Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09166/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral determination given following hearing	
On 5 April 2017	**On 13 June 2017**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

M P J
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Palmer of Counsel, instructed by Gulsen & Co Solicitors
For the Respondent: Mr P Armstrong, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant in this case is a citizen of Sri Lanka who was born in December 1978. He originally claimed asylum in July 2012. That

application was treated as having been withdrawn, the reason being that the appellant had not attended an asylum interview (although some further consideration will be given below to this) but further submissions were made on behalf of the appellant in December 2015. The respondent did not decide to treat these submissions as not giving rise to a fresh claim but considered them afresh before deciding on 12 August 2016 to refuse to grant the appellant asylum refusing also to grant him humanitarian protection. It was against this decision that the appellant appealed and his appeal was heard before First-tier Tribunal Judge Buckwell at a hearing which took place over two days on 28 September and 7 December 2016. In a decision and reasons promulgated very shortly after, on 9 January 2017, Judge Buckwell dismissed the appellant's appeal.

2. The appellant sought permission to appeal against this decision on a number of grounds and was granted permission to appeal by First-tier Tribunal Judge Robertson on 15 February 2017. Judge Robertson only granted permission on one ground giving reasons why she did not consider that the other grounds had arguable merit. Regrettably the form which was sent to the parties after this decision did not inform the appellant in terms as it should (see in particular the decision of this Tribunal in *Ferrer (limited appeal grounds; Alvi)* [2012] UKUT 00304 that the appellant should himself seek to renew his appeal for permission to appeal on the other grounds before the Upper Tribunal), one of the consequences of which was that a renewed application was not made within the timescale set out within the Rules. However, even though this was submitted a little late, on 22 March of this year, which is some two weeks before this hearing the appellant did make submissions to be allowed to renew the grounds on which permission had been refused before the Upper Tribunal. I have had regard to the guidance given by the Court of Appeal in *SS (Congo)* [2015] EWCA Civ 387 and in particular from paragraph 92 onwards, and having regard to that guidance I consider it appropriate to extend time to allow the appellant application for permission to appeal on the other grounds to the Upper Tribunal. Obviously, the application has not been considered on the papers before today and in the circumstances it is appropriate to consider the application for permission as part of the rolled-up hearing in which I will also consider whether there is an error of law in the decision of the First-tier Tribunal such that the decision should be set aside and remade. Accordingly I will consider all the grounds together and to the extent that I find an error of law (as I do) I also grant permission to appeal against the decision on all grounds.

3. I do not propose to deal at length with all the grounds because it is not necessary for me to do so. The grounds have cumulative effect. The relevant grounds are grounds 1, 3 and 4, of which the most important is clearly ground 3. I will set aside the decision of the First-tier Tribunal and I give my reasons below.

4. The appellant claims that he would be at risk of persecution by the Sri Lankan authorities because he would come within the category of persons

at risk as set out in the country guidance case of *GJ and Others Sri Lanka CG* [2013] UKUT 319, a decision which has subsequently been upheld in the Court of Appeal in *MP (Sri Lanka) and another* [2014] EWCA Civ 829.

5. The essential basis of the judge's decision dismissing the appeal was the adverse credibility findings made by the judge which included first (the subject of ground 1) a finding that Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 applied, secondly a finding that the evidence of the appellant's brother, who had been granted asylum, was not of sufficient relevance in this case to assist the appellant (the subject of ground 3) and thirdly a finding that a document submitted on behalf of the appellant could not be relied upon (the subject of ground 4).

6. It is right at the outset, notwithstanding that I will set this decision aside, if I state that Judge Buckwell's decision was clearly a very well thought out and considered decision arrived at after conscientious consideration of the evidence. Furthermore, although as I will state below as a matter of fact some of the findings were wrong, or are sufficiently in doubt as to require further consideration, certainly to some extent as regards the consideration of the Section 8 point, this Tribunal has the benefit of evidence which does not appear to have been before the First-tier Tribunal.

