



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/08271/2016**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard At Bennett House, Stoke-On-Trent  
On 17<sup>th</sup> November 2017**

**Decision & Reasons  
Promulgated  
On 5<sup>th</sup> December 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**V F**

**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms U Miszkiel (Counsel)

For the Respondent: Mr C Bates (Senior HOPO)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge O'Malley, promulgated on 6<sup>th</sup> June 2017, following a hearing at Taylor House on 28<sup>th</sup> March 2017 and 26<sup>th</sup> April 2017. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## **The Appellant**

2. The Appellant is a male, a citizen of Sri Lanka, and was born on 18<sup>th</sup> August 1976. He is of Tamil origin. He appealed against the decision of the Respondent dated 13<sup>th</sup> August 2007, refusing his application for asylum and humanitarian assistance. The appeal was earlier heard by Judge Chana and refused on 20<sup>th</sup> September 2007. Subsequent further representations were made, on the basis of medical evidence, which was not previously available, which it fell upon Judge O'Malley to take into account.

## **The Appellant's Claim**

3. The essence of the Appellant's claim is that he had been transferred to the Karuna Group, from where he had escaped, such that he would now be on the Sri Lankan stop list. He had a very large scar on his left arm as well, which was consistent with injury during combat. Importantly, he had also engaged in illegal departure, which was "a further risk factor" that would render his return back to Sri Lanka untenable (see paragraphs 34 to 37).
4. Before Judge O'Malley, there was also reliance placed upon the UN Special Rapporteur's report, which identified that anyone deemed to have any link with the LTTE, is now at risk of persecution and that those detained in those circumstances are at risk of degrading treatment (see paragraphs 38 to 39).

## **The Judge's Findings**

5. In a detailed and extensive determination (of 108 paragraphs), the judge found large parts of the Appellant's claim to be untenable (see paragraphs 64, 67, 68, 69, and 74). The judge did accept, on the lower standard, that the Appellant had been detained and beaten because there is a Medical Foundation Report, prepared by Dr Jessica Burton, detailing the injuries which were said to be consistent, or highly consistent with his account of beatings (see paragraph 66).
6. The judge proceeded to allow the Appellant's appeal, however, only on Article 8 grounds, observing that, "there is a real risk that the Appellant would be detained on return as he left illegally and as a failed asylum seeker" (paragraph 88). In so stating, the judge drew heavily from the UK Government's own COIS Report, which had referenced an article from The Guardian (see the COIS at paragraph 12.2.5), which states that, "typically, asylum seekers who are returned to Sri Lanka are held in police custody or Negombo Prison". The judge also drew upon the Australian Government's, Department of Foreign Affairs and Trade (DFAT) Report on Sri Lanka, which had also been included in the UK Government's COIS Report (at paragraph 12.2.7), which referred to the prospect of detention and jail, together with fines being imposed, upon those who had left the country illegally.

## **Grounds of Application**

7. The grounds of application state that the judge was wrong to have allowed the appeal under Article 8 only on the basis that the Appellant had left illegally and would be detained on return. The judge's conclusion had an inadequate analysis of the current country guidance case in **GJ [2013] UKUT 319**. There was no general proposition in the law that failed asylum seekers are at risk of breach of their Article 8 rights upon return to Sri Lanka.
8. On 22<sup>nd</sup> September 2017, permission to appeal was granted.
9. On 4<sup>th</sup> November 2017, a well prepared and detailed Rule 24 response was entered by Ms Miszkiel, setting out the position with respect to the Appellant's claim, in relation to the Grounds of Appeal by the Secretary of State. Thereafter, Ms Miszkiel also submitted a helpful skeleton argument dated 27<sup>th</sup> March 2017.

### **Submissions**

10. At the hearing before me Mr Bates, appearing on behalf of the Respondent Secretary of State, stated that the reason why this determination by Judge O'Malley was unsustainable, was that he had created a new risk category, over and above those contained in **GJ [2013] UKUT 319**, without showing a sufficient basis for this.
11. First, at paragraph 85 of the determination, the judge accepted that the Appellant had left Sri Lanka illegally, and then made large citations from an article in The Guardian (which was drawn from the COIS Report at paragraphs 12.2.4 and 12.2.5), but which overlooked the fact that the "policy summary" at section 3 of the COIS Report, did not contain any risk category for people who had simply engaged in illegal exit, and were now facing return to Sri Lanka.
12. Second, there was nothing in the Appellant's expert report that would have led to such a conclusion.
13. Third, the most that could be said, was that there was a Guardian article, which was reported by the Australian Government's Department of Foreign Affairs and Trade Report, but this only said that most Sri Lankan returnees "can be charged" under the Immigrants and Emigrants Act 1949, upon arrival in Sri Lanka (see paragraph 12.2.7 of the COIS Report). This would not have enabled a First-tier Tribunal Judge to have gone beyond a country guidance case, and concluded that there was an original risk category.
14. Other evidence in the same section of the COIS Report also did not lend legitimacy to such a conclusion because at paragraph 12.2.9, there was simply reference to a written statement submitted by the Society for Threatened Peoples, dated 4<sup>th</sup> September 2015, which stated that, "returning Tamils from abroad continue being arrested at the airport".

