Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of KP) v Secretary of State for the Home Department IJR
[2016] UKUT 00027 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard at Cardiff Civil Justice Centre

On 19 November 2015

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE QUEEN (ON THE APPLICATION OF KP)

(ANONYMITY DIRECTION MADE)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Applicant: Mr B Hoshi, instructed by Duncan Lewis Solicitors

For the Respondent: Ms M Bayoumi, instructed by the Government Legal Department

JUDGMENT

Judge Grubb:

1.
I make an anonymity order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in the light of the applicant's claim for asylum. This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of the applicant. Any disclosure in breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or Court.

Introduction

2.

The applicant challenges the respondent's decision of 28 May 2015 not to treat his further submissions as amounting to a 'fresh claim' under para 353 of the Immigration Rules (Statement of Changes in Immigration Rules , HC 395 as amended).

3.
The applicant is a citizen of Sri Lanka who was born on 14 February 1984. On 11 February 2010 he entered the United Kingdom with leave as a student. That leave was subsequently extended to 12 January 2014. However, following the revocation of the licence of his sponsor college on 7 July 2011, the Secretary of State curtailed the applicant's leave to 12 February 2012. On 10 January 2014, the applicant made a further student application and on 24 February 2014 he was granted leave on that basis until 20 April 2015: that grant of leave included a condition prohibiting employment.

4.
On 30 July 2014, the applicant was apprehended working in breach of that condition of his leave and was served with form IS151A. He was granted temporary release. On 31 July 2014, he pleaded guilty at the Hendon Magistrates' Court to common assault and was conditionally discharged.

5.
On 23 September 2014, he requested an appointment to claim asylum. That appointment was scheduled for 2 October 2014 but was deferred on that day because of illness. Eventually, on 10 February 2015, the applicant claimed asylum. On 12 February 2015, the applicant was placed in the fast track procedure. He was interviewed on 23 February 2015.

6.
On 25 February 2015, the Secretary of State refused his claim for asylum and international protection generally. The applicant appealed and, following a hearing in the First-tier Tribunal (Immigration and Asylum Chamber) on 6 March 2015, in a determination dated 9 March 2015 Judge A J M Baldwin dismissed the applicant's appeal. The applicant's subsequent applications for permission to appeal against that decision were refused by the First-tier Tribunal and the Upper Tribunal.

7.
On 20 May 2015, the applicant's legal representatives made further submissions to the Secretary of State.

8.
On 28 May 2015, the Secretary of State considered the applicant's further submissions and rejected them concluding that they did not amount to a fresh claim under para 353 of the Immigration Rules.

9.
On 14 May 2015, the Secretary of State set removal directions to remove the applicant to Sri Lanka on 2 June 2015.

10.
In response to that, on 28 May 2015 the applicant's legal representatives sent a pre-action Protocol letter to the Secretary of State.

11.
On 1 June 2015, the applicant filed these proceedings seeking by judicial review to quash the respondent's decision of 28 May 2015 and seeking a declaration that the applicant's further submissions of 20 May 2015 amounted to a fresh claim under para 353.

12.
On 1 June 2015, HHJ Seys Llewellyn QC stayed the applicant's removal until further order.

13.
On 8 July 2015, HHJ Keyser QC granted the applicant permission to bring these proceedings.

The Applicant's Asylum Claim

14.
The applicant's claim is based upon a relationship which he had with a well-known actress in Sri Lanka (whom I will refer to as "Z"), beginning in 2005. She had political aspirations and between 2007 and 2009 she had sexual relations with a number of political figures in Sri Lanka in hotel rooms which the applicant claimed were booked in his name. During the liaisons, Z secretly recorded conversations with the politician and their phone calls. The implication is that she intended to use these recordings as leverage to further her political career. Z asked the applicant to keep the recordings safe and that she would pay him to do so. As a result, he kept them in the loft of his family's home. The applicant claims that these recordings included a conversation on how Tamil Tiger leaders had been killed by extrajudicial execution in the so-called "white flag" incidents in the final days of the civil war in Sri Lanka. The applicant claims that Z became an MP in April 2010.