7. Notwithstanding the preceding paragraph, at paragraph 120 of his determination Judge Buckwell stated as follows:

> "I confirm that I take into account all evidence presented. That includes all documentation, whether or not specifically referred to hereafter and subject to any findings in relation to any particular document presented".

8. It is accordingly incumbent on the judge to have taken into account all the documentary evidence before him, even though much of that evidence may not have been specifically referred to by either party's representative during the hearing and is accordingly easily missed. It is clear from the decision now under challenge that Judge Buckwell did give very careful consideration to the evidence of the appellant's brother, setting out the bulk of this evidence from paragraphs 29 to 99. He also gave reasons at paragraphs 130 and 131 why the brother's case was in many respects different from that of the appellant. The judge also had regard to the witness statement given by the appellant. However, what the judge did not do, in my judgment is give specific consideration to an important aspect of the evidence of the appellant's brother which was contained in the exhibits to the witness statement, which may not have been referred to specifically during the hearing and on which the witness may not have been specifically questioned, but which was nonetheless included within the documents within the file to which the judge had said he had had regard. I refer in particular to the screening interview and asylum interview given by the appellant's brother, to both of which this Tribunal

has been referred. At question 4.1 of the screening interview the appellant's brother had stated as follows when giving his reasons for coming to the UK:

> "My older brother [this appellant] was an LTTE member who went missing in the final battle with the army in 2009. **The army and the CID came to my house in Jaffna on 15/09/09 looking for him and arrested me** [my emphasis]. I was held for ten days at a camp, tortured and interrogated ...".

9. Then, subsequently in answer to Q117 of his asylum interview in which he was asked "what has happened when the army came looking for your brother?", the witness had replied that "somebody has given information that my brother has come and escaped to my uncle's". Later in the same answer he said that "they [a reference to the authorities who had been questioning him] told me, your brothers were member of the LTTE ...".

10. This evidence was not referred to by the judge within the decision and he does not appear to have had regard to this evidence when setting out his conclusion that there were sufficient differences between the positions of the appellant and his brother (who had been given asylum) that the brother's evidence could not be relied upon in support of an assertion that the authorities would have had a significant interest in this appellant to have rendered it feasible that they would have tortured him (that is the appellant) rather than just treated him like the bulk of Tamils arrested during this "dreadful period of internal conflict and civil war". It was for this reason that although at paragraph 125 the judge accepted the evidence of the appellant "as to his involvement to a degree with the LTTE", he also found that "I do not believe that even then he had a degree of responsibility or profile which would have led to his suffering torture during any period of detention". Given the brother's evidence that the police had arrested him initially because they had been looking for the appellant and that he had himself suffered torture in consequence of his arrest, the judge's failure to deal with this aspect of this witness's evidence is in my judgment a serious omission such as, albeit marginally, to render the decision unsafe.

11. This is a finely balanced case but this Tribunal also must take into account what appears to have been a mistake of fact made by the judge (albeit that he cannot himself be blamed for this because he did not know the evidence which this Tribunal knows) with regard to what the judge regarded as the appellant's failure to pursue his original asylum claim or to renew it until some considerable time later. The judge's finding (at paragraph 135) is that he was entitled to have his views as to the unreliability of the appellant's evidence "further bolstered by the fact that the appellant in effect absconded after entering this country and made no effort to advance any claim for immigration leave between 2012 and 2014". The evidence which at that time had been before the Tribunal was that the appellant had been invited to attend an asylum interview in or about July 2012, which interview had been due to take place on 1 August

2012 but that the appellant had failed to attend. A letter is in the file apparently written by the respondent to the appellant dated 1 August 2012 informing him that he had failed to turn up and inviting the appellant to give his reasons for failing to attend. In the absence of any reasons the asylum claim was treated as having been abandoned.

