



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

Appeal Number: AA/03850/2015  
AA/03820/2015

**THE IMMIGRATION ACTS**

**Heard at Bennett House, Stoke-on-Trent  
On Thursday 5 May 2016**

**Decision & Reasons  
Promulgated  
On Thursday 12 May 2016**

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MRS C W  
MISS N K  
(ANONYMITY DIRECTION MADE)**

Respondents

**Representation:**

For the Appellant: Mr McVeety, Senior Home Office Presenting Officer  
For the Respondent: Mr Sadiq, Legal Representative

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

An anonymity order was not made by the First-tier Tribunal. However, this is a protection based claim and also involves a young child. It is therefore appropriate to make an anonymity direction.

**DECISION AND REASONS**

## **Background**

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Secretary of State appeals against a decision of First-Tier Tribunal Judge Ennals promulgated on 6 May 2015 (“the Decision”) allowing the Appellants’ appeals on asylum grounds.
2. The Appellants are a Sri Lankan Sinhalese mother and daughter. The core of their claim for asylum arises from the First Appellant’s husband (and Second Appellant’s father’s) assistance to LTTE members who were accused of carrying out a bombing in Sri Lanka in 2008. The Respondent does not dispute that the bombing on which the Appellants rely did occur although does not accept that the First Appellant’s husband was involved.
3. The First Appellant says that she was arrested by the police in April 2008. She was staying with her mother and daughter at her husband’s house. She says that her husband was renting rooms to three Tamil men. They were arrested in connection with the bombing. She says her husband also was arrested for providing assistance to them. As a result, police searched the house and found materials linked to the bombing and she was arrested on that account.
4. The First Appellant says that she was tortured and raped during her detention which endured for fourteen months until her relatives had her released on payment of a bribe. Thereafter, she remained at the house of an agent for two months before arriving in the UK in August 2009 as a visitor. There was some discrepancy between the dates given for her arrival. She is said to have stated on one occasion that she arrived in 2007 which would have preceded the bombing in 2008. She did not claim asylum until January 2012. The Respondent, whilst accepting that she had been broadly consistent in the core and detail of her account held against her both the difference in dates of arrival and the delay in claiming asylum.
5. The Respondent takes issue with two findings made by the Judge when finding the First Appellant credible and says that those are material because the Judge has failed to give adequate reasons for finding her account credible. Permission to appeal was granted to the Respondent by First-tier Tribunal Judge Tiffen on 2 June 2015. This appeal comes before me to determine whether the Decision contains a material error of law and, if so, to either remit the appeals or re-make the Decision.

## **Submissions**

6. Mr McVeety relied on the Secretary of State's grounds as set out in the application for permission to appeal. The two issues which arise are the Judge's findings in relation to the date of the passport on which the Appellants travelled and how they managed to leave Sri Lanka and the Judge's findings in relation to the scarring which it is accepted the First Appellant has on various parts of her body.
7. Mr McVeety submitted that, the Judge having directed himself to the difficulties with the First Appellant's account in relation to the first issue needed to make a finding about why, notwithstanding this difficulty, he accepted that the First Appellant was credible. The Appellants did not provide medical evidence about the First Appellant's scarring in the form of a medical report. Mr McVeety submitted that it was not therefore open for the Judge to make findings about how the scarring was caused.
8. I raised with Mr McVeety in the course of submissions whether there was an error in the Judge's consideration of the background material and the application of the country guidance case of GJ and others (post civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) ("GJ") particularly when read in conjunction with MP and NT (Sri Lanka) v Secretary of State for the Home Department [2014] EWCA Civ 829 ("MP (Sri Lanka)"). The Judge had regard at [27] to the OGN of July 2013 but appeared not to have had regard to the later COIR report of 2014 (which was in the Appellant's bundle). Mr McVeety very fairly accepted however that this was not a point taken in the Respondent's grounds and did not seek to pursue it. He submitted though that this might be relevant in the event that I found the errors of law for which the Respondent contends.
9. Mr Sadiq urged me to find either that there is no error of law or that any error is not material. He pointed to the section of the Decision setting out the Judge's consideration of the evidence and his findings. He submitted that the Respondent's criticisms amounted to cherry picking of two elements only of the overall findings and, read in context, the finding in the Decision that the First Appellant is credible were open to the Judge.
10. In relation to the Judge's consideration of the background material, Mr Sadiq submitted that this was not raised in the Respondent's grounds and that, in any event, there was no error when [27] to [29] of the Decision were read as a whole.

