



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: AA/09042/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 28 May 2015

Determination Promulgated  
On 16 July 2015

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA**

**Between**

**MS RASILTHA AMERTHANATHAN  
(no anonymity direction made)**

Appellant

**and**

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

Respondent

**Representation:**

For the appellant: Mr S Muquit of Counsel

For the respondent: Mr S Whitwell, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Sri Lanka born on 22 April 1986. She appeals to the Upper Tribunal against the determination of Immigration Judge Oscar Del Fabbro dated 14 March 2015, refusing her appeal against the decision of the respondent dated 15 October 2014, refusing her claim for asylum and humanitarian protection in the United Kingdom.
2. Permission to appeal was granted by First-tier Tribunal Judge Zuker on 13 April 2015 stating that it was arguable that the Judge applied the wrong standard of proof to the medical evidence of Dr Martin.

## The first-tier Tribunal's findings

3. The Judge in his determination made the following findings which I summarise.
  - I. The appellant entered the United Kingdom on 26 April 2014 hidden in the boot of a car. She claimed asylum on 28 April 2014 which was refused by the respondent. At the hearing, at which the appellant was present, she was not called to give evidence because it was contented that she was not fit to do so in light of her current mental and physical condition. Dr Saleh Dhumad, a consultant psychiatrist concluded in his report dated 27 January 2015 that the appellant was unfit to attend the hearing and give evidence. The report stated this after an interview with the appellant on 19 December 2014. The report stated that the appellant was severely depressed and had symptoms akin to Post-Traumatic Stress Disorder. The appellant however prepared a witness statement with the assistance of her solicitors.
  - II. The appellant claims that she is an ethnic Tamil of the Roman Catholic faith. Before leaving Sri Lanka in 2013, she lived with her parents in Jaffna. She formed a relationship with a man who she described as her fiancé. He was killed after he was shot in a shop on 15 April 2006. She believes that her fiancé was killed because the authorities believed that he was involved with the LTTE. The appellant left for Vani with her brother and lived there until 23 April 2006.
  - III. The appellant has to show on a lower civil standard of proof adopted in asylum cases, that there is a real risk of persecution because of her reputed political opinion. In essence the appellant must prove that there is a chance that she remains of interest to the authorities and/or would be on a stop list on return to Sri Lanka and that she would be likely to be detained either on entry or later and that she would be ill-treated as a result.
  - IV. The credibility of the appellant's account is the starting point of deliberations. The appellant's account is not credible. Although she is a Tamil from a Christian background, who on balance may have had some association with the LTTE as a forced conscript, in the later part of the long-running civil conflict in Sri Lanka, I find that she would not have been of any interest to the authorities seven years after the cessation of hostilities and after being processed and released through an IDP camp in July/August 2009. On her own account, the appellant had no distinguishing involvement with the LTTE during the short time she served as a conscript. She gave conflicting accounts of her role in her interview. She certainly did not occupy any position of importance in the command structure, gave no orders and was not involved in combat operations. She was not in contact with any senior officers or personnel associated with the LTTE in the area or had knowledge or understanding, on my reading of her account, as to what was happening in the conflict at the time. Her claim that she left the LTTE camp in April 2009, is at odds with the background evidence that by January 2009 the area was under the control of the Sri Lankan Army.
  - V. The appellant comes from a respectable law-abiding family background who had no connection with the LTTE movement. Neither did other members of her family and relations and the area do not have a background of civil or armed conflict with the authorities. In her interview the appellant expressed her

personal view that she did not believe in a separate Tamil State which in essence is in stark contrast to the raison d'être of the LTTE movement. Her explanation about the reasons for her detention lacked detail and consistency such that I find on a recount and set against the background evidence that the appellant could never have been suspected of any LTTE or terrorist activity let alone involved in such activities in 2011 as she asserts in her account.

- VI. The appellant asserts that the reason why she came to the attention of the authorities was because her fiancé was killed in 2006, is in my assessment tenuous and speculative. There is no evidence that her fiancé was involved with the LTTE. He was shot and killed according to contemporary press reports, in the shop where he was working. It would appear that he was shot during a visit to that shop by armed men. The photographs in the bundle of his funeral provide no indication whatsoever that he was involved with the LTTE.
- VII. The appellant once processed and released through the IDP camp returned to live at her family home. I do not accept her evidence that she was living in various locations to avoid the authorities because when making her claim, she provided as her last address in Sri Lanka as her mother's home address. Moreover, at the time she had no reason to be in fear of any authority as she had been cleared and released into the community. It is not credible that the appellant would could have been the subject of such intense adverse attention from the CID for no apparent reason other than the fact that she may have had a connection with her fiancé in 2006. On the evidence, it is equally unlikely that she would have been detained in this way, brutally ill-treated on account yet at the same time permitted access to a lawyer who confirms that he was able to make contact with the chief army officer at the Jaffna area army camp and offered his services in securing her release. The lawyer was apparently told that the authorities suspected that she was involved with anti-government Tamil youth groups and others. There is no evidence from the appellant that this was the nature of the accusations levelled against her during detention.
- VIII. It is not credible that the appellant, given the level of her claimed ill-treatment alleged by the CID, in detention, namely that she was involved in a resurgence of LTTE activity would have been released on the payment of a bribe and shortly thereafter permitted to leave the area, travel to Colombo, avoid security checks at the international airport and able to depart the country without any problems.
- IX. Adverse credibility findings are also made against the appellant for her failure to claim asylum in France which is a safe country. Her failed attempt to enter the United Kingdom in January 2014 and her incredible assertions that she was oblivious to where she was for many months and was unable to do anything for herself, is not credible. She is an educated mature woman with academic qualifications. Her mental condition was not so acute that given the medical report notes, the deterioration in her medical happened once in the United Kingdom. In her interview she provided cogent and detailed responses to questions. Her first attempted entry into the United Kingdom failed when she was encountered in the boot of a motor vehicle. The evidence of the encounter is provided by the respondent but the appellant made no mention of this incident. The fact that she attempted illegal entry into the United Kingdom, she

must have been aware of the precariousness of the situation in France and did nothing to secure international protection not claim asylum there.

