



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/03951/2014
AA/03950/2014

THE IMMIGRATION ACTS

Heard at Field House
On 25 September 2014

Determination Sent
10 October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE APPELYARD

Between

AA
SA
(ANONYMITY DIRECTION MADE)

First Appellant
Second Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms A. Benfield, Counsel.
For the Respondent: Mr S. Allen, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellants are both citizens of Sri Lanka and are husband and wife. They were born respectively on 14 March 1985 and 12 May 1988. In a letter dated 27 May 2014 the respondent refused their separate claims for asylum in the United Kingdom and

on 6 June 2014 gave directions for their removal under Section 10 of the Immigration and Asylum Act 1999.

2. The appellants claim to be refugees whose removal from the United Kingdom would breach our obligations under the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 ("the Qualification Regulations"), which I have taken into account.
3. Alternatively the appellants claim that they are entitled to be granted Humanitarian Protection in accordance with paragraph 339C of the Immigration Rules HC 395 (as amended), which I have taken into account.
4. The appellants also claim that their removal from the United Kingdom would breach our obligations under the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms ("the 1950 Convention") with particular reference to Articles 2, 3 and 8 thereof.
5. The first appellant was born in Valvettithurai in Sri Lanka which is the birth place of Velupillai Prabhakaran, the leader of the LTTE. The town was, throughout the conflict in Sri Lanka, the focus of hostilities between the LTTE and the Sri Lankan Army. He left Sri Lanka for south India in 1986 when he was 1 year old. This was by reason of the conflict in the region. Some three years later he returned with his family to Sri Lanka due to the discrimination and hardship the family endured at the hands of the Indian authorities. Upon return he was present during a range of attacks including a shelling attack in which his grandfather and aunt were killed. In 1990, as a result, the family went back to south India and once more returned to Sri Lanka in 2002. Shortly thereafter the first appellant was stopped by the army and as he was unable to produce an identity card he was questioned and then detained for a period of twelve days in Valvettithurai army camp. During this detention he was physically abused and beaten. The army considered that he had strong ties to an LTTE cell in south India. He was eventually released following intervention from his mother. Following this incident he and his family once more fled to south India. The first appellant was involved in Tamil rights movements there, was a member of "Nam Thamilar" and attended demonstrations. He came to the United Kingdom in 2002 as a student and joined the Tamil Youth Organisation (TYO) in London and started to help the Tamil Expatriate Movement. He participated in processions and demonstrations against the Sri Lankan Government.
6. The second appellant was also born in Valvettithurai. She was injured by shrapnel following a bomb attack when a house was destroyed and her uncle was killed. As a consequence of the hostilities she and her family, in 1996, went to an army controlled camp in Vavuniya where they were questioned regarding their involvement with the LTTE. As a consequence of the continuing unrest in her home country she and her family moved to south India when she was aged 9 years. There she was, as a college student, involved in demonstrations for Tamil rights during the period of 2008 to 2010. In May/June 2007 she returned to Sri Lanka to visit her father who was ill. She

was stopped and questioned on arrival about her involvement with the LTTE in India. She had been absent from Sri Lanka for eleven years which prompted interest in her activities abroad. Her father informed her that he had connections with the LTTE and that the army had adverse interest in him. He had been questioned on several occasions by the army. The second appellant was warned by her father that it was unsafe to remain in Sri Lanka and that she should return to India forthwith. On the third night of her visit she was staying at her maternal grandmother's brother's house when ten members of the army raided the property. She was taken to a camp where she was fingerprinted, photographed and interrogated. She was questioned and raped by four army officers. She was informed during her questioning that the reason for her arrest was her father's known involvement with the LTTE and the belief that she had helped the Indian wing of that group in India. She was released with reporting conditions. Fearing for her safety, she obtained an emergency passport on payment of a bribe and fled to south India. She married the first appellant in August 2011.

7. These facts were considered at an appeal hearing in the First-tier Tribunal by Judge Hembrough. In a determination, promulgated on 25 July 2014, he dismissed both appellants' appeals on asylum, Humanitarian Protection grounds and with reference to Articles 2, 3 and 8 of the 1950 Convention.
8. In so doing the judge broadly accepted the factual matrix of the appellants' claims although he had some doubts about the provenance of a TYO letter dated 14 July 2014 which was submitted at the hearing and which stated that the first appellant was a member "in the year 2009". Moreover there was no reference in the letter to the appellant holding any office within the organisation and no requirement to pay an annual subscription. The judge also found that whilst the TYO is a proscribed organisation in Sri Lanka, its aims and objectives do not include the formation of a separate Tamil state. The judge concluded that the appellant is a low level supporter and member of a number of groups with an interest in promoting the rights of Tamils in Sri Lanka. Whilst accepting that the appellant attended a number of events in the United Kingdom the judge also found that the first appellant is "by no means an activist". The judge went on to apply the guidance and risk categories of **GJ and others Sri Lanka CG [2013] UKUT 319 (IAC)** and found the appellant did not meet any of the risk categories identified therein and that he was in fact an economic migrant, albeit one with continuing interest in Tamil affairs as contemplated at paragraph 356(A) of **GJ**.
9. As to the second appellant, he found that she had never engaged in any political activity in Sri Lanka and was never an LTTE member, albeit that she attended a small number of political meetings in India. She has not engaged significantly in political activity in the United Kingdom. The judge further found that even accepting her account of her detention and rape in 2007 at face value, on her own account within her asylum interview she was found to be innocent of any involvement with the LTTE and was released without charge.