### **The Decision**

11. The section of the Decision dealing with the Judge's findings is at [18] to [26] of the Decision. As the Judge rightly records, the main challenges to the First Appellant's credibility raised by the Respondent in the refusal letter were the differences in date of arrival and the delay in seeking asylum. The Respondent accepted that the

First Appellant's account was consistent. I note also from the Decision that there is a difference in the date given at [9] for the marathon of 4 June 2008 and the date given for the arrest of April 2008 but I think it likely that this arises from a transposition of the date in the Respondent's refusal letter which would appear to be an error. The Appellant's statement clearly stated that the date was 6 April 2008 and not 4 June 2008.

12. In relation to the passport issue, the submissions and evidence in that regard are set out at [19] to [21] of the Decision as follows:-

"[19] Mr Dillon argued that the CID would not have allowed the appellant's husband to call her, which would warn her of the danger. Her response to question 100 in her asylum interview made clear that he spoke quietly to her, and it sounded as though the phone was snatched from him. That implies that the call was not sanctioned by those detaining him. Mr Dillon also questioned if she had been released without restrictions why the authorities would still be interested in her? I will consider that point later on.

[20] Her evidence was that her uncle, who had paid a bribe, met her with an agent, who then arranged everything to do with her departure. Mr Dillon pointed out that her passport, which it was said the agent had obtained, had a date of issue of 2005, and so could not have been obtained by the agent at that time. That is perplexing. It could be that if the agent was obtaining a passport by corrupt means, he would ensure an issue date far enough in the past to avoid alerting anyone looking at the document. It could perhaps be that the passport was in fact hers, and had been obtained without her knowledge, or memory, some years previously. It could also be that this point undermines the whole of her story.

[21] Mr Dillon also makes the point that if the authorities had been interested in her, firstly they would not have released her, even with a bribe, and that she would then have been put on a 'watch list' at the airport of wanted people. She had left the airport without problem. The appellant could not answer this point as she consistently said that the agent had arranged everything."

13. The Judge addresses the issue of the delay in the Appellants' claim for asylum at [22] of the Decision. He did not accept that the delay in making the claim damaged the First Appellant's credibility. There is no challenge to this aspect of the Decision. At [23] he deals with evidence from friends in the UK. As the Judge notes, however, those persons did not give evidence before him and in any event could not assist in relation to the credibility of the First Appellant's account save

that they could support the consistency of the core of it (which was not challenged in any event).

14. At [24] to [25] of the Decision, the Judge turns to the other evidence relied upon by the Appellants including the medical evidence. This is the basis of the second of the Respondent's challenges. Having noted some evidence from the First Appellant's GP that she was taking sleeping tablets (which he records as of limited value in assessing credibility but not inconsistent), the Judge goes on to deal with the scarring issue as follows:-

"[24] Of more use is a report dated 26 January 2012 with someone described as an asylum nurse practitioner. The nurse's name is not clear, and there is no information as to her qualifications. The form refers to extensive scarring to her chest and back, and also her arms and legs, said to be consistent with reports. Regrettably no details are given of the 'reports' which the scars are said to be consistent with, and there is no indication of whether the term is used in the way defined in the Istanbul Protocol. There is no detailed medical report available.

[25] However I was handed by Mr Dillon the originals of a collection of photographs taken of the scars on the appellant's body. These show very significant scarring, especially on the appellant's back, but also on her arms, shoulders, chest and ankles. I am in no position to determine accurately the cause of these scars, but I cannot conceive of how they could have been caused other than by the intentional infliction of severe violence. I find these photographs particularly significant. There is no suggestion of any other cause of the scars than that contained in the appellant's account of events."

