Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04122/2012

THE IMMIGRATION ACTS

Heard at Field House
On 23 August 2013

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE KING TD

Between

SOPITHAN SATHASIVAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Sowerby of Counsel instructed by S Satha & Co Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born on 2 November 1990 and is a citizen of Sri Lanka.

2. The appellant left Sri Lanka on 2 October 2010 upon his own passport endorsed with a Tier 4 student visa. On 12 March 2012 the appellant claimed asylum.

3. The respondent refused to grant the relief sought and issued a decision to that effect on 11 April 2012.

4. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Levin on 23 May 2012. His claim was found to lack credibility and the appeal dismissed in all respects.

5. Grounds of appeal were submitted against that decision and permission to appeal was granted. Thus, the matter comes before me in pursuance of that leave.

6. Mr Sowerby, who represents the appellant, invited my attention to the written grounds of appeal and sought to amplify them in his submissions to me.

7. Ground 1 relates to the standard and burden of proof which, submits Mr Sowerby, the judge had both misunderstood and misapplied.

8. In paragraph 22 of the determination the judge set out as follows:-

> "In deciding any issue of credibility, I am mindful that the burden of proof is upon the appellant and the standard of proof required is the lower standard of 'reasonable likelihood' and that the question that I have to ask myself in deciding any issue of credibility is:-
>
> > 'is what the appellant claims more likely than not to be true'.
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> I am also mindful that in reaching my decision, I am required to look at the evidence 'in the round' and to take into account the fact that those claiming asylum have an incentive to embellish and exaggerate their case."

9. The criticism that is offered of that definition is that it is confused and that the phrase "more likely than not" suggests the balance of probabilities rather than the lower standard that is to be applied. Furthermore, it is suggested that starting off from the position that those claiming asylum have an incentive to embellish and exaggerate their case, suggests a starting point of belief this has taken place.

10. Mr Sowerby recognises that part of the credibility findings that were made by the judge relate to the inconsistencies of evidence that were found. He accepts that the judge was entitled in those circumstances to make adverse credibility findings. The difficulty however in the case was to determine how the judge approached matters of evidence if such inconsistencies were not apparent. By way of example, my attention was drawn to paragraph 32 of the determination.

11. It was the appellant's case that he was arrested by plain clothed police officers in Colombo on 10 March 2010 because when they looked at his mobile phone they discovered photographs of his brother in LTTE uniform. In his witness statement the

appellant had indicated that he had moved to Colombo because his life was in danger in his home town. The judge found, therefore, that his claim that he had brought with him to Colombo his mobile phone which contained photographs of his brother wearing an LTTE uniform to be inconsistent with his claim that he was forced to leave his home area. The judge did not find it credible that the appellant would, in the circumstances that he has described, leave photographs of his brother on his mobile phone thereby exposing him to the risk of arrest.

12. The explanation which the appellant had offered to explain that situation was simply that he had not paid attention to the phone. Mr Sowerby submits that there was no reason at all why the judge should have rejected that explanation. In any event, it is not clear what standard of proof was being applied to the finding of lack of credibility.

13. Similarly, in paragraph 36, it was said by the appellant that he had been arrested on suspicion of being an LTTE supporter and of planning to plant a bomb in Colombo, the judge did not find it credible that the appellant would not have been required to surrender his passport as a condition of his bail. The Judge went on to find that the claim of the appellant that he was granted bail by a court upon a charge of terrorism to be inconsistent with the background information. Mr Sowerby once again invites me to find that there was really no good reason why the judge should have rejected the explanation given by the appellant and in so doing it is far from clear what standard or burden was to be applied.

14. I was invited to find that the whole determination was tainted by the direction as to standard and burden of proof.

15. Mr Wilding, who represents the respondent, accepted that perhaps the standard could have been better expressed but it was clear that the judge was mindful of the proper burden of proof being that of "reasonable likelihood". He invites me to find that although the phrase "more likely than not" does not entirely reflect "reasonable likelihood" it represents a similar approach in commonsense.

16. What was important he submits is that the judge considered the evidence in the round and therefore was in a better position to make proper judgments as to credibility rather than dealing with various aspects of evidence piecemeal. There was no suggestion, he submits, that the judge had formed an adverse impression of the appellant before embarking upon the determination. Many distinct issues are considered and findings made upon them but within the overall context of the claim.

