Case No: C5/2008/0162

Neutral Citation Number: [2008] EWCA Civ 508
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No. AA/08855/2005]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 17th April 2008

Before:

LORD JUSTICE TOULSON

- -

Between:

PC (SRI LANKA) **Appellant**

- and -

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

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr P Rudd (instructed by Messrs Singhania & Co) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED

- -

Judgment

(As Approved by the Court)

Lord Justice Toulson:

1. The appellant renews his application for permission to appeal against a decision by Immigration Judge Kelsey dismissing his appeal on refugee convention and human rights grounds against the respondent's decision to refuse to grant him asylum.

2. The application for permission to appeal was refused on paper by Senior Immigration Judge Gleeson and by Sir Henry Brooke. The latter was somewhat critical of the vagueness of some of the grounds the appeal put forward. Mr Rudd on the appellant's behalf has sought to make that good by a detailed reference to the passages of the evidence in the determination on which this application is founded. I make no criticism of that in the circumstances, but it has meant that this hearing has taken far longer than usual on a renewed application for permission to appeal. The court always looks at these cases with anxious scrutiny.

3. The appellant is a Sri Lankan Tamil, born on 3 August 1983. Before leaving Sri Lanka he made a fraudulent application to the British High Commission for entry clearance. He flew from Sri Lanka to the UK, via Delhi, on 1 April 2007. He arrived with his own Sri Lankan passport and a mutilated British passport with a substitute biodata page. He claimed asylum on arrival. He claimed to have helped the Liberation Tigers ("LTTE") while living in the Vanni area and said that in consequence he had been kidnapped and tortured by the Elam Peoples' Democratic Party ("EPDP"). In February 2007 he claimed to have received a message from his mother that the military were looking to arrest him after a bomb blast in the Jaffna area where he was now living, so he went to Colombo and hid with the assistance of his uncle. He was arrested on a police search because he had a Vanni ID card, but they released him after some days when they were told that he would be going overseas. He then fled to the UK.

4. That, in my briefest outline, is the essence of the claim. His claim was rejected by the respondent. His appeal was first heard by Immigration Judge Woodcraft, but reconsideration was ordered on procedural grounds because his counsel had been given only a short time to see the appellant before the hearing, after counsel had experienced difficulty in getting to court. Since this was a fast track case, that meant that the opportunity for the taking of instructions was so short that, in all the circumstances, the Senior Immigration Judge directed that there should be reconsideration. On reconsideration, Immigration Judge Kelsey disbelieved the appellant's account.

5. His determination is challenged on three separate grounds. Mr Rudd submits that while each needs to be examined separately, it is also necessary to consider them overall in any ultimate decision.

6. First, it is submitted that Immigration Judge Kelsey fettered his discretion by wrongly placing reliance upon the decision of the previous immigration judge.

The way in which he dealt with the matter in the determination was as follows. At paragraph 8 he said:

> "At the start of the hearing before me, both advocates agreed that I needed to conduct this reconsideration with a view to establishing the quality of the findings made by the Designated Immigration Judge."

7. Mr Rudd submits that this was an inaccurate way of summarising the judge's task and did not reflect agreement between the advocates. The judge went on to say that he had therefore read and considered the previous determination and would not repeat all the details of history, except in so far as it was necessary for the purpose of making his own findings and reaching his conclusions. He indicated that he only intended to comment on the earlier determination if he reached a different conclusion, in which case he would give his reasons for doing so, but otherwise it could be assumed that he agreed with, or had no comment on, the contents of the earlier determination.

8. At paragraph 34, he turned to the conclusions reached by the previous immigration judge. In paragraph 39 he said that, subject to certain qualifications, he found the conclusions of the previous judge to have been fully explained and justified on the evidence and that he came to the same conclusion. It is submitted that this amounted to a fundamentally wrong approach to the task which this immigration judge had to perform. It was a matter of complete irrelevance what the previous immigration judge had concluded. Considering the matter on paper, Sir Henry Brooke said that, so long as Immigration Judge Kelsey made it clear -- as he did -- that he was taking into account all the relevant evidence before him, he did not see that his methodology, in comparing his conclusions with those reached by Immigration Judge Woodcraft at the end of an unsatisfactory hearing, revealed an error of law. The critical matter was that this immigration judge had to address the evidence before him and reach his own independent judgment on it. I do not accept the argument that he appears from the determination not to have done so. It is right that, as a matter of law, it was certainly not his task to review the findings of the previous immigration judge in the way that the Senior Immigration Judge had done, but, provided that he did carry out a fresh examination of the evidence, I cannot see that there is an error of law in him making reference to the earlier findings and the evidence which was before the previous immigration judge. It is an unusual way of proceeding, but I repeat that the critical requirement as a matter of law was that he should apply his own mind to the evidence before him and reach his own conclusions on it.

