceived to be a threat of 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. Then journalists 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. The next category was 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. The Tribunal held that 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, would be stopped at the airport and handed over to the appropriate Sri Lankan authorities in pursuance of such an order or warrant.

18. The respondent's letter addressed the significance of the country guidance case as follows. It was not accepted that the applicant was a person whom the UNHCR eligibility guidelines describe as having more elaborate links with the LTTE. It had previously been found that there was no evidence that the authorities knew that the applicant had worked unwillingly as a helper for the LTTE. It was not accepted, and there was no evidence to demonstrate, that the applicant was amongst those in the London Diaspora who had engaged in activities directed at actively seeking to destabilise the Sri Lankan state. The applicant was not a journalist or human rights activist. There was no evidence to show that there was any extant court order or arrest warrant registered against his name and it was therefore reasonable in the respondent's view to conclude that the applicant's name would not be held on a computerised stop list. Finally, as the applicant was not in Sri Lanka at the conclusion of the civil war, the respondent considered it reasonable to conclude that he had not witnessed any alleged war crimes and so could not give evidence to the Lessons Learned and Reconciliation Commission.

19. In summary, therefore, the respondent considered that the applicant did not fall into any of the risk categories identified by the Tribunal in GJ. The letter concluded that the applicant was no more than an ordinary national of Sri Lanka returning to his home country who would be of no adverse interest to the authorities.

20. Having said all that, the letter turned to the evidence of Dr Josse. The letter says this: "It is considered that this, [that is to say the description and opinions of the causes of scars] was an opinion consisting mainly of pure speculation". It was not accepted

that the applicant would be brought to the attention of the Sri Lankan authorities due to any scars on his body. So far as the witnesses were concerned they were said to provide evidence that was "self-serving and subjective. No objective evidence has been submitted which can support your claims".

21. The respondent accordingly concluded, applying the well-known case law in WM (DRC) [2006] EWCA Civ 1495, that any hypothetical judge would not be reasonably likely to allow the applicant's appeal.

22. The grounds accompanying the application for judicial review take issue with the respondent's decision as follows. They point out that MT was recognised as a refugee and that NS was also recognised as a refugee after a successful appeal when she was found to be credible. The reference to Dr Josse's report as being "pure speculation" was challenged as essentially being irrational:

> "A clinical finding that the applicant has scarring consistent with burns to the penis must logically be relevant to the question of whether the applicant was tortured. It is difficult to see how this scarring could arise ordinarily."

Criticism was also made of the description of the witnesses' evidence as being "self-serving".

23. After permission to bring judicial review proceedings had been granted, the respondent issued a supplementary decision letter on 28 October 2014. This returned to the evidence of Dr Josse. It was noted that the doctor had given a detailed description and an opinion of the scars on different parts of the applicant's body. It was, however, considered that the doctor's opinion:

> "consists mainly of a recount of your narrative of how you came to have these scars. It is considered that this opinion is speculative as in the 'Facts' section Dr Josse wholly accepts your account unquestioningly, quoting 'he was struck by the butt of a rifle, [and] a baton, kicked and punched being flung against a wall'."

24. The letter noted that Dr Josse had been shown the asylum appeal determination but there was no reference in the doctor's report to the fact that the Immigration Judge had rejected the credibility of the applicant. Dr Josse did not acknowledge that rejection nor did he say why he accepted the applicant's account. The letter reiterated the respondent's view that it would not be at all likely that the scars would draw the applicant to the adverse attention of the authorities at the point of return to Sri Lanka. So far as the witness statements were concerned, it was again stated that these were self-serving and subjective as no objective evidence had been submitted which would support the claim.

> "We have reached this conclusion on the basis that the witnesses were close friends of yours and the closeness existed in the United Kingdom at a time when you were pursuing your asylum claim and spending time with the witnesses. Furthermore you have failed to address that neither witness saw the events described by you and are merely relying upon accounts given to them by you."

25. Even though the witnesses had been accepted to be refugees, it was pointed out by the respondent that each claim made by an individual asylum seeker fell to be considered on its own merits. For these reasons the evidence was considered to carry no weight and would not have a realistic prospect of success as regards the hypothetical judge.

