



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/06940/2013
AA/06942/2013
AA/06945/2013
AA/06946/2013

THE IMMIGRATION ACTS

Heard at Field House
On 20 March 2013

Date Sent
On 3 April 2014

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

R U AND OTHERS
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Sowerby instructed by Lawland Solicitors
For the Respondent: Mr G Saunders, Presenting Officer

DETERMINATION AND REASONS

The appellant was granted anonymity by the First-tier Tribunal. Although no application was made I nevertheless consider it desirable that this continues in the Upper Tribunal. Consequently no report of these proceedings shall directly or

indirectly identify him or any member of this family. Failure to comply with this direction could lead to contempt of court proceedings.

INTRODUCTION

1. The appellant is Sri Lankan and he is of Sinhalese ethnicity. He was born in 1975 and he came to the United Kingdom on 9 July 2010 on a student visa. He was joined by his wife and a child (another was subsequently born in the United Kingdom) in December 2010. Their leave to remain expired on 8 June 2011. After making an appointment in the proceeding month, the appellant made his application for asylum on 12 March 2012. He was substantively interviewed about that claim on 15 August 2012 and for reasons given in a refusal letter dated 5 July 2013, the appellant and his family members were served with notices of decision to remove them as illegal entrants on the same day.
2. The basis of the appellant's claim to asylum was a fear from the Sri Lankan authorities whom he contended were adversely interested in him because of his support for General Fonseka and the Democratic National Alliance (DNA). The appellant had been in the army and on leaving worked as a co-ordination officer for the DNA. In January 2010 that party was defeated in the general election. The following month, the appellant with nine others and General Fonseka were arrested. It is the appellant's case that he was taken to the military police headquarters and held for ten days during which he was ill-treated. After ten days, he was able to escape with the assistance of an army major and four soldiers. He thereafter stayed in his cousin's house. A search was put out by the civil police during which his wife and his father were questioned and the latter detained for four days. Whilst in hiding, the appellant made contact with someone who was able to obtain a visa by May 2010. The agent accompanied the appellant to the airport and he left Sri Lanka on a direct flight to the United Kingdom.
3. The respondent accepted the appellant had been a member of the Sri Lankan Army. But it was not accepted he had resigned from the army to pursue a political career. This was in part due to an inconsistency between the evidence provided as to when and under what circumstances this resignation had taken place. Inconsistencies over the date also led the respondent to reject the claim that the appellant had been arrested in February 2010. The appellant had relied on scarring. In this regard the respondent contended that he had not provided any medical evidence in support of how he had obtained those scars and consequent injuries. As to evidence regarding the interest by the civil police following the appellant's claimed escape, the respondent rejected the reliability of a police message relating to his wife. The respondent was concerned that the appellant had been able to leave Sri Lanka using his own passport whilst the authorities were actively pursuing him.
4. On 16 December 2013 First-tier Tribunal Judge C J Lloyd heard evidence from the appellant and his wife and for reasons given in her determination concluded the appellant had not been credible in his claim to be at real risk in Sri Lanka. The

appeal was also dismissed on Article 8 grounds on the basis that the family would leave as a unit.

5. Permission to appeal was granted by First-tier Tribunal Judge J M Lewis in a decision dated 21 January 2014. The challenge to the determination was two-fold. The first was that the judge had failed to set out the burden and standard of proof. It was argued that nowhere in the determination did the judge set out the approach she was taking as to the standard of proof she was applying in respect of the appellant's account. The reference towards the end of the determination to whether there was a 'real risk' did not assist in establishing whether the correct approach to precedent facts had been taken. That standard is necessarily lower than the civil standard and it was not reflected in the language of the determination.
6. The second ground is that there had been an inappropriate application of the country guidance decision in *GJ & Others* (post civil war returnees) Sri Lanka CG [2013] UKUT 00319. It is asserted that the judge had apparently concluded that because the appellant did not fit within any of the categories of risks set out in that case he was not at risk on return to Sri Lanka. This was not apt in the light of the appellant's ethnicity and thus the judge had taken into account irrelevant factors in her assessment.
7. In granting permission to appeal, Judge Lewis observed that to apply an incorrect burden or standard of proof is an error of law; to omit to state them is not. He went on to observe

"there is nothing in the judgment, including the use of language like 'believe', 'accept' and 'find', which suggest to me that the judge did not apply the correct burden and standard of proof".
8. As to the second ground, the judge noted the grant of permission to appeal by the Court of Appeal in *MP (Sri Lanka) & NT (Sri Lanka) v SSHD* referred to the observation made when granting permission that pending final determination of that appeal or further order, individuals falling outside the *GJ* risk of categories should not for that reason alone have their asylum claims rejected.
9. Mr Sowerby was not aware that the appeal in *MP and NT* had been heard earlier in the week but it was not until the conclusion of submissions that he decided to make application for adjournment on that basis. This was opposed by Mr Saunders and I decided that it was not justified. The judge had not dismissed the appeal simply because the appellant did not come within the risk categories identified in *GJ and Others* but had given detailed reasons for rejecting the appellant's credibility. Even before turning to *GJ & Others*, she had found in [20] of her determination that the appellant would be safe. She was alive to the focus of the Tribunal's decision in *GJ* and which she addressed in [22] of her determination.

DID THE TRIBUNAL ERR IN LAW?