9. The next ground of challenge, which has taken up most of the time in argument, is a challenge to the judge's credibility finding. The submission falls into two parts but they come together. It is submitted that his determination contained misstatements of the evidence and also that he arrived at a conclusion which was not reasonably open to him in the Wednesbury sense. I have therefore scrutinised closely the respects in which it is said that he misstated the effect of the evidence.

10. The first area of challenge related to the way in which the judge dealt with the evidence of injuries about which there was medical evidence before him which had not been before the previous judge. The evidence was that the appellant has two hyper-pigmented areas on the upper forearm. There is, I think, a typing error in the report, because it refers to two areas of pigmentation on the right forearm but, under opinion and prognosis, refers to burn scars on the left upper arm. This discrepancy does not seem to have been explored anywhere, but I do not think that it is important for present purposes. The relevant point is that there were areas which were consistent with burns on the upper arms. He also noted scars on the appellant's back which were highly consistent with accounts of events of injuring his back with nails on a wall, and the symmetrical distribution of the scars suggested that the cause was non-accidental. There were also scars on the shoulder and thigh which the doctor considered were consistent with being caused by a broken bottle and a piece of shrapnel respectively.

11. The judge said, when dealing with the evidence of scars:

> "The difficulty here is that the Appellant has provided 2 explanations for the scar on his right thigh. In his interview he said that it was caused by a broken bottle in his 2006 detention, but he told the surgeon that it was the result of a shrapnel wound in 2005."

He went on to observe:

> "I do not accept that a person who has been injured by shrapnel or injured by being jabbed with a broken bottle would forget the cause of the injury in question or get such wounds muddled. The Appellant's credibility is harmed by the fact that he has given 2 different explanations for those injuries."

12. For a time it was my understanding that the immigration judge was being criticised for finding that there had been a discrepancy in the appellant's evidence when there had been no such discrepancy; but it transpired that there was a discrepancy and there was no inaccuracy in the factual findings made by the judge in that regard. I will come back to the question of his conclusion.

13. Next it was said that the judge's findings were inaccurate when the judge said, in his description of the hearing, as follows:

> "He was asked why there was no mention of kidnapping or torture at the time of his screening interview; page C15 shows that he was asked what his reason was for coming to the UK and what he said was 'because I feel uneasy in Sri Lanka'. He

> then said that he wanted to get away because of the war, and he applied for a visit visa."

Mr Rudd has pointed out that what the appellant had said in his screening interview was "because I feel unsafe in Sri Lanka I cannot live there because my life is at risk because of the political situation".

14. But the point, as I read it, which the judge was making was that, when first asked for his reason for coming to the UK, he gave an answer which related to the general political situation in Sri Lanka and made no mention of the fact that he had been kidnapped or tortured. Whether this was significant or not was a matter for the immigration judge's judgment, but I am unpersuaded by the argument that, in this context, his summary suggests that he was materially misdirecting himself.

15. Next, the criticism is made that the judge misstated the evidence regarding the way in which funds were provided to enable the appellant to buy his way out of detention and out of Sri Lanka. It was the appellant's evidence that his mother enabled him to do so. The immigration judge said as follows:

> "It is implausible that his mother sold jewellery and land in order to pay the EPDP the bribe for his release. He asserts that she sold all her jewellery and her land; that is on the face of it surprising, since the family was bombed out of their home in Jaffna and had to move to Vanni in 1995. There is no evidence as to how the Appellant's mother acquired the land in the first place. However, the matter then becomes even less credible when the Appellant claims that his mother sold land and jewellery again in order to finance his trip from Sri Lanka to the UK."

16. It was submitted that the judge misstated the evidence here, because what the appellant had said in the screening interview at question 92 in relation to the provision of the money to pay the agent to arrange for the appellant's travel to the UK was as follows:

> "My mother sold all the land she had and the rest of the jewellery and my uncle also gave some money."

17. Mr Rudd emphasises the words "the rest of the jewellery" which the immigration judge omitted. However, the appellant had previously been asked how his mother had raised the money to obtain his release, and to that question he answered:

> "She sold all her jewellery and all her land to give them the money."

18. So, as a matter of fact, there was an inconsistency between his statement that she sold all her jewellery and all the land to obtain his release, and his statement that she subsequently sold her land and the rest of the jewellery to pay for his transport. The significance of this is another matter, but looking at the matter simply in terms of whether there was a misstatement of evidence, the point cannot be substantiated.