The submissions

26. Ms Jegarajah's submissions essentially follow the form of her written grounds. She emphasised, however, that the determination of the judge was in a Fast Track case and it should be viewed according to subsequent case law concerning that process. She highlighted the professional background and history of Dr Josse, in particular his work with the police. She pointed out that the injuries set out in Dr Josse's report are all recorded by him as being consistent with the explanation given by the applicant.

27. The witnesses' evidence, Ms Jegarajah said, was indeed self-serving, insofar as that phrase meant that the documentation had been assembled in order to assist the applicant in his case. The witnesses were, however, clearly people who knew the applicant well, including through family connections.

28. So far as the witnesses were concerned Ms Jegarajah added that since they had been members of the LTTE in various capacities it was unlikely that they would want to go out of their way to help someone who had not been in that organisation by claiming falsely to a judge that he had been.

29. As regards the country guidance case of GJ although Ms Jegarajah accepted that not all escapees would, as such, be on a stop list, nevertheless a hypothetical judge hearing an appeal today would be asked on behalf of the applicant to consider that the fact the applicant had escaped and his time spent in the Diaspora in the United Kingdom would be reasonably likely to place him at real risk. There was, according to Ms Jegarajah, more than a fanciful prospect of success.

30. Mr Malik submitted that the issue comes down to one of Wednesbury unreasonableness, that being the test which after some uncertainty the Court of Appeal had concluded is the correct one to apply in paragraph 353 cases. He categorised Ms Jegarajah's submissions on behalf of the applicant as amounting to no more than a disagreement with the respondent's conclusions.

31. The Immigration Judge had made robust adverse credibility findings, which had not been disturbed on appeal. Even if the applicant had been ill-treated in Sri Lanka, Mr Malik submitted that the nature of the country guidance was such as to give no comfort to the applicant in a hypothetical appeal brought today. The respondent had correctly taken the judge's determination as a starting point. She had quoted extensively from the country guidance. The two witness statements were self-serving. Any problem as regards the analysis of those witness statements or indeed

the report of Dr Josse had, Mr Malik said, been cured by the supplementary letter where his primary case was that the original decision had been sufficient.

32. In reply Ms Jegarajah stressed the eminence of Dr Josse. She reiterated the contention that, taken in the round, the applicant's case could well succeed today. In any event the relatively modest threshold set by the case law and paragraph 353 was satisfied.

Discussion

33. I am grateful for Counsel's submissions. The question for me is whether the respondent was entitled on Wednesbury grounds to reach the conclusions she did in her decision under challenge. In considering that, I must examine whether the requisite amount of anxious scrutiny has been applied. In so doing, as the case law indicates, there is perhaps little space between such an analysis and stepping into the shoes of the Secretary of State so as to ask myself the direct question whether a hypothetical judge would be reasonably likely to allow the appeal (YH v Secretary of State for the Home Department [2010] EWCA Civ 116; MN (Tanzania) v Secretary of State for the Home Department [2011] EWCA Civ 193).

34. The respondent's view of the medical evidence is in my view unquestionably valid. The respondent was entitled to take the view that this report viewed in the round with the other evidence, including the findings of the judge, would not carry the applicant's case the relevant distance. I accept the eminence of Dr Josse but any expert is only as good as his or her report and the respondent in my view was unquestionably entitled to conclude that the report was problematic in that it had accepted at face value and without any qualification the account given by the applicant. The various injuries are in each case merely said to be "consistent" with the account given by the applicant. It is easy at this remove to stand back and criticise a report written several years ago for not engaging, amongst other things, with the Istanbul Protocol, which requires experts (inter alia) to consider whether

scars are consistent or highly consistent and to explain why; as well as considering other possible reasons for those scars. Nevertheless, the report has manifest failings and the respondent was entitled to note them and as a result give the report little weight.

35. I find little merit in the criticism of the original decision letter, as regards its reference to Dr Josse's report being "an opinion consisting mainly of pure speculation". It is clear what point is being made about the report in that letter and, indeed, in the supplementary letter.

