



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

Appeal Number: AA/11130/2013

THE IMMIGRATION ACTS

Heard at Field House

On 1 July 2014

**Determination
Promulgated**

On 10 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

MR VETHANAYGAM ANTONNOBERT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Solomon (Counsel)

For the Respondent: Mr P Duffy, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant whose date of birth is 18 August 1974 is a citizen of Sri Lanka. This matter comes before me for consideration as to whether or not there was a material error of law in the determination dated 8 February 2014 before First-tier Tribunal Judge Naphine in which he dismissed the appellant's appeal on asylum grounds.

Background

2. The respondent refused the appellant's claim for asylum under paragraph 336 of HC 395 (as amended). The reasons for refusal were set out in a letter dated 3 December 2013. The appellant arrived in the UK on either 22 March 2011 or 22 May 2011 and claimed asylum on 22 May 2011 and was served with a notice as an illegal entrant.
3. The respondent accepted that the appellant was a Sri Lankan national of Tamil ethnicity, that he worked for the LTTE and was arrested by the Sri Lankan Army on 15 February 2009, detained and tortured by the army and escaped from detention on 23 May 2009. The only issue challenged by the respondent was the appellant's claim that the CID continued to visit his home since he left Sri Lanka asking about his whereabouts. The respondent considered that the situation had changed since the appellant left Sri Lanka. The respondent relied on **GJ (& Others) post civil war - returnees** on the grounds that the appellant was not an LTTE member, was not an activist seeking to destabilise the country and it was not reasonably likely that he would be detained on return.
4. The First tier Tribunal took as the starting point the agreed facts and concession made by the respondent. It further took into account an expert report which confirmed that injuries to the appellant's back, upper arms and legs were consistent with his claim of being beaten and assaulted.
5. At [34] of the determination the Tribunal found it lacking in credibility that the Sri Lankan authorities would continue to visit the appellant's home over two years after he had left and gone to India. Reasons were cited in [35 to 37]. At [36] the Tribunal took into account that the appellant's brother, a former LTTE fighter, was detained in 2009, (when the appellant left) but was released after three days and no further action was taken. At [38] the determination took into account matters under Section 8 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 concluding that the appellant's failure to claim asylum in France and his visit to India, undermined the credibility of his claim. **GJ & Others (post civil war - returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)** was considered. The Tribunal concluded that the appellant did not come within the risk factors cited therein and compared his situation to that of NT, the second appellant in **GJ & Others**.

Grounds of Appeal

6. The appellant argued that the Tribunal erred by failing to take into account that the appellant escaped from custody; he was not (as with NT) released on payment of a bribe. That factor rendered it plausible that the Sri Lankan authorities would visit the home of a detainee who had escaped, in order to question family members as to his whereabouts. Further, the Tribunal failed to take into account that after his escape the appellant left Sri Lanka illegally by boat to India, there would be no record of his leaving Sri Lanka and visits by the authorities were conducted to

find out whether the family had heard from him not simply to see if he was there.

7. The Tribunal further erred by confusing the appellant's two brothers and what happened to them post-arrest.
8. The third ground was that the Tribunal Judge failed to put to the appellant his concerns as to the plausibility of visits to the family after the appellant had left Sri Lanka.

Permission to Appeal

9. First-tier Tribunal Judge Reid granted permission on 26 February 2014. Her reasons are as follows,

“The judge in his determination at paragraphs 33 to 37 came to what appear to be speculative conclusions about the credibility of the appellant's claim that the Sri Lankan authorities continued to call at his home after he left Sri Lanka without specifically putting his concerns or having them put to the appellant at the hearing. There was procedural unfairness.”

Error of Law Hearing

Appellant's submissions

10. At the hearing before me Mr Solomon relied on the detailed grounds of appeal. He emphasised that the respondent had in the main accepted the appellant's account and that the only dispute was as regards whether or not the authorities visited the family home after he left, although this was accepted as consistent evidence by the respondent. In assessing the evidence the judge failed to engage with the appellant's claim that he escaped from custody and left illegally by boat. This was material to his claim as to whether or not he would be pursued by the authorities.
11. Mr Solomon argued that the judge appeared to have conflated the factual aspects relating to the appellant's two brothers. His brother Anton Rosen had LTTE links, but it was his brother Westin who was arrested on the day of the appellant's escape, not the brother with LTTE links as incorrectly found by the Tribunal Judge.
12. As regards procedural unfairness Mr Solomon relied on **ST (child asylum seekers) Sri Lanka [2013] UKUT 292 (IAC)** and **Kalidas (agreed facts - best practice) [2012] UKUT 00327 (IAC)**.
13. He further argued that the Tribunal erred in finding no difference between the appellant and NT the second appellant in **GJ**. Mr Solomon emphasised the distinction which was supported by the Court of Appeal decision **MP & NT v SSHD [2014] EWCA Civ 829**. Mr Solomon submitted that the Tribunal failed to consider and apply the UNHCR risk categories which were relevant and must be read together with the guidance in **GJ**.

Respondent's submissions

14. Mr Duffy conceded that the grounds in relation to credibility and going behind concessions of the Secretary of State were accepted. He further accepted the position as regards risk on return with reference to **MP & NT** and in particular the Court of Appeal's treatment of NT whose case was remitted to the Upper Tribunal for rehearing. In essence Mr Duffy conceded that as regards this latter point he was in difficulties and could not argue to support the determination.

Decision

15. Having heard the submissions made by Mr Solomon and the realistic and sensible concessions made by Mr Duffy, I found that there was a material error of law in the First-tier Tribunal Determination. I now give my reasons. I find that there was a material error in that the judge confused the facts as regards the appellant's two younger brothers. He took into account that the appellant's brother (with LTTE links) was released following his arrest, in his assessment of risk and the credibility of whether or not the authorities would continue to visit the family home. I find that his assessment was flawed because the brother that was in fact arrested had no links with the LTTE, which was material. I find further that the determination was flawed procedurally to the extent that the Judge failed to put to the appellant his concerns as to the credibility of the authorities visiting after he left Sri Lanka. In particular having in mind that the Secretary of State accepted that evidence as consistent, I find that the judge was effectively going behind the concessions made. Further I find that the judge in comparing the appellant with NT, the second appellant in **GJ**, failed to have regard to the fact that there was a significant difference between NT and the appellant. The latter escaped from custody and left Sri Lanka illegally which in my view was a material fact relevant to the assessment of the credibility of his account and as to risk on return.
16. There is a material error of law in the determination. I set aside the determination. Having regard to the nature and extent of the judicial fact finding and heard from Mr Solomon and Mr Duffy, I directed a rehearing de novo before the First-tier Tribunal (Hatton Cross) (excluding First-tier Tribunal Judge Naphine) in accordance with the Senior President's Practice direction . I preserve the agreed findings as set out above in paragraph 3.

Directions

17. The appeal is listed for rehearing at **Hatton Cross on 12 January 2015** with a time estimate of two hours, one witness and a Tamil interpreter.

Signed

Date 9.7.2014

Deputy Upper Tribunal Judge G A Black