10. The Tribunal determining the appeal in the First-tier is a specialist one and it can be assumed that it will apply the correct standard of proof when undertaking fact-finding in asylum appeals. As correctly observed by Judge Lewis, the absence of a specific direction as to the standard does not of itself amount to an error of law. Where in a case such as this there has been no specific direction by the Tribunal, the determination needs to be considered as a whole to ascertain from the language used and the reasons given for the findings indicate that a more demanding standard than was permissible had been applied. In other words, can it be discerned from the language of the determination that the factual findings were reached on other than a reasonable degree of likelihood.
11. Mr Sowerby argued that the determination was flawed because it was not until the judge reached [23] of her determination that there was any reference to a standard which he did not accept reflected the right approach:

“For all the reasons given above I do not accept the credibility of the appellant’s core claim to be at real risk now in Sri Lanka. I do not find a real risk that he would have a well-founded fear of persecution for a UN Convention reason nor that he would face a breach of his absolute rights under Articles 2/3, nor that substantial grounds exist whereby he should be granted humanitarian protection.”
12. He went on to argue that the preceding credibility findings had been reached in a vacuum of a reminder as to the standard of proof and likewise in respect of the Article 8 considerations. There was no challenge to the Article 8 conclusions but he relied on the passages on that ground to illustrate his point. Mr Sowerby also candidly acknowledged that there was no challenge to the reasons given by the judge for rejecting the truthfulness of the appellant’s account and that as a consequence, the challenge was simply as to the basis which those conclusions had been arrived at.
13. From my reading of the determination as a whole, I am satisfied that there is nothing to indicate that the judge strayed from the correct standard. Such error is sometimes evidenced by terms such as “not convinced”, “on balance ...”, “highly inconsistent ...” or “there is no compelling evidence that ...”. It is clear from the language used in [23] quoted above that the judge’s mind was focused on the task before her which was to determine whether there was a real risk. There is no reason to believe that before directing herself, she had embarked on a fact finding exercise applying the wrong standard. The reasons for rejecting aspects of the claim were supported by the evidence and are cogently expressed. They all point to the correct standard of proof having been used. I am not persuaded that this ground is made out.
14. I turn to the second ground. This requires an analysis of the facts as found. The judge accepted as conceded by the Home Office that the appellant had previous army service but not that he was a political activist. The ground does not challenge this finding. The appellant’s political activities formed the core his claim and are the reason given for his claimed fear. In reaching her negative conclusions, the judge noted the issue as to when the appellant left the army. His claim had been that this

was in November 2009 to support the General in his political ambitions. The judge explained that she did not accept this in the light of the production of a document dated 6 May 2010 which expressly stated the appellant was compulsory retired on a specified pension and thus did not support the claim of voluntary resignation. It was open to the judge to observe that the president had approved the granting of the pension to the appellant which contradicts his claim that he was at risk from the government.

15. As to why she did not believe the appellant was a political activist in the DNA, the judge explained that in the asylum interview he had displayed little knowledge of the party's policies. Furthermore she was concerned about the vague and inconsistent evidence regarding the appellant's claim that he was responsible for papers implicating the government in war crimes. As to the claimed arrest and detention for ten days in February 2010, the judge noted it was clear General Fonseka had been detained but the appellant had claimed to have been arrested at a hotel where a DNA conference was taking place but the background evidence showed that the General had been arrested at his offices. Correctly the judge explained that she could not speculate the cause of the marks on the appellant's body. There was no challenge to her observation that he had been a soldier for many years which could have resulted in injuries.
16. The judge noted that on his own account the appellant had remained in Sri Lanka until leaving in July 2010. During these five months although he said he had been in hiding, he had also spoken of working. The judge found it incredible for the appellant to say that he was hiding and yet also to say that he was working.
17. The judge also turned her attention to the documentary evidence relied on. She found it incredible there should be an arrest warrant for the appellant issued two years after he had left Sri Lanka and after General Fonseka himself had been released. She explains that the advocate's letter takes matters a little further and did not know how the appellant had got a copy of his wife's police information book entry which was issued on 28th September 2012. She found it incredible the authorities would assist in this way if the appellant was a wanted man.
18. The judge then proceeded to observe in her conclusions at [20] that General Fonseka had been released in May 2012 and that the party had been registered with the election department concluding "I do not find it credible that Fonseka can now pursue his political ambitions in Sri Lanka but the appellant, underling even if he had supported and worked for Fonseka in the past, would not be safe for political reasons."
19. All that was left of the claim was that the appellant had served in the army. In my view the judge was correct to refer to *GJ & Others* and indeed had she not done so it would be arguably have been an error. She was alive to the differences between the risk categories identified in *GJ & Others* and the appellant's circumstances which she has demonstrated in [22] of her determination:-

"The case identified current categories of person at risk in Sri Lanka. Clearly the appellant was not a journalist and I do not accept he was a human rights activist. Nor

was he involved in Tamil separatism or the lessons learned in reconciliation commission. I do not accept the appellant's name appears on a computerised 'stop' list accessible at the airport, that is a list of people against whom there is a court order or arrest warrant outstanding nor on a 'watch' list, that is a person likely to be monitored by the security services after return (I do not accept there is an arrest warrant; he passed through the airport on the way - although I recognise there could still be a risk on return I do not accept there would be in this case.)"

20. There was no evidence before the judge that only Tamils were capable of appearing on either the stop or watch list. Having given cogent reasons for rejecting the claim that the appellant was wanted by the authorities it was entirely appropriate for her to complete the risk assessment by reference to the most up-to-date country guidance.
21. Accordingly I am not persuaded the appellant is able to make out the second ground of challenge and accordingly his appeal is dismissed.

Signed

Date 2 April 2014

A handwritten signature in blue ink, appearing to read 'Dawson', with a horizontal line extending to the right.

Upper Tribunal Judge Dawson