36. So far as the witness statements are concerned, it is perhaps unfortunate that the term "self-serving" is used as widely as it is in cases involving contested evidence in claims to international protection. However, looking at the decision, it is evident that what the respondent was in effect saying was this: in the light of the cogent adverse credibility findings of the Immigration Judge, which remained undisturbed, the fact that these witnesses were now coming forward as friends of the applicant was a matter of some significance, in deciding hypothetically what weight might be given to their evidence.

37. Ms Jegarajah submitted that it would be unlikely for those who were genuinely in the LTTE to lie about the LTTE background of third parties. That may be so; but it does not necessarily follow; and on the evidence before us, we do not know about the views of the witnesses in this regard. Further, the nature of the evidence set out in the witness statements is somewhat thin and, in some respects, indirect. Ms Jegarajah is quite right to say that hearsay evidence is permissible in Tribunals. Nevertheless, these matters are all plainly relevant ones in assessing the weight that might be given to the statements.

38. I find that the original decision letter shows no absence of anxious scrutiny or Wednesbury unreasonableness. But in any event, the fuller explanation given in the letter of 28 October undoubtedly carries the respondent's case the requisite distance.

39. However, the country guidance aspect of this case strikes me as on any view highly significant. The country guidance in GS has been referred to by me earlier in this judgment and I need not repeat it. What is striking about it is that, even if one takes the applicant's case regarding his experiences in Sri Lanka at its highest, there is frankly nothing to place him within any relevant risk category. The scarring on the visible parts of his body would not attract the requisite adverse attention at the airport. The fact that he had secured release on payment of a bribe several years ago does not bring him within the category of those who are likely to be on a stop list. The fact that he comes from the United Kingdom would be known to the authorities but, again, it is plain from the country guidance that significantly more in that regard is needed in order to reach the point of being within a risk category.

40. I accept fully that the country guidance in GJ is not to be regarded as a tick list. However, stepping back and even if I were to reject Mr Malik's submissions on Wednesbury and put myself in the position of the Secretary of State, I see nothing in the applicant's case to make it more than fanciful that a hypothetical judge, applying the extant country guidance, would find in the applicant's favour. However, this is very much in the nature of an alternative finding.

41. For the reasons that I have articulated, I find that the respondent was entitled to refuse to treat the applicant's submissions as a fresh claim, not only by reference to the country guidance but also on the basis that the three strands of evidence put forward did not carry the applicant to the point where it could be said there was a reasonable likelihood that a hypothetical judge would find in his favour.

42. For all these reasons this application is refused.

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Costs

Mr Malik makes an application for the costs of the proceedings. In the light of my judgment he is unquestionably entitled to costs. He has handed to me documentation indicating the sum which the respondent seeks from the applicant. It amounts to a grand total of £4,840.

Ms Jegarajah objects to that in a number of respects. She points to the number of fee earners listed as having been engaged on the case. She considers that the sum of £1,792 for "attendances on documents" is, in particular, excessive and as far as I understand her, she challenges the fees of Counsel set out as £830 for advice, conference and documents and £1,044 as fees for the hearing, that being broken down between the substantive and the permission hearings.

I have had regard to what Ms Jegarajah has said. I have also noted what she says about the means of her client, the applicant, who is said to be relying on the charity of others in order to bring these proceedings.

So far as the number of fee earners is concerned, Mr Malik explains that this has been partly due to a fee earner leaving and partly to one being on holiday. Any organisation, whether it be the Treasury Solicitor or a private firm of solicitors, plainly has to take account of matters of that kind and I have heard nothing to suggest that the amount should be reduced as a consequence of it. The fees for attendances on documents strike me as not inappropriate given the history of these proceedings and the interaction which has been necessary as between the Treasury Solicitor and Mr Malik, at various stages during them. Mr Malik's own fees I consider to be on their face entirely reasonable for a matter of this kind.

So far as the applicant's means are concerned, Ms Jegarajah said that it would not be in the State's interest to have this sum awarded, since there would be little if any point in enforcing the order. As I pointed out to Ms Jegarajah, enforcement is not a

matter for me. It is open to the applicant to make such submissions as he sees fit to the Secretary of State.

In all the circumstances, and bearing fully in mind what Ms Jegarajah has said, I have concluded that the sum of £4,840 is reasonable in all the circumstances and I therefore order the applicant to pay the respondent's costs in that amount.~~~~*0*~~~~