



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05362/2016

THE IMMIGRATION ACTS

Heard at Birmingham
On 29 March 2018

Decision and Reasons Promulgated
On 15 May 2018

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MS
(ANONYMITY DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Mensah (Counsel)

For the Respondent: Mrs Aboni (Senior Home Office Presenting Officer)

DECISION AND REASONS

Introduction

1. This is the claimant's appeal to the Upper Tribunal. His appeal had been dismissed by the First-tier Tribunal ("the tribunal"), a decision to that effect having been sent to the parties on 24 November 2016. But after a hearing of 30 June 2017 I decided to set aside the tribunal's decision. I did so for reasons set out in my written decision of 24 August 2017. But in short, I decided that the tribunal had erred in its assessment as to the credibility of

certain claims the claimant had made concerning his political activities in the United Kingdom. It was decided that there would be a complete rehearing of the appeal but that that would take place before the Upper Tribunal (before me). That is what occurred and what follows is my explanation as to how I have remade the decision.

The claimant and his immigration and adjudication history

2. The claimant is a national of Sri Lanka. He was born on [] 1975. He is married to a Sri Lankan national whom I will simply refer to, for reasons of anonymity and without any disrespect, as his wife. The couple have two children.

3. The claimant entered the United Kingdom ("UK") on 15 March 2002 and applied for asylum. In so doing, he said that he would be at risk on return to his home country because of his previous involvement with the Liberation Tigers of Tamil Eelam ("LTTE"). His claim was refused by the Secretary of State who did not believe that he had given a truthful account of events underpinning his claim as then put. However, he appealed and his appeal was considered by an Immigration Adjudicator at a hearing of 20 August 2004. The Adjudicator, in fact, believed the claimant's account of events to the "lower standard" (see below) but nevertheless dismissed the appeal because she thought his LTTE activities were of such a low level as not to be of concern or interest to the Sri Lankan authorities. But it is worth noting, at this point, that she did accept that he had received a gunshot wound in consequence of his being taken by the LTTE to fight for them when he was fifteen years of age, that he had later transported weapons for the LTTE (albeit that he had been pressurised or forced into doing so), that he had been arrested by the authorities and taken to an army camp where he had been beaten and ill-treated until he had admitted to assisting the LTTE and that he had subsequently escaped from detention and had left Sri Lanka with the assistance of a relative (see paragraph 6 of the Adjudicator's written reasons of 23 August 2004). The claimant did attempt a further appeal against the Adjudicator's decision but without success. Having, at that stage, become "appeal rights exhausted" he did not leave the UK.

4. The claimant next came to the attention of the UK authorities through the commission of criminal offences. On 8 June 2011 he was convicted, at Liverpool Crown Court, of two counts of "possess/ control articles for use in fraud" and on 8 July 2011 he was sentenced to a period of twelve-months imprisonment which, of course, he has now long since served. But the commission of those offences led to the Secretary of State considering matters and, ultimately, led to a deportation order in respect of him being signed on 18 March 2014. On 8 September 2014 the claimant, through his legal advisors, submitted representations to the Secretary of State asserting, in effect, that he was entitled to international protection as a refugee and that deporting him from the UK would breach his human rights under the European Convention on Human Rights ("ECHR"). On 13 May 2016 the Secretary of State decided to maintain the deportation order. Her reasons for doing so are set out in detail in a document of that date which is headed "Notice of Decision". It is that decision which was before the tribunal and, hence, since I have set the tribunal's decision aside, is now before me.