10. Following the dismissal of their appeals the appellants sought permission to appeal. That was granted by Judge of the First-tier Tribunal Landes on 13 August 2014.
11. Thus the appeal came before me today.
12. Ms Benfield relied upon and amplified the lodged grounds in submitting to me that the judge had made material errors within his determination as identified in the grounds. If I was mindful to accept her arguments she invited me to set the judge's decision aside and to remake it, allowing the appeal on the basis of the risk of persecution each appellant would face upon return to Sri Lanka. She acknowledged that the second appellant's claim, on the facts, is the weaker but she nonetheless is dependent, in any event, on that of the first appellant.
13. Mr Allen submitted that the first ground was no more than a dispute or disagreement with the findings of the judge. Clear reasoning had been given and the judge had taken into account the first appellant's sur place activities and submitted that GI is not authority to suggest that mere involvement in diaspora activities renders one a refugee. Both within the headnote and the authority itself it emphasises the need to have a "significant role". The judge's findings were open to be made on the evidence and the conclusions that the judge reached in paragraph 48 of his determination were open to him. Paragraph 48 states:-

"48. I accept that he has attended the events claimed in the UK. However he is by no means an activist. He has never spoken at a meeting at which he was in attendance. Nor has he committed his opinions to writing. He has never openly voiced views in opposition to the Sri Lankan government nor has he ever advocated the creation of a separate of Tamil state in the UK where he is free to do so. Whilst privately he may hold the view that this may be the only realistic solution to the plight of Tamils living in Sri Lanka I find that at the heart of his political beliefs is the desire to promote the rights and improve the circumstances of Tamils not the destruction of the unitary state in Sri Lanka."
14. Mr Allen submitted that ground 3 was also no more than a disagreement with the judge's findings and although paragraph 43 of the judge's determination is not a "definitive finding" as to whether the first appellant is or is not a member of the TYO, the issue was nonetheless dealt with by the judge in the following paragraph when he considers that the TYO letter of 14 July 2014 makes no reference to the appellant holding any office within the organisation, that there is no requirement to pay an annual subscription and, whilst the TYO may be a proscribed organisation in Sri Lanka, its aims and objectives do not include the formation of a separate Tamil state.
15. Beyond that the judge has given clear reasoning for coming to the conclusions that he did.

16. As to the second ground, Mr Allen acknowledges that the determination makes no reference to **HJ (Iran) [2010] UKSC 31** but that in itself is not an error of law given the judge's analysis within the determination of the risks the appellants may face if returned to Sri Lanka.
17. It is helpful here to make reference to some of the authorities that have been put before me prior to considering whether the judge erred as submitted by Ms Benfield.
18. The headnote to **GJ** states:-
 - “(1) This determination replaces all existing country guidance on Sri Lanka.
 - (2) The focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009. The LTTE in Sri Lanka itself is a spent force and there have been no terrorist incidents since the end of the civil war.
 - (3) The government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state enshrined in Amendment 6(1) to the Sri Lankan Constitution in 1983, which prohibits the 'violation of territorial integrity' of Sri Lanka. Its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka.
 - (4) If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.
 - (5) Internal relocation is not an option within Sri Lanka for a person at real risk from the Sri Lankan authorities, since the government now controls the whole of Sri Lanka and Tamils are required to return to a named address after passing through the airport.
 - (6) There are no detention facilities at the airport. Only those whose names appear on a 'stop' list will be detained from the airport. Any risk for those in whom the Sri Lankan authorities are or become interested exists not at the airport, but after arrival in their home area, where their arrival will be verified by the CID or police within a few days.
 - (7) The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, are:
 - (a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka.

- (b) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government.
 - (c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.
 - (d) A person whose name appears on a computerised 'stop' list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.
- (8) The Sri Lankan authorities' approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war. In post-conflict Sri Lanka, 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.
- (9) The authorities maintain a computerised intelligence-led 'watch' list. A person whose name appears on a 'watch' list is not reasonably likely to be detained at the airport but will be monitored by the security services after his or her return. If that monitoring does not indicate that such a person is a Tamil activist working to destabilise the unitary Sri Lankan state or revive the internal armed conflict, the individual in question is not, in general, reasonably likely to be detained by the security forces. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual.
- (10) Consideration must always be given to whether, in the light of an individual's activities and responsibilities during the civil war, the exclusion clauses are engaged (Article 1F of the Refugee Convention and Article 12(2) of the Qualification Directive). Regard should be had to the

categories for exclusion set out in the 'Eligibility Guidelines For Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka', published by UNHCR on 21 December 2012."