15.
In September 2010, the applicant claims that he was abducted, detained and mistreated by persons who demanded that he surrender the recordings. He was released after ten days on agreeing to surrender them. Although he did not do so, he did destroy the recording and told Z that he had done so. He went into hiding until his departure from Sri Lanka could be arranged. On 25 January 2010 he was issued with a student visa and he arrived in the UK on 11 February 2010.

16.
The applicant claims that his parents have been threatened in Sri Lanka and they have, as a result, moved home and his sister has moved to Australia.

17.
The applicant claims that he would be at risk on return to Sri Lanka from the well-known politicians who would want to obtain the recording made by Z and which incriminate them and others.

The Appeal to the First-tier Tribunal

18.
In her decision of 25 February 2015, the Secretary of State rejected the appellant's claim for asylum, for humanitarian protection and on human rights grounds. The Secretary of State did not accept the appellant's account that he had been kidnapped as a result of his safekeeping of conversation recorded by Z with a politician with whom she had sexual relationships.

19.
Judge Baldwin dismissed the applicant's appeal. He accepted much of the applicant's account (although this was not accepted by Ms Bayoumi on behalf of the respondent before me) but, nevertheless, concluded that the applicant had failed to establish that he had a well-founded fear of persecution or serious ill-treatment if returned to Sri Lanka. The judge's reasoning is set out at paras 21-22 of his determination as follows:

“21. The Appellant claims that before [Z] became really well-known, he became involved with her and continued the relationship when he colluded with her in her successful attempts to record conversations and telephone calls made by high profile people with whom she slept. He helped her by allowing his name to be used to book hotel rooms and keeping the recordings, receiving “lots of money” from her for doing so. Photographs provided of her with him provide some degree of corroboration of a relationship between them. Whilst I accept that some people may be prepared to say almost anything in order to found a claim to remain in the UK, and the Appellant’s account of events is quite extraordinary, it is also one which I accept would not be easy to tell as it reflects so poorly on his good judgement and standards. When I asked him questions in order to clarify certain matters, I found it difficult to get him to give concise or straightforward answers. In fairness to him, I accept that some of the inconsistencies, interpretation issues and his tendency to ramble on could lead the listener struggling to make sense of it all. However, if one stands back a bit, one can see that there is a core to the account which is fairly detailed and certainly not inconsistent with the unflattering impression given by articles provided about [Z]. I conclude that it is possible that what the Appellant said about his relationship with her is true and that, over 5 years ago, he may have been abducted and released on a promise that he would provide his abductors with the recordings. The question which remains is, even if that is all so, would he face a well-founded risk of persecution and / or serious ill-treatment if returned to Sri Lanka.

22. The Appellant has made it clear that he threw the recordings into a river and told [Z] he had done so. There is no suggestion that [Z] has disappeared or suffered some dreadful fate and, as a well known M.P., it is reasonable to assume that if anything had happened to her it would have been roper reported quite widely in Sri Lanka and would have surfaced in the background material searches undertaken by or on behalf of the Appellant. Having been unable to find the Appellant in the last five years, anyone wanting those recordings would surely have moved against her and, if they did not accept her assertions about them having been thrown into a river, gone on to ransack his family home in order to try and find them – yet there is no suggestion that this has happened. The only interference one can reasonably draw from this is that anyone with a particular interest in these recordings has satisfied themselves that the recordings have been disposed of. The Appellant’s claim that his sister has been forced to move to Australia and his parents have been threatened and had to move is, I find, very likely to be an embellishment of what may otherwise well be a broadly true account. Furthermore, if adverse active interest in him had continued, it is simply not credible that the Appellant would have taken 4.5 years to work out he needed to claim asylum. He may have a tendency to ramble on in his speech, but there is no suggestion he would have been incapable of finding out what his options were for ensuring he did not have to return to Sri Lanka. Whether or not he had continuous leave from the moment he set foot in the UK, he knew he was only here to study. With no evidence of study in recent years, and through working here unlawfully, he must have realised that his right to remain in the U.K. was far from being assured. His failure to claim asylum a great deal sooner strongly suggests he does not genuinely believe he would now be at real risk in Sri Lanka, the abduction notwithstanding.”