17. It is perhaps helpful when considering that matter to note the overall structure and framework of the determination. The appellant's case is set out in considerable detail as is that presented by the respondent. The submissions of the parties are noted. The respondent highlighted numerous inconsistencies and discrepancies in the appellant's account and invited the judge to find that the claim was not credible. The

appellant's Counsel on the other hand invited the judge to find that the appellant was a credible witness who had generally given a consistent account of events.

18. The judge recognised in paragraph 21 that essentially the case revolved upon credibility and the findings of fact that needed to be made.

19. In paragraph 23 the judge accepts what the appellant had to say as to his helping decorate the streets for the LTTE celebrations and providing information upon troop movements to the LTTE. Thus, the judge did not start from the perspective of disbelief but rather accepted that which was said.

20. When considering, however, the account of the appellant as it unfolded the judge noted at paragraph 25 certain discrepancies in the evidence. The omission of the appellant to mention the activities of his brother was regarded by the judge as a significant feature. Given that the starting point of the appellant's case was that he was asked to deliver packages and letters for the LTTE which in turn led to his being detained and ill-treated, it was important at paragraph 47 for the judge to note certain inconsistencies in relation to those matters. There were also some inconsistencies as to the number of times that he had been arrested and the length of those detentions.

21. The judge noted the circumstances in which the appellant claimed that he came to the attention of the authorities in Colombo because of the mobile telephone and did not accept that account. Inconsistencies as to the length of that detention were noted as were inconsistencies as to what it was that he was charged with.

22. The judge had regard to the background material, particularly relating to those arrested on terrorist charges. Given that background information the judge did not accept the account of the appellant that he was released on bail with his passport not surrendered. The judge went on to consider the evidence from the lawyer about the police procedures and for various reasons did not find that much weight could be attached to those letters. Further documents were also considered in the overall nature of the claim and found to be of little reliability. Other matters relating to the time taken to claim asylum and the circumstances in which asylum was claimed were also noted. Thus, it was a structured approach, not focusing on one matter but looking at the claim as a whole.

23. In that connection I note the case of **Mukarkar v Secretary of State for the Home Department [2006] EWCA Civ 1045** in which Carnwath LJ (as he then was) said:-

> "Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis."

24. There were many inconsistencies identified and the judge, having heard the evidence of the appellant, did not accept the explanations that were made. The incident with the mobile phone drew sharply into question whether it was reasonably likely that

the appellant, seeking to escape persecution, would have such a photograph on his phone. It is of course possible to argue that he could have overlooked that photograph. That explanation does not stand in isolation from many other matters surrounding the matrix of the claim. In that connection I note also what was said by the Supreme Court in **B (a child) [2013] UKSC 33**. Quoting from the case of **Piglowska v Piglowski [1999] 1WLR 1360** Lord Hoffmann said at page 1372 of the judgment as follows:

> "The need for appellate caution in reversing, the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance. . . of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

25. Read as a whole, I do not detect that the judge was implying an unduly high standard of proof in the approach that was taken. There were matters found in favour of the appellant and matters found against. Overall, I find that it was a balanced approach and not one that was eloquent of bias or of undue severity.

26. The second criticism is to the effect that the judge failed to make a finding on the appellant's claim that unknown men came to his home in 2007 enquiring about his brother and accusing him of helping the LTTE. Mr Sowerby submits that that was fundamental to the claim as presented, as being the introduction to the events which led eventually to the appellant's detention.

27. The judge noted at paragraph 24 that central to the appellant's claim was his being at risk from the Sri Lankan authorities for having skipped bail upon terrorist-related charges. The judge considered that it was the events of 2008 onwards that were material to the claim.

28. Once again it has been emphasised on many occasions that it is not reasonably to be expected of a judge that he or she make findings on every matter that is raised in the appeal but rather on those central matters upon which the outcome of the appeal depends.

29. Mr Wilding invites me to find that was precisely what the judge was saying in paragraph 24. The judge was very focused upon the key issues, particularly those relating to the risk on return as highlighted in **LP** and set out in some detail in paragraph 50. Rather than missing key evidence he invites me to find that it was a focused determination. With that submission I agree.