19. I am aware that the Court of Appeal found in **MP (Sri Lanka) and NT (Sri Lanka) v SSHD [2014] EWCA Civ 829** that there was no legal error in the Upper Tribunal's guidance on Sri Lanka despite the fact that it had narrowed the risk categories from those in the Eligibility Guidelines of the United Nations High Commissioner for Refugees.
20. I am satisfied that the judge materially erred as submitted in relation to all three grounds.
21. He failed to appropriately consider the findings of the Upper Tribunal in **GJ** in respect of the relevance of attendance and a high likelihood that, in the light of the frequency of the first appellant's attendance, there would be a reasonable degree of likelihood that the first appellant (and therefore the second appellant) will be at risk upon return owing to his sur place activities. These amount to fifteen attendances, including the first appellant being shown in a range of pictures including a Channel 4 TV documentary, coupled with his activity at the Tamil Remembrance Day distributing papers. There was also evidence before the Tribunal from the Tamil Guardian picturing the appellant. There was ample evidence to suggest that the first appellant is, or is perceived to be, a threat to the integrity of Sri Lanka as a single state because he has, or is perceived to have, a significant role in relation to post-conflict Tamil separatism within the diaspora. Ultimately this is a conclusion that can be reached when looking at the totality of the evidence that was before the judge.
22. The judge also erred in not explicitly considering **HJ (Iran)** and the arguments that were put forward in reliance thereon. I appreciate the judge did consider that the desire to promote the rights and improve the circumstances of Tamils was at the heart of the first appellant's political beliefs. I find though that the judge erred in not concluding that the first appellant might express such views when asked by the Sri Lankan authorities or, if he did not, it would be due to a fear of persecution.
23. I also find that the judge erred in failing to make a finding in relation to the appellant's membership of the TYO and the impact of such membership and the perceptions the Sri Lankan Government would hold consequent upon such membership. In oral evidence the appellant dealt with the anxieties of the judge in relation to the unattributed and unsigned letter and in not finding that the appellant was a member of the TYO conclusively or otherwise the judge fell into error. When looking at this letter in the context of the totality of the positive credibility findings, I find the appellant was a member of the TYO as claimed.
24. The first and second appellants have both been subjected to persecution and serious harm within their home country of Sri Lanka. This is an indication of their well-founded fear of persecution.

25. The first appellant has been subject to arrest and torture, has been absent from Sri Lanka for a substantial period and will be viewed with suspicion owing to the perception of association with the LTTE in south India. He was released and warned not to leave his house and be available for the authorities to visit and find him at home. His immigration history shows non-compliance with that demand.
26. He has had a high level of involvement in Tamil diaspora movements in demonstrations in India and the United Kingdom and such activities are highly likely to have brought him to the attention of the Sri Lankan authorities, thus placing him at risk on return. Within the United Kingdom there is evidence of his membership of the TYO and other involvements including the Tamil Society of Kingston University, production of papers and acting as a volunteer at the Tamil Remembrance Day event on 27 November 2013. Whilst attendance at demonstrations may not be enough in itself to show that an individual is a committed Tamil activist seeking to promote separatism, it is a factor that can be taken into account when looking at the totality of the evidence and any individual appellant's particular makeup and the risk that he or she might face upon return to Sri Lanka. Given the extensive nature of this first appellant's individual involvement in diaspora organisations, coupled with his attendance at demonstrations published in the media, I find that he is likely to be at risk of identification by the Sri Lankan authorities were he to return. I remind myself that the TYO is subject to a proscription order and the first appellant's membership thereof increases his risk. The first appellant is someone with strong political opinions and if returned to Sri Lanka he would be unable to express them in contravention of the principles established by the Supreme Court in **HJ (Iran)**.
27. The second appellant's claim is perhaps weaker than the first appellant's. Nonetheless it is dependent upon it. However, in coming to my conclusions that these appeals should be allowed I also take into account the second appellant's rape when held by the Sri Lanka Army, her father's profile as a supporter of the LTTE who had been subject to questioning himself, her own absence for a substantial period from Sri Lanka, her interrogation, detention and her non-compliance with the reporting conditions imposed upon her.
28. I remind myself that the burden is on the appellants to show that there are substantial grounds for believing that they meet the requirements of the Qualification Regulations. Given the conclusions as outlined above, I find the appellants have discharged the burden of proof to establish that they are entitled to the grant of asylum. I come to the conclusion that their removal would cause the United Kingdom to be in breach of its obligations under the Qualification Regulations.
29. Accordingly the appellants are not entitled to Humanitarian Protection.
30. Given my conclusions I also find that the appellants' rights under Articles 2 and 3 of the 1950 Convention are engaged and that the decision appealed against would cause

the United Kingdom to be in breach of the law or its obligations under that Convention.

31. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
32. I set aside the decision.
33. I remake the decisions in these appeals by allowing them.

Direction regarding Anonymity - Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

1 October 2014

Deputy Upper Tribunal Judge Appleyard