5. In the Notice of Decision the Secretary of State acknowledged that the Immigration Adjudicator had made certain factual findings in the claimant's favour but also drew attention to the conclusion that his activities in Sri Lanka had been low level ones. As to the claimant's contentions that since he had been politically active as an oppositionist to the Sri Lankan regime whilst in the UK he would attract adverse interest on that account upon return, the Secretary of State noted he had not demonstrated membership of any oppositionist political party and thought he had not shown that he had a significant political profile in the UK. As to the matter of his having two brothers who have been given asylum in France, it was said that such did not have any direct bearing upon his own case. Whilst the claimant had asserted that the authorities had visited his family in Sri Lanka looking for him and his siblings, it was said that there was no evidence that such visits had taken place or, even if they had, that it was his claimed activities in the UK which had caused them. Applying the approach set out in the country guidance decision of *GJ & Others (Post-Civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC) the Secretary of State concluded that he would not be at risk of persecution or serious ill treatment upon return. So it was decided that he had not shown himself to be a refugee. As to humanitarian protection, the Secretary of State concluded that as a result of his offending he was excluded from a grant of humanitarian protection under paragraph 339D of the Immigration Rules. As to Article 3 of the ECHR the Secretary of State was unpersuaded by an argument that removal/ deportation would lead to a suicide risk. Arguments based on the right to private and family life under Article 8 of the ECHR, both within and outside the Immigration Rules, were also rejected.

6. The appellant's appeal against the decision of 13 May 2016 was considered and dismissed by the tribunal after a hearing of 15 November 2016 and in a decision sent to the parties on 24 November 2016. As indicated, I have set aside that decision.

The law

7. As to international protection, in order to succeed on asylum grounds the claimant is required to demonstrate that he faces a real risk of persecution for one of the five reasons specified in the 1951 Refugee Convention. As to humanitarian protection it is necessary to show a real risk of being subjected to serious harm. As to Article 3 of the ECHR, it is necessary to show a real risk of being treated in such a way as to bring about a breach of that Article which protects against torture and/ or inhuman and degrading treatment or punishment. Article 8 of the ECHR affords a qualified protection for the right to respect for family and/ or private life.

The evidence

8. I had before me various documents which had been before the tribunal together with additional bundles of documents supplied by the claimant's representatives. That included, amongst other things, witness statements and background country material. I also had a helpful skeleton argument submitted by Ms Mensah. I heard oral evidence from the claimant and his wife. I received oral submissions of a helpful nature from each representative.

9. In making my relevant findings of fact and in reaching my conclusions on the appeal I have taken into account the documentation before me, the oral evidence I have received and the submissions made to me.

Credibility

10. In this case I have found it necessary to consider whether or not I am able to accept the appellant being a witness of truth. I have concluded, in light of all of the material before me and all of the arguments put to me, that I am able to accept the account of events he has offered as being truthful to the lower standard of proof (the real risk test) applicable in cases such as this where international protection is sought. I have reached that conclusion for reasons which I set out below.

11. As noted the claimant was accepted as being truthful to the lower standard by the Immigration Adjudicator at the hearing which took place in 2004. It was the position of both representatives before me that, following the well-known case of *Devaseelan v SSHD UKIAT 00702*, the previous findings would represent my starting point. Further, I was not invited by either representative to depart from those findings for any reason. So, I adopt them and I proceed on the basis that the claimant did tell the truth to the Adjudicator. But the question for me here is what that now tells me with respect to my broader assessment of the claimant's credibility.

12. As to that, it does not follow merely because a claimant has told the truth at a hearing in the past that anything else he has subsequently says should also be believed. That is especially so where, as here, a claimant might have something to gain through not telling the truth. But his previous truthfulness is not an irrelevant consideration. It is a matter which weighs in this claimant's favour, albeit only to a limited extent, in my credibility assessment.

13. It is a key part of the claimant's case to me that he has been involved in quite extensive oppositionist activity in the UK. In his most recent witness statement of 21 March 2018, he provided extensive and quite detailed information regarding that claimed activity. Put simply, he says he has attended at a number of events including the "LTTE Hero Day" remembrances and demonstrations organised in response to activities of the Sri Lankan government. The earliest demonstration he refers to took place in April of 2009 and the most recent on 4 February 2018. But it is not accepted by the Secretary of State that he has participated as claimed.