20.
As a consequence, Judge Baldwin dismissed the applicant’s appeal.

The Applicant’s Further Submissions

21.
In his further submissions made on 20 May 2015, the applicant relied upon three documents. First, an expert’s report by Dr Suthaharan Nadaraja (at pages 86-104 of the bundle). Secondly, a letter from

the Chief Minister of the North Western Province Council dated 22 April 2015 (at page 105 of the bundle). Finally, a letter from a member of the Sri Lankan Parliament, Mr Katagodo dated 17 April 2015 (at page 106 of the bundle).

22.
The expert's report dealt with a number of matters, including the background in Sri Lanka and the "white flag" incident and the position of Z as an MP in Sri Lanka. For present purposes, the expert's conclusions are set out in paras 42-45 of his report as follows:

" **The risk on return for our client from the powerful politicians he has mentioned a fear of.**

42. The client has listed Sarath Fonseka and Gotabaya Rajapaksa as among the Sri Lankan political figures he fears. He says that he has been in possession of recordings of these individuals' conversations made by [Z] and passed on to him. He also says he admitted possession of these to those who had kidnapped and ill-treated him in 2009 and had agreed to hand over these recordings, but had not done so. In particular, the client said the recordings included one of Field Marshall Fonseka speaking of the 'white flag' incident i.e. in his words, "when the Tamil Tigers came to surrender with white flags, [the recording that] contained that [sic] conversation an how the government decided to kill them all." The client says this recording shows the government was 'corrupt'; but, as discussed above, in fact Fonseka's comments implicates Gotabaya and top army commanders in a war-crime that is amongst those of particular international focus, including at the UN. At the same time, the recording, if made public, would again do considerable damage to Field Marshall Fonseka's now revived standing in Sri Lanka, given this attribution (which he later vehemently denied) was the basis of the government's charges against him under the PTA.

43. As such, the client faces a serious risk of being detained or abducted and suffering ill-treatment and harm. The client says he destroyed the recordings (while drunk), but given the international and domestic stakes of Fonseka's link to the 'white flag' incident, there is every likelihood he would not be believed by the authorities.

Whether it is likely that our client would not be at risk simply because [Z] herself has not been targeted;

44. As discussed above, despite initially supporting Fonseka's presidential bid against Rajapaksa, [Z] switched sides to Rajapaksa's government soon after being elected MP in 2010, and has since provided unqualified support. Moreover, she is a well-known and popular actress (garnering a substantial vote in the 2010 elections greater than a prominent UNP figure). Thus it is not surprising that she has not been targeted by the government. However, [Z's] good relations with the government (past and, seemingly, present) has no relation to the potential risk to the client, which, for the reasons set out above, is very serious.

The likelihood of our client being arrested at a Sri Lankan port of entry

45. I cannot speak with certainty to this; however, given the client is likely now known to Fonseka and Gotabaya as someone in possession of potentially damaging recordings, I would expect there to be considerable urgency on their respective parts to recover these and to prevent the client from speaking to the contents thereof. [Also, the client has mentioned in interview that one of the four politicians he fears is 'Dominda Silva', whose men he says abducted and assaulted him an effort to recover the recordings and with whose brother [Z] had sexual relations. I presume he is referring to Duminda Silva, MP, who, elected in 2004 on the opposition UNP ticket crossed over to Rajapaksa's

ruling UPFA coalition in 2007 reportedly in exchange for the government restoring the cancelled broadcasting licence of the Asia Broadcasting Corporation owned by his (Silva's) brother. Duminda was elected on the UPFA ticket in 2010.]."

23.
At para 46, the expert also commented on, as plausible, the practice of targeting family members in Sri Lanka who threaten government figures.

24.
The letter from the Chief Minister spoke of the threats to the applicant's family and that in the "personal opinion of the writer, the applicant should not return to Sri Lanka".

25.
Finally, the letter from the Member of Parliament spoke of the threats to the applicant and, again, indicated that he should not return to Sri Lanka.

26.
I have only briefly referred to the contents of the two letters because Mr Hoshi, who represented the applicant, placed no reliance upon them in his oral submissions before me. The focus of his case was upon the expert evidence.

