



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

Appeal Numbers: AA/00353/2014

THE IMMIGRATION ACTS

**Heard at Field House, London
On 27 October 2014**

**Determination
Promulgated
On 5 November 2014**

Before

The President, The Hon. Mr Justice McCloskey

Between

JUHENDRA NADARAJAH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Ms S Akinbolu (of Counsel) instructed by Tamil Welfare Association (Romford Road)

Respondent: Mr E Tufan, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appeal to this Tribunal originates in the decision of the Secretary of State dated 30 January 2013. By the terms of this decision the application

of the Appellant, a national of Sri Lanka, now aged 26 years, for asylum under the Refugee Convention was refused. The Secretary of State further determined that the Appellant did not qualify for humanitarian protection. Finally it was concluded that the dismissal of the application would not infringe any of the Appellant's rights under the Human Rights Convention.

2. The First-tier Tribunal (the "FtT") refused the Appellant's appeal on all grounds. In short it affirmed the decision of the Secretary of State in every respect. Permission to appeal to this Tribunal was granted on the basis that, *inter alia*, it was arguable that the FtT had erred in law in failing to consider the consequences of the Appellant's release from detention through the payment of a bribe. The other grounds of appeal, which related to specified findings by the Judge, were also deemed arguable.
3. The Appellant's case has been put with admirable clarity by Ms Akinbolu on his behalf. Her submissions point to two key factual issues in respect whereof it is contended the FtT has failed to grapple the evidence and to make appropriate findings. The first relates to the evidence concerning the circumstances of and explanation for the release of the Appellant from detention. This places the spotlight on [65] of the determination. This contains a series of findings favourable to the Appellant, particularly that he was detained by the Sri Lankan authorities and was beaten. This is followed by a somewhat abrupt and unexplained sentence in the following terms:

"However, he was released because there was no evidence against him".

The criticism of this passage is that the Judge has failed to engage with the evidence as recorded in [18] of the determination, that the Appellant was released furtively, under cover of darkness and because a bribe had been paid. The FtT failed to make any findings on these important issues. I conclude that there is substance in this ground of appeal. The finding in question, which is one of unmistakable importance, is vitiated on the basis put forward on behalf of the Appellant.

4. The second contention canvassed on behalf of the Appellant is that the Judge has committed similar errors in relation to the issue of mobile phone communications. This arises in the context of the Appellant's asserted food transportation activities on behalf of the LTTE to Tamil terrorists. The Judge made a finding in [65] of the determination that the Appellant was not involved in such activities. He then provided a reason in the following terms:

"The Sri Lankan Intelligence Service is very sophisticated and would have intercepted mobile phone messages".

It is argued that this finding is irrational because it had no evidential foundation and has no basis in the Country Guidance judgment of GJ. I

accept this argument. I consider that there is a further dimension to this. On the face of the determination, this issue was not ventilated at the hearing. I conclude that, in consequence, the hearing was unfair since the Appellant should have been giving the opportunity to deal with this issue in his evidence. This facility should have been afforded either in cross-examination or in questioning from the bench, or by both mechanisms.

5. The third challenge to the determination of the FtT focuses on [58] of the determination. The thrust of this challenge is comparable to the first of the main grounds advanced on behalf of the Appellant. The Appellant had provided an explanation for apparently inconsistent or incorrect dates in three places, namely in two witness statements and in his evidence to the Tribunal. Dr Cohen's evidence also sounded on this issue. None of this evidence was considered in [58] of the determination. I consider that it was incumbent on the FtT to address this evidence and to make specific findings of fact accordingly. There was a failure to do so. Once again this was an issue of unarguable importance, given its self-evident significance.
6. I cannot accept the argument that these errors were immaterial. To accept that argument would require this Tribunal to conclude that the outcome would have been the same. I cannot make that conclusion with the necessary degree of confidence.
7. I also draw attention to the terms in which the Upper Tribunal has expressed itself in GJ. I find nothing in the relevant category recognised in GJ which necessarily excludes this Appellant from the possibility of qualifying for the protection of asylum. This is emphasised in the terms in which Lord Justice Underhill expresses himself in [50] of the judgment in MP. A record of past LTTE activism does not as such constitute a risk factor for Tamil's returning to Sri Lanka. However, it is not necessarily excluded. The Upper Tribunal considered that diaspora activism, actual or perceived, is the principal basis on which the government of Sri Lanka is likely to treat returning Tamils as posing a current or future threat, viz not the only or exclusive one. He then goes on to say he does not read paragraph 3567(A) of the GJ determination as prescribing that diaspora activism is the only basis on which a returning Tamil might be regarded as posing such a threat and, thus, of being at risk on return.
8. This resolves to the following conclusion, namely, if the errors of law which I have found in the determination of the FtT had been avoided the Tribunal, properly directing itself, might have concluded that the Appellant belongs to one of the recognised risk categories acknowledged in GJ. I need to go no further than that by well established authority.

DECISION

9. For these reasons I conclude that the determination of the FtT is vitiated by material errors of law and must be set aside accordingly.

10. Taking into account my finding of procedural unfairness, I remit the case to a different constitution of the FtT for the purpose of remaking the decision on the Appellant's appeal.

Bernard McCloskey.

THE HON. MR JUSTICE
MCCLOSKEY
PRESIDENT OF THE
UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 30 October 2014