19. The immigration judge also referred to the appellant having been detained by the EPDP but not by the army in Sri Lanka. The criticism made of that is that the two bodies were effectively one and the same. That is a matter of judgment; it was not a strict misstatement of the evidence. I will come to the reasonableness of the conclusion subsequently.

20. Finally, attention has been drawn to the point that the judge referred to an apparent inconsistency between the statements made by the appellant at different times regarding who paid for the bribe to secure the appellant's release. He said that, according to one account, it was paid by his mother, but that on another version his uncle was involved. In the same paragraph he went on to observe that although an adjournment had been sought in the previous proceedings -- in part in order to be able to apply further evidence on this topic -- he had no evidence from the uncle. It is submitted that the proper analysis of the evidence does not bear out the conclusion that there was ever any inconsistency. From the statements that I have seen that may very well be the case, and I approach this application on the assumption that it is.

21. Looking closely at all the points raised where it is said that there was a misstatement of evidence, one is left with very little. Certainly not enough, in my judgment, to vitiate the judge's overall conclusions.

22. There is then the separate matter whether his conclusion on credibility can be challenged as Wednesbury unreasonable. That is a heavy task to undertake. There were significant grounds for not accepting the appellant as truthful. I have referred to his different explanations for how he came by his thigh injury, and the comment which the judge made was one which was open to him to make. There were other unsatisfactory features in the appellant's case, to which the judge referred. For example, his story about having gone into hiding was not consistent with his having gone to the British High Commission at the same time to try to obtain entry clearance, and there were other matters of discrepancy.

23. Particular criticism is made of the judge's failure to attach significance to the back scarring, which the doctor had concluded was highly consistent with the appellant's account and was suggestive of non-accidental injury. But one has to stand back and judge whether, on the totality of the evidence as it appears before the court, the conclusion that the appellant was not to be believed in the essential account that he had given was one which the judge was entitled to draw; and, having concluded that on important matters he could not be believed, in my judgment the appellant has no real prospect of being able to persuade the full court that this finding was not open to the judge.

24. That leaves finally a criticism that the judge failed properly to follow the guidance of the Asylum and Immigration Tribunal in the country guidance case of LP (LTTE area, Tamils, Colombo, risk) Sri Lanka [2007] UKAIT 00076. At the hearing, both sides' representatives relied on it. Mr Rudd rightly submits that there may be risk factors which may give rise to a well-founded fear of persecution on return, even in the cases of somebody whose story is disbelieved, and he submits that these required individual attention. From the factors singled out in paragraph 238 of that judgment, he identified the following. First, Tamil ethnicity -- that is undisputed; it is something of which the judge was plainly well aware. It was of course also part of the decision of the tribunal that Tamils are not per se at risk of serious harm to the Sri Lanka authorities in Colombo. Second, a previous record as a suspected or actual LTTE member or supporter. That will depend on the credibility of the appellant's account and whether the authorities were likely to know of such past support. In the light of his credibility findings, the judge was perfectly entitled to conclude that there was no reason to suppose the authorities would be so aware.

25. Next, the presence of scarring. That may have evidential value in relation to what has happened to somebody in the past, but the immigration judge have considered that matter. It is also something which, if it were to come to the attention of the Sri Lankan authorities, might put them on a line of enquiry.

26. Next, that the appellant had returned from London. It is correct that he would be returning from London. Next, that he had departed from Sri Lanka illegally. I see no basis for drawing that conclusion, since the appellant had left with a valid Sri Lankan passport and gone in the first instance to Delhi. Next, that he made an asylum claim abroad. Whether that came to the Sri Lankan authorities attention would depend, at least in part, on how he comes to return. If the appellant were to cooperate and go back on his Sri Lankan passport or on an extension of it, it is difficult to see why it should come to anybody's attention that he had made an asylum claim abroad.

27. It would have been better if the immigration judge had reviewed these individual matters but Sir Henry Brooke, considering the matter on paper, concluded as follows:

> "While it would have been better if the AIT had said why a case based on the risk factors mentioned in LP (inaudible) given the AIT's findings of facts, those findings were so adverse to the claimant that I do not consider arguments based on this complaint have any real prospect of success."

28. Nor do I. I have considered the matter afresh, but I do not see any real prospect of the full court being persuaded that, if the immigration judge had identified separately those different factors, there was any likelihood of him reaching a different overall conclusion or that he should have done so. As I have said, this application has been now examined in much more minute detail than is usual in the case of a renewed application for permission to appeal, but

having gone through it all with a fine toothcomb, I am not persuaded there is any real prospect of an appeal succeeding. For those reasons this application is refused.

Order: Application refused