The Respondent's Decision of 28 May 2015

27.
In response to those submissions, the Secretary of State rejected the appellant's claim and concluded they did not amount to a fresh claim under para 353 of the Rules.

28.
At para 5 of her decision letter, the Secretary of State dealt with the expert evidence as follows:

"5. With regards to the expert report it is noted that you submit that this is "clear proof" that your client would be at risk on return to Sri Lanka. However, it is noted that when discussing the likelihood of your client being arrested on return to Sri Lanka the expert at paragraph 45 states "I cannot speak with certainty to this, however given the client is likely now known…as someone in possession of potentially damaging recordings, I would expect there to be considerable urgency on their respective parts to recover these and prevent the client from speaking to the contents thereof" . It is considered that the expert is merely speculating as to the actions the authorities in Sri Lanka might take. In addition, he is unable to provide any explanation as to how, if that was the case, your client was able to leave the country, using his own identity without any problems some 5 months after he allegedly came to the attention of the politicians who subsequently sent people to recover the tapes from him. In addition, the immigration judge in his determination of 09/03/2015 at para 22 found that "Anyone wanting those recordings would surely have moved against her ([Z])…or gone on to ransack his family home in order to try and find them yet there is no suggestion that this has happened., The only inference one can reasonably draw from this is that anyone with a particular interest in these recordings has satisfied themselves that they have been disposed of" . No explanation has been provided to counter the judges findings. Although you claim that a "significant error has been made in our clients case which has lead to the conclusion that our client would not be at risk on return" , your claims in this regard were considered after your appeal to both the First and Upper Tier tribunal for permission to appeal. This determination was upheld by the Upper Tribunal Judge on 23 March 2015 who noted "I have paid full regard to the findings of fact made in favour of the appellant by the Judge

but the challenge made in the grounds is a perversity challenge attacking the assessment of risk. Paragraph 22 of the determination is a proper and adequate analysis of risk and cannot, even arguably, be said to be perverse." Therefore, it is not accepted that the contents of the said expert report would create a realistic prospect of success before an immigration judge."

29.
In para 6 of her decision letter (at pages 64-69 of the bundle) the Secretary of State dealt with the two letters from the Chief Minister and the MP as follows:

"6. Lastly, it is noted that you have submitted 2 letters from a member of parliament in Sri Lanka and also a Minister of one of the Provinces. These letters claim that your client is not safe to return to Sri Lanka at present. However, taking these into account, regard must be given to the Country of Origin report for Sri Lanka March 2012 at para 27 which states:

A letter from the British High Commission (BHC) Colombo dated 14 September 2010 reported:

"The base document for many services in Sri Lanka is the birth certificate, and in particular, access to state education requires the production of this document. The document also supports applications for national identity cards and passports. The British High Commission is aware that forged birth certificates are readily available through agents, at a reported cost of around 2,500 LKA rupees (approximately £12.50). These forged documents often pass the scrutiny of the relevant authorities and successfully support the fraudulent issue of ID cards and passports. There are numerous agents throughout the country who advertise employment or studies abroad, and will provide an entire package of forged documents to support applications for passports and/or visas. Apart from birth certificates, these can include forged passports, identity cards, educational certificates, work references, bank statements, sponsorship letters etc."

The BHC letter of 14 September 2010 added that:

"The high level of corruption in Sri Lanka and the unscrupulous actions of government officials at all levels, somewhat undermines the issuing process for many official documents. It is common knowledge that persons can obtain an ID card or passport in any identity they want to with the right contacts. The Visa Section at this mission regularly see forged education certificates, bank statements, employment references etc, yet they rarely see forged Sri Lankan passports or ID cards. The reason for this is that the genuine documents are so easy to obtain fraudulently, there is no need to forge them. It is suspected that there are many more ID cards in circulation than the actual total population of Sri Lanka."

7. In addition, it is noted that it has never been your evidence that you have had any political involvement in Sri Lanka and therefore it is unclear how you are known to these 2 Government officials or how they are aware of your problems within the country. In addition, it is noted that they have not been sent direct from the authors of the letters but by a S.C.P. It is not clear who this person is or why the letters would have been given to him before being forwarded to you. In addition, the content of the letter is considered completely vague and self serving. It is also noted that both letters refer to you and your family having received verbal and physical threats many times when that has never been your evidence. As a result, no weight is placed on these in support of your further submissions".