30. Ground 4 makes complaint that undue weight was given to the matters set out in the screening interview. It was made clear to the appellant that he would be given the

opportunity of giving further details. In those circumstances it was unfair of the judge to hold the appellant to account.

31. Mr Wilding submits that it was central to the claim whether the appellant was detained for six days or three months. The judge did not accept the explanation and discrepancy. It would be reasonable to expect the appellant, having been detained, to at least state with accuracy the central matters of his claim.

32. The appellant, on three separate occasions in the screening interview states that he was arrested by the authorities, detained and tortured from 10 March 2010 to 15 March 2010. He said he was not sure that he was subject to an arrest warrant or wanted by any law enforcement authority for the offence.

33. That is contrasted with the account of the appellant in his interview and witness statement that he was detained on 10 March 2010 until granted bail on 15 June 2010.

34. Mr Sowerby points out quite rightly that the appellant himself had sought to correct what he had said in the screening interview, being a mistake as to the month. The judge noted that matter specifically at paragraph 34. He did not accept that there was a mistake in what the appellant had said bearing in mind the frequency in which it was stated. Once again that is a matter properly open to the judge to take into account. The fact that an appellant gives an explanation does not of itself oblige the judge to accept it. Clearly care must be taken in the approach to screening interviews, bearing in mind the limited application that they have for evidence gathering. However, if an appellant has made a misstatement on a core and crucial aspect of his claim it is not to be ignored.

35. It was said that the judge misdirected himself as to the approach in the evidence of the lawyer. There was a letter from the lawyer, Mr Perera confirming his role in acting for the appellant and securing his release on bail. Mr Sowerby submits that that was a letter capable of being given weight to because it was obtained independently of the appellant through his representatives contacting the lawyer in Sri Lanka.

36. The judge considered it, significant, in evaluating that letter that the relevant bail documents and court documents and charge sheet were not enclosed with it. It was regarded as significant that the lawyer in the letter of 17 May refers to having sent such documents. There were no documents apparently enclosed with the letter of 15 April. In any event those documents were not before the Tribunal at the hearing and that was a significant omission in the eyes of the judge.

37. It is clear that the judge had paid careful regard to the letter but, for the reasons as set out, particularly in paragraphs 39 and 40, placed little weight upon it. It is also to be noted that the judge, in coming to that conclusion, had regard also to the COIS Report and the ease with which false documents can be obtained. Mr Wilding invites me to find that the approach to those documents was entirely proper. If the lawyer

had been acting as claimed it is reasonable to expect the relevant documents to have been supplied given the contention that they had been sent.

38. I asked Mr Sowerby whether those documents had yet been obtained and he indicated that to his knowledge they had not.

39. Criticism is also made as to the approach taken to the diagnosis ticket relating to the injuries suffered by the appellant's father. It was submitted that that was part of the appellant's overall account and should have been considered more fully. Once again, the judge at paragraph 43 noted certain omissions in the account of the appellant which were regarded as significant to the relevance of those tickets.

40. The judge had made the self-direction that the evidence should be looked at "in the round", that matters were found in favour of the appellant and certain matters against. To understand the weight and relevance to be given to a particular factor it is necessary to put that factor within its proper context. Looking at the determination as a whole, I find that that is what the judge attempted to do. I do not find that the judge started from a pre-condition of disbelief but rather upon anxious scrutiny on all matters. The findings were properly open to be made and within the reasonable ambit of judicial discretion. The judge had the advantage of hearing the appellant, weighing the evidence in the light of the arguments then advanced. Reasons were given for rejecting credibility. The judge can only evaluate that evidence which was presented. I find that that has been done.

41. In the circumstances therefore I find that the grounds of appeal are more weighted towards merits argument rather than identifying any material error of law. Looked at through the prism of "reasonable likelihood" as opposed to "more likely than not" it is difficult to detect that there would have been any practical difference of approach or analysis.

42. In the circumstances therefore the appellant's appeal is dismissed. The decision of Judge Levin shall stand, namely that the appellant's asylum appeal is dismissed and that relating to humanitarian protection is dismissed. The appellant's appeal on human rights is also dismissed.

Signed Date

Upper Tribunal Judge King TD