- X. The appellant said that she managed to enter the United Kingdom clandestinely but she is unable to explain how this was achieved. She must have been able to contact her uncle in order to know the arrangements upon entering the United Kingdom where she was able to meet up with her uncle's friend in the United Kingdom. This demonstrate that this was a well planned trip to facilitate the appellant's entry into the United Kingdom and mitigates against the scenario which the appellant presents, namely, that she was in genuine fear at the time of her flight from Sri Lanka.
- XI. "I have given careful consideration to the medical report of Mr Andres Martin, consultant in emergency medicine, in relation to his finding of the scarring. He concludes that the scars to the back, chest and lower limbs were caused intentionally unlikely by a third party. He is unable to say that the injuries were caused by torture nor rule out self-infliction by proxy. The medical report concerning her injuries did not provide incontrovertible evidence that the injuries could have only been sustained as a result of torture. I have to consider his opinion in the round and in the context of all the other evidence before me. Given my findings concerning the credibility of the appellant and her account I do not find the appellant's account credible regarding her detention. I conclude that these injuries were not inflicted in the circumstances claimed.
- XII. In respect of risk on return the appellant was able to leave Sri Lanka undeterred in a matter of days after her release by the authorities. If the authorities in Sri Lanka were indeed seeking to detain and interrogate political opponents and those suspected of destabilising the country she would not have been allowed access to a lawyer not released on the payment of a bribe. On the evidence she could not have represented any risk the authorities otherwise, given the sophisticated intelligence methods adopted by the CID in particular, the appellant would have been on a watch list and would not have been allowed to leave the country.
- XIII. The appellant has not remained of interest or is likely to remain of interest to the authorities on return. Her evidence that her parents and the family home had been contacted on several occasions by individuals who asked about her whereabouts is not supported by cogent evidence.
- XIV. Taking into account the country guidance case of **GG and others (post-Civil War: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)** the appellant does not, on the evidence, fall into any category that would place her at risk. There is no political connection by her with the Tamil diaspora in the United Kingdom which might be of interest to the authorities. She identifies herself with category seven of the country guidance case namely, as an individual perceived to be a threat to the integrity of Sri Lanka that by her former actions she would have been perceived as having a significant role in relation to post-conflict separatism is not made out on the evidence. I also do not find that she will stand out as being of interest because of the scarring and the circumstances of her release

from detention. She will also not likely to be on or have appeared in a computerised list accessible at the airport.

### **The grounds of appeal**

4. The appellant in her grounds of appeal states the following which I summarise. The Judge's adverse assessment of credibility relevant to the issues of risk under the refugee Convention is based, as it is, on reasons that are themselves untenable in the law for the following reasons. The approach to the medical report of Dr Martin is flawed because the First-tier Tribunal materially erred by failing to have proper regard to the evidence positive to the appellant's credibility. In the case of **KV scarring medical evidence Sri Lanka [2014] UKUt 00230 (IAC)**. The Judge, in requiring the appellant to establish a claim and to produce evidence that proved incontrovertibly that her account was true. The appellant was only required to produce evidence establishing that her account was reasonably likely.

### **The hearing**

5. At the hearing Mr Muquit pointed out that the Judge at paragraph 19 stated that the burden of proof is on the lower civil standard of proof. He conceded that the Judge did apply the correct burden in the same paragraph. At paragraph 21 it was pointed out that the Judge's statement that the appellant may have been of interest to the LTTE.
6. Mr Whitwell in his submissions said that he cannot rely on the Rule 24 response because a sentence has strayed into the response which is clearly based on cut-and-paste. He stated that the Judge at paragraph 21 stated that on the balance may have but this does not include a legal test. He said that the Judge was entitled to find that the medical report was neutral and it does not assist the decision maker. The Judge stated that there would have been other explanations for the injuries and had looked at the medical evidence in the round.
7. Mr Muquit in reply stated that there is no doubt that the Judge applied both the correct and the incorrect burden of proof and sometimes in the same paragraph. In respect of the medical evidence, the Judge found at paragraph 28 states "the medical report concerning her injuries does not provide convertible evidence that the injuries could have only been sustained as a result of torture".
8. This is a misdirection of law and it is not for the appellant to provide incontrovertible evidence in an asylum claim. The judge therefore materially erred in law by failing to apply the correct burden of proof in the determination and especially to the medical evidence.

### **Decision on the error of law**

9. The Judge when he stated that the appellant has not "provided inconvertible proof" that the injuries were sustained in the manner that she claims, fell into material error. It is not for the appellant to prove her case with inconvertible proof but to prove it on a balance of probabilities. The Judge fell into material error in his analysis of the medical report.

10. I therefore set aside the determination and that the appeal be remitted to the First-tier Tribunal for a fresh hearing. I direct that the appeal be listed before any Judge of the First-tier Tribunal, other than Judge Oscar del Fabbro on the first available date.

**DECISION**

The appeal be remitted to the First-tier Tribunal

Dated this 13<sup>th</sup> day of July 2015

Signed by,

Mrs S Chana  
Deputy Judge of the Upper Tribunal

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