30.

In conclusion, the respondent stated (at para 8 of the decision) that the further submissions had “no realistic prospect of success”.

The Applicant’s Challenge

31.
The applicant’s challenge is set out in the grounds, the skeleton argument of Mr Hoshi and his oral submissions before me. Mr Hoshi placed exclusive reliance upon the expert report of Dr Nadaraja and submitted that the respondent’s decision letter had failed properly to deal with it.

32.
Mr Hoshi submitted that Judge Baldwin had made a positive credibility finding in relation to the applicant’s account in para 21 of his determination. He had, Mr Hoshi submitted, accepted the applicant’s relationship with Z, that she had made the recordings of the politicians as the applicant claimed and that as a result he had been abducted in order to obtain them. Mr Hoshi submitted that in para 22 of his determination the judge had given three reasons why, despite those positive findings, he had not accepted that the applicant was at risk on return. First, the judge had concluded that the only reasonable inference that could be drawn from the fact that Z had not suffered any problems was that those who had an interest in the recordings were satisfied that they had been disposed of. Secondly, the applicant’s claim had been embellished when he said that his family had had to move, including his sister to Australia. Thirdly, the judge had relied on the applicant’s delay of some four and a half years before he claimed asylum if, in truth, he genuinely feared persecution on return to Sri Lanka.

33.
Mr Hoshi submitted that in para 44 of his report, Dr Nadaraja had explained why it was likely that Z had not been targeted by the government. This, Mr Hoshi submitted was not considered by the Secretary of State in para 5 of her decision letter when considering the expert report. That, he submitted, flawed her decision. In the light of that evidence she was not entitled to find that the applicant’s claim did not have a realistic prospect of success before a judge on appeal.

34.
Mr Hoshi also submitted that the respondent had been wrong to discount the expert’s report. In para 45, although he had said he could not “speak with certainty” whether the applicant would be arrested at the port of entry, the tenor of his remarks (in particular in para 43) was that the applicant would be at risk in Sri Lanka.

35.
Mr Hoshi submitted that it was not a proper basis for rejecting the expert’s report that he had not explained how the applicant was able to leave Sri Lanka without any problems or had remained in Sri Lanka safely for some months. In relation to the former, Mr Hoshi relied upon what was said in He v SSHD [2002] EWCA Civ 1150 at [31] by Schiemann LJ that:

“history contains examples of regimes which persecute a minority in their home country but are content for them to leave their home country. Their attitude is: we just do not want them here.”

36.
As regards the latter, Mr Hoshi pointed out that the applicant claimed to be in hiding for the period of time he remained in Sri Lanka before leaving.

37.

Mr Hoshi submitted that the respondent's decision letter failed to give "anxious scrutiny" to the applicant's new submissions, in particular failed to have regard to the positive credibility findings made by the judge and Dr Nadaraja's report which, he submitted, created a realistic prospect of success.

The Respondent's Position

38.
The respondent's position is set out in the detailed grounds of defence, in Ms Bayoumi's skeleton argument and in her oral submissions.

39.
First, Ms Bayoumi submitted that Judge Baldwin had not in para 22 accepted the applicant's account.

40.
Secondly, she submitted that the respondent in her decision letter had adequately considered the expert's report. She submitted that the expert had failed to deal with Judge Baldwin's other reason for rejecting the appellant's claim, namely his delay in claiming asylum, how he was able to remain in Sri Lanka safely for a number of months after his abduction, and how he left Sri Lanka without difficulty. As regards the latter, Ms Bayoumi submitted that the decision in He did not assist the applicant as this was not a case where those who sought the applicant would prefer that he left the country. They wanted, she submitted, to obtain the recordings from him.

41.
Ms Bayoumi submitted that the expert report did not, in fact, take the applicant's claim any further. She submitted that there were not any findings of substance in the report which assisted the applicant. In relation to threats to the applicant's family, she pointed out that the expert has simply stated that they were targeted. She drew my attention to two references, to the same event, where the applicant claimed his family had been threatened in his statement at para 6 (page 114 of the bundle) and in his asylum interview at question 102 (at page 115 of the bundle). She submitted that it was not wrong for the respondent to say that the threats to the family were not a significant part of his claim and had not added to it.