15. In the same way at paragraph 12.2.10, the Immigration and Refugee Board of Canada had reported in February 2015, that, “sources report that individuals returning from abroad are particularly subject to screening”.
16. None of this was sufficiently compelling as to enable the judge to create a new risk category, which had not been so determined, by the Upper Tribunal in a country guidance case.
17. Finally, all of this had to be considered in the context that the judge had, following an extensive determination, found the Appellant to be lacking in credibility in large parts of his evidence, except recognising that he had engaged in illegal exit from his country.
18. For her part, Ms Miszkziel, appearing on behalf of the Appellant, submitted that the Grounds of Appeal from the Secretary of State did not allege perversity or irrationality. All that was being said was that there was “insufficient evidence”. Yet, this was difficult to understand, in the light of the fact, that the evidence referred to by the judge was expressly drawn from the COIS Report.
19. If it was there, it had a legitimate basis, and was available for a decision-maker to make what he or she could of it. It was not relevant to a decision before the judge.
20. Secondly, the judge had not just confined himself to the report from The Guardian or the DFAT Report. He had gone on to also state that he would “note the conclusions of the Special Rapporteur at paragraph 9”, and this was the report of Ben Emmerson, the Special Rapporteur in Sri Lanka (see paragraph 86 of the determination), where the judge stated that,

“The committee remains seriously concerned at consistent report from national and un sources, ... indicating that torture is common practice carried out in relation to regular criminal investigations in a large majority of cases by the CID of the police regardless of the suspected offence ....”.
21. Third, it was entirely open to Judge O’Malley to distinguish the country guidance case of **GJ [2013] UKUT 319** because since 2014, the Appellant’s representatives had been writing a series of letters raising a “fresh claim” in relation to risk factors that infringed upon the Appellant.
22. Given that humanitarian protection was at stake, the judge was entitled to conclude as he did, and not least because he drew for his conclusions, from the COIS Report.
23. In reply, Mr Bates submitted that the judge’s decision, to expand the risk categories in relation to this Appellant, was unwarranted in the light of the “policy summary” at section 3 of the COIS Report. Illegal exit was not a risk factor.
24. Second, the judge had effectively created a “floodgate risk category”, by not referring to the particular circumstances of the Appellant, but simply

stating that illegal exit in itself would attract a risk of ill-treatment, such as to engage Article 3 of the ECHR.

25. Finally, if the judge were intending to so do, it was necessary to undertake a far more extensive analysis of the evidence, looking also at evidence to the contrary, before concluding as he did.

### **Error of Law**

26. I am satisfied that the making of the decision by the judge did involve the commission of an error of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.
27. First, the judge's focus (see paragraph 83) was on "whether there is a real risk that the Appellant will be detained on return". In this regard, he first referred to The Guardian report (which was drawn from the COIS Report at paragraph 12.2.5), which was to the effect that, "typically, asylum seekers who are returned to Sri Lanka are held in police custody or Negombo Prison" (paragraph 85). There is nothing in this extract that refers to Tamil asylum seekers who have exited Sri Lanka illegally.
28. Second, the judge referred to the conclusions of the Special Rapporteur, Ben Emmerson, at paragraph 9 of his report, when he had said that, "the committee remains seriously concerned at consistent reports ... indicating that torture is a common practice ...". However, there is again, nothing here that suggests that it is illegal exit from Sri Lanka that attracts a consistent pattern of torture. In fact, what the Special Rapporteur is stated as having referred to, is torture being a "common practice carried out in relation to regular criminal investigations" which does not suggest that it relates to detainees who have exited Sri Lanka illegally.
29. Third, and in any event, the judge failed to have regard to the "policy summary" at section 3 of the COIS Report, and to explain how this could be distinguished, on the evidence before the judge (for all its ambiguities as described by myself here). The "policy summary" states at the outset that, "a person being of Tamil ethnicity would not in itself warrant international protection" (see paragraph 3.1.2). It does go on to say that, "a person who is known to the authorities, such as having their name on a 'stop' or 'watch' list or having a court order or an outstanding arrest warrant against them, is likely to be at risk of ill-treatment whilst in custody ..." (see paragraph 3.1.8).
30. However, the judge did not accept any suggestion that the Appellant was on a stop or watch list, or that there was a court order or outstanding arrest warrant against him. So for all these reasons, the decision fell into error.

### **Re-making the Decision**

31. I have re-made the decision on the basis of the findings by the judge, the evidence before him, and the submissions that I have heard today. Ms Miszkiel, in her able and well measured submissions before me, had submitted that, should I make a finding of an error of law, this matter should be remitted back to the First-tier Tribunal, for the latest evidence in the form of the expert report of Dr Jessica Burton from the Medical Foundation, to be taken into account, together with any other necessary evidence.
32. However, having given this due consideration, I am of the view that this would be a separate application before the Secretary of State for a protection claim, but that as far as this particular claim was concerned, Judge O'Malley having found large parts of the Appellant's evidence to be implausible, erred in coming to the conclusion that the Appellant deserved to succeed simply on the basis that he had participated in illegal exit.
33. As a matter of law, there is no basis for such a conclusion, reached in a general sense, that is applicable to all such cases, without any particular distinguishing feature. That being the case, this appeal falls to be dismissed.

#### **Notice of Decision**

34. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is dismissed.
35. An anonymity direction is made.

#### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Juss

1<sup>st</sup> December 2017