15. The Judge then reaches the following conclusion based on his findings:-

"I have considered all the evidence before me. I cannot explain why the appellant was allowed to leave the country, nor the question of the date of issue of the passport. However I am satisfied to the lower standard of proof that her account is true and that she was indeed detained and tortured by the Sri Lankan authorities as she claims. Indeed, I am satisfied on the balance of probabilities, although that is a higher standard than required."

### **My decision and reasons**

16. I am satisfied that the Decision contains errors of law and that the errors are material. I accept Mr Sadiq's submission that the Judge did not go so far as to reach a finding that the cause of the scarring was the torture which the First Appellant claimed to have suffered.

However, it does appear on the face of the Decision that the Judge has placed heavy reliance on the photographic evidence of the scarring without the benefit of any further medical evidence as to the nature and possible alternative causes of that scarring. The Judge describes the photographs as “particularly significant”. However, although they are capable of showing that the First Appellant had suffered injuries and that at least some of those (ie on her back) must have been caused by another person, they could not be significant without further evidence. I agree with the Respondent that the finding that the photographs were significant corroboration of the First Appellant’s account without more was not open to him on the evidence.

17. Further, and in any event, there is also a material error of law in relation to the issue of how the Appellants were able to leave Sri Lanka and, more crucially, whether they were of interest to the authorities at that stage or would be of interest on return. Although the Judge says at [19] that he will consider the submission later in relation to why the authorities would remain interested in the First Appellant given her release without restrictions and the fact that she was able to leave Sri Lanka without challenge, he does not address that in his findings on the evidence.
18. I would not have found an error in relation to the Judge’s consideration of the passport based on its date. There may be any number of reasons why a false or forged document would not bear a recent date and that does not undermine the First Appellant’s credibility (particularly where the Respondent does not apparently challenge her account that the passport was procured by an agent and she knew nothing about it). However, the issue of how she was able to leave Sri Lanka is relevant to the question of whether she remained of interest to the authorities then or now. Even if the Judge was entitled to accept the First Appellant’s account of her detention and torture, it was incumbent on him to make a finding about how she would be able to leave Sri Lanka if she were genuinely of interest to the authorities. That he has failed to do.
19. Insofar as the Judge intended that issue to be addressed by his findings in relation to the background material and the country guidance case at [27] to [29] of the Decision, I am satisfied that there is a material error in that analysis. In particular, the Judge has considered that risk against the background of the OGN issued in July 2013 and has failed to note the COIR of 2014 which was before him. Had he done so, he would have been alerted to what was said by the Court of Appeal in MP (Sri Lanka) concerning the risk to those who are family members of someone suspected of terrorism. The final sentence of [27] of the Decision appears to be at odds with what is said in MP (Sri Lanka) (see in particular [19] and [20] of that judgment).

20. I note also that the Judge may have misunderstood what is said in GJ concerning detention by the authorities. At [29] he appears to view GJ as support for a submission that a person previously detained by the security services would be at risk now. However, that is not what is said in GJ. The country guidance accepts that there would be a real risk of ill treatment for someone now detained by the security services. However, as is said in the headnote to GJ “an individual’s past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government”. There is no suggestion that the First Appellant had any interest in Sri Lankan politics in the past or has taken any active interest in any activities against the regime whilst in the UK.
21. For the foregoing reasons, I am satisfied that there are material errors of law in the Decision. Both representatives were agreed that, if I were to find material errors of law the appeal should be remitted to the First-tier Tribunal. Having regard to the Practice Direction and since the issues in relation to which I have found errors of law to exist require further findings on credibility, I am satisfied that the appeal should be remitted. I do not preserve any findings.

## **DECISION**

**The First-tier Tribunal Decision involved the making of material errors of law. I therefore set aside the Decision of First-tier Tribunal Judge Ennals promulgated on 6 May 2015. The appeal is remitted to the First-tier Tribunal for re-hearing by a Judge other than Judge Ennals.**

Signed



Date 9 May 2016

Upper Tribunal Judge Smith