42.
Ms Bayoumi submitted that the Secretary of State had been entitled to conclude, on the basis of Judge Baldwin's findings, particularly in para 22, that taking account of the further submissions made, there was not a realistic prospect of a judge on appeal deciding in the applicant's favour.

Discussion

43.
The relevant law is common ground between the parties.

44.
The definition of a 'fresh claim' is set out in para 353 of the Rules as follows:

"When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

(i)
had not already been considered; and

(ii)
taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

This paragraph does not apply to claims made overseas."

45.
The correct approach to para 353 is set out in the decision of the Court of Appeal in WM (DRC) v SSHD [2006] EWCA Civ 1495 and in the judgment of Buxton LJ at [6]-[7] and [10]-[11] as follows:

'6. There was broad agreement as to the Secretary of State's task under rule 353. He has to consider the new material together with the old and make two judgements. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353(i) according to whether the content of the material has already been considered. If the material is not "significantly different" the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgement will involve not only judging the reliability of the new material, but also judging the outcome of the tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.

7. The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nicol QC pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in Bugdaycay v SSHD [1987] AC 514 at p.531F […].

….

10. That, however, is by no means the end of the matter. Although the issue was not pursued in detail, the court in Cakabay recognised, at p191, that in any asylum case anxious scrutiny must enter the equation: see §7 above. Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.

11. First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see §7 above. The Secretary of State of course and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision.'

46.
As this makes plain, the Secretary of State's decision can only be challenged on public law grounds, principally irrationality which includes a requirement that the Secretary of State give the further submissions "anxious scrutiny". Further, the issue which the Secretary of State must decide is whether, taking the previous material with the new material, there is a "realistic prospect of success" before a judge on appeal. The test is not whether the Secretary of State considered that there is a "realistic prospect of success" but rather looks to the decision that a judge would make on appeal. A "reasonable prospect of success" means only "more than a fanciful such prospect" (see R (AK (Sri Lanka)) v SSHD [2009] EWCA Civ 447 at [34] per Laws LJ).

47.
Paragraph 353 imposes "a somewhat modest test" in the dual sense that the question is whether there is a "realistic prospect of success" before a judge and also that, in determining the success of an appeal, a judge need only conclude that there is a "real risk" to the applicant of being persecuted on return.

48.
The starting point for the respondent, as Ms Bayoumi accepted in her submissions, was Judge Baldwin's decision. I do not accept her submission that in para 21 of his determination, the judge did not accept a number of aspects of the applicant's claim. His conclusion that it was "possible" in the penultimate sentence of para 21 that what the applicant had said about his relationship with Z, that the recordings had been made and he had been abducted and released only on a promise that he would provide those recordings can only mean, on the standard applicable in asylum cases, that the judge accepted those matters as found in the applicant's favour.

49.
If there was any doubt about that, the final sentence of para 21 makes plain that the judge considered that, having stated that the applicant had established that these matters were possible, the question which remained was whether "even if that is all so" he had a well-founded risk of persecution or serious ill-treatment if returned to Sri Lanka. In other words, the judge moved on to consider the objective risk to the applicant on the basis of what I am satisfied were his previous findings of fact in favour of the applicant.

50.
When the judge did that in para 22, he concluded that the applicant had failed to establish that he was objectively at risk for three reasons. First, on the basis that Z had not suffered any problems over the recordings, the judge concluded that:

“the only inference one can reasonably draw from that is that anyone with a particular interest in these recordings has satisfied themselves that the recordings have been disposed of”.

51.
Secondly, the applicant had embellished his account about his family having to move. Thirdly, that if he had a genuine fear that was inconsistent with him having taken four and a half years to claim asylum.

52.
It seems to me that Dr Nadaraja’s report directly attacked the only reasonable inference which the judge felt compelled to draw, based upon Z having suffered no difficulty over the recording. In his report, Dr Nadaraja specifically deals with them at para 44 explaining why it was “not surprising that [Z] has not been targeted by the government.”