12. It appears from the evidence that this Tribunal has seen that that letter dated 1 August 2012 had been sent to an organisation called Refugee Action which had previously been acting on behalf of the appellant but that the appellant had changed solicitors to a firm called Raj Law who had written (or at least a letter was apparently sent, although it is not clear whether the address was correct) to the respondent informing the respondent that they were now acting for the appellant before the letter of 1 August 2012 was sent. There is no independent confirmation of this, but this Tribunal has no reason to doubt that it is more likely than not that this was a genuine letter and that certainly so far as this appellant was concerned he was not personally aware, or certainly he may not have been personally aware, that he had been invited to an asylum interview. The other matters of which this Tribunal has been informed (of which the judge was unaware) was that from December 2012 the appellant had been reporting initially weekly and then monthly to the respondent which, if correct (and again there is no reason why I should find at this stage that it was not correct) would suggest that as a matter of fact the judge was wrong to consider that the appellant had "in effect absconded after entering this country" or that he had "made no effort to advance any claim for immigration leave between 2012 and 2014" especially as it was his new solicitors who in 2014 wrote to the respondent (and indeed wrote a pre-action Protocol letter prior to an intended application for judicial review) complaining that no action had been taken on his previous claim.

13. Even if the judge cannot be faulted for not taking into account material of which he was unaware I must have regard to the guidance given by the Presidential Tribunal in *MM (unfairness; E & R Sudan)* [2014] UKUT 00105, where the president, referring to the decision given by the Court of Appeal in *E & R – v – SSHD* [2004] EWCA Civ 49, stated as follows:

> "19. Of unmistakable importance also, in the context of this appeal, is the decision of the Court of Appeal in [*E & R ...* [2004] ...]. As appears from the opening paragraph of the judgment of Carnwath LJ, one of the two central issues raised in this appeal concerned cases decided by the first instance Tribunal (in that instance, the Adjudicator) where it is demonstrated that –
>
> > '... an important part of its reasoning was based on ignorance or mistake as to the facts ...'
>
> Drawing particularly on the speech of Lord Slynn in *R - v - Criminal Injuries Compensation Board, ex parte A* [1999] 2 AC 330 (at pages 333 - 336), Carnwath LJ stated:

> ‘[63] In our view, the *CICB* case points to the way to a separate ground of review, based on the principle of fairness ... the unfairness arose from the combination of five factors:
>
> (i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case);
>
> (ii) The fact was ‘established’, in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;
>
> (iii) The Claimant could not fairly be held responsible for the error;
>
> (iv) Although there was no duty on the Board itself, or the police, to do the Claimant’s work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result.
>
> (v) The mistaken impression played a material part in the reasoning.’

The learned Lord Justice added:

> ‘[64] It is in the interests of all parties that decisions should be made on the best available information.’

He continued:

> ‘[66] In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been ‘established’, in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisors) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.’”

14. Although this ground on its own would not been sufficient to persuade me to set aside the decision, coupled with the judge's failure either to consider adequately the evidence of the brother's witness or in any event to give adequate reasons for considering that evidence not to be relevant notwithstanding the matters to which I have referred above, this ground adds weight to the challenge, especially in circumstances where the evidence of the appellant's brother was not impeached at any stage during the proceedings.

15. Similarly, the finding that the documentary evidence adduced in support of the claim was not reliable could only be made when all the evidence was considered in the round, and so to the extent that I have found that it appears not to have been, the finding with regard to the documentary evidence is also unsafe.

16. It follows that this decision must be set aside and in the circumstances the appeal will have to be reheard. Neither party has sought to persuade the Tribunal that the re-hearing should be in the Upper Tribunal and I agree with both parties that the appropriate forum for the rehearing is the First-tier Tribunal, where the appeal should be heard afresh by any Upper Tribunal Judge apart from Judge Buckwell.

Decision

17. The decision of First-tier Tribunal Judge Buckwell is set aside as containing a material error of law. The appeal will be reheard in the First-tier Tribunal, sitting at Taylor House, by any judge other than Judge Buckwell.

Signed:

Upper Tribunal Judge Craig Date: 7 June 2017