53.
In her refusal letter, in particular at para 5, the Secretary of State makes no mention of this evidence. That was highly relevant in assessing whether there was a realistic prospect of success before a judge, given that was one of the three reasons given in Judge Baldwin’s determination for concluding that there was no objective risk to the applicant. If a judge were to accept Dr Nadaraja’s view, and it was not subject to any challenge by the respondent, that would run a “coach and horses” through Judge Baldwin’s reasoning why the applicant was not at risk.

54.
The remaining two reasons given in para 22 were less direct in refuting the applicant’s case on objective risk, namely the embellishment of his claim about his family and his delay in claiming asylum. Judge Baldwin’s reliance upon the ‘only reasonable inference’ point is not only first in his reasons for rejecting any objective risk to the applicant but is also, in my judgement, the most powerful and the one capable of sustaining his ultimate finding.

55.
The Secretary of State was wrong when in para 5 of her refusal letter she said that: “no explanation has been provided to counter the judge’s findings”. That is said directly following a quotation from Judge Baldwin’s determination at para 22 based upon the ‘only reasonable inference’ that could be drawn from the fact that Z had not suffered any problems over the recordings. In my judgement, para 5 of the Secretary of State’s decision letter does not demonstrate that she has applied “anxious scrutiny” to Dr Nadaraja’s report and the supportive material in it to the applicant’s claim.

56.
I do not accept Ms Bayoumi’s submission that the report can be discounted because it does not deal with some of the judge’s reasoning and, as I understood Ms Bayoumi’s submissions, points that were not relied upon by the judge at all.

57.
True it is that Dr Nadaraja does not refer to the issue of delay but that is hardly a matter within his expertise to assess its implications for the applicant’s claim. He does, however, deal with the applicant’s claimed threats to his family and states that they are plausible.

58.
Ms Bayoumi also relied upon Dr Nadaraja’s failure to deal with how the applicant had safely remained in Sri Lanka after his abduction and had been able to leave safely. These were not matters relied upon

by Judge Baldwin in reaching his findings. He did, after all, accept the credibility of the core aspects of the appellant's account. Judge Baldwin's decision turned upon whether the applicant had established an objective risk to him. He took neither of the matters relied upon by Ms Bayoumi into account in reaching his finding in para 22. It is difficult, therefore, to criticise the expert for not dealing with matters not relied upon by the judge whose determination and finding were the starting point for the Secretary of State's assessment of whether the applicant's claim amounted to a fresh claim. The obvious response, of course, as to how the applicant was able to remain safe in Sri Lanka after his abduction was that he went into hiding. That was not a matter of expert evidence. It may well be, as Ms Bayoumi pointed out, that the approach in He has no direct application to the applicant's circumstances. His claimed pursuers might well need him to remain in Sri Lanka in order to recover the incriminating recordings. That may well be a relevant matter in assessing the applicant's claim overall, but it was not a matter raised by the judge and it was not, in itself, a good enough reason for rejecting the expert evidence.

59.
Drawing my reasons together, I accept Mr Hoshi's submission that the Secretary of State has failed properly to take into account the totality of the expert report in rejecting the applicant's claim and concluding that it did not amount to a fresh claim under para 353 of the Rules. She has failed to apply "anxious scrutiny" to the applicant's claim, in particular the further submissions and consequently her conclusion that the applicant's claim did not have a realistic prospect of success before a judge on appeal is flawed on public law principles.

60.
I reach that decision on the basis of the Secretary of State's failure properly to consider the expert report. Mr Hoshi did not rely upon the two letters which were part of the further submissions and I need say no more about them.

Decision

61.
For the above reasons, the respondent's decision of 28 May 2015 rejecting the applicant's claim and concluding that it did not amount to a fresh claim under para 353 of the Rules was unlawful. That decision is quashed.

62.
Mr Hoshi invited me also to declare that the applicant's further submission did amount to a fresh claim. That would only be appropriate if the respondent could only make a decision under para 353 in the applicant's favour. My reasons for concluding that her decision was unlawful does not necessarily imply that consequence. Therefore, I do not propose to take, what Mr Hoshi accepted was an unusual course, of making a declaration in the terms he sought.

Signed

A Grubb

Judge of the Upper Tribunal