14. The amount of detail the claimant has provided about these events does weigh in his favour to a limited extent though I accept that it is perfectly possible for a dishonest person to lie in detail. So whilst this is something which does weigh in his favour that is only so to a limited extent. But I accept Ms Mensah's contention made in her skeleton argument to the effect that someone who has been ill treated by the Sri Lankan authorities in the past (and as I say the fact of some ill treatment and detention was accepted by the Adjudicator) might be disenchanted with the authorities to the extent that he might be

inclined to take an oppositionist stance and attend and participate in oppositionist demonstrations. So, it is plausible that the claimant would behave, in the UK, in the way that he says he has done.

15. Further, whilst a point was taken against the claimant for his not being a member of a formal oppositionist group, I do not think that the lack of any such membership should, of itself, cause me to disbelieve his claims. A person can be an oppositionist activist without belonging to a formal organisation.

16. Further, I attach weight to the fact that the claimant was not subjected, before me, to any significant challenge as to his credibility with respect to his UK based activities. Indeed, in her closing submissions Mrs Aboni very fairly said that she would accept that he had attended at least some demonstrations in the UK.

17. The claimant has asserted that, since he left Sri Lanka his parents have had occasional visits from the Sri Lankan authorities. In his various witness statements (and he adopted three such statements before me) he has said that persons he described as “unknown men” had gone to the family home in July of 2014 looking for him. He also says that there was such a visit carried out by “the police and the CID” in July of 2016 and that enquiries were made of his mother as to his whereabouts and the whereabouts of his two brothers who have been granted asylum in France and questions were asked as to whether or not they had been involved with the LTTE overseas.

18. I have hesitated as to whether or not I should believe the claimant about that even to the lower standard. His activities whilst in Sri Lanka were found to have been and I accept as a matter of fact were, quite low-level ones. But it was said in *GJ* that the Sri Lankan authorities use sophisticated intelligence in order to seek to detect oppositionist activities both within and outside of Sri Lanka. At paragraph 366 of *GJ* it was noted that “the former Tamil areas and the diaspora are heavily penetrated by the security forces” and that photographs are taken at public demonstrations. It is not implausible that, against that background, the Sri Lankan authorities may know the claimant as a person who has previously come to their adverse attention (albeit many years ago) and also as a person who has actively demonstrated in the UK such that putting both together, he remains of concern or interest to them. That would provide a plausible explanation for the visits. To the lower standard then, although I might well not have accepted this to a balance of probabilities, I have concluded that I am able to believe the claimant regarding the claimed visits in 2014 and 2016. I also note that his contentions in that regard were not probed extensively in cross-examination before me and that I was not specifically invited to disbelieve that part of his account when closing submissions were made. I also take account of the fact that an entirely unscrupulous claimant might have sought to claim that there had been further more recent visits.

19. I do not think that with respect to credibility issues the claimant derives significant support from the accepted fact of his brothers being granted asylum elsewhere in Europe. The mere fact of those grants does not say anything specific as to the truth or otherwise of the specific contentions made by the claimant. Nevertheless, putting everything together

and applying the lower standard, I have concluded that I am able to accept the claimant as being a credible witness.

Findings of fact

20. Having reached my view as to credibility I have made the following findings:

- a. The claimant is a national of Sri Lanka who previously, albeit in response to pressure being applied to him, joined the LTTE ranks as a fifteen-year-old child, transported weapons for the LTTE and was apprehended by the authorities and detained by them prior to escaping.
- b. I find that since coming to the UK the claimant has, for a number of years, attended demonstrations and other oppositionist events.
- c. I find that although the claimant has never been an organiser of such events (he has not claimed to be) and although it cannot realistically be said even on his own account that he occupied the role of a leader or something similar at such events, there is a real risk that his persistent presence at such demonstrations will have been detected by the persons who monitor such activity in the UK for the Sri Lankan authorities. I also find his family home in Sri Lanka was visited by the authorities and that questions were asked about him as claimed.

My conclusions

21. The general approach to be taken in cases involving claimants from Sri Lanka who seek international protection has been set out by the Upper Tribunal in *GJ* to which I have already referred above. That was accepted by both parties before me as being the relevant applicable Country Guidance decision. No attempt was made to persuade me to depart from *GJ* in any way.

22. In *GJ* the Upper Tribunal set out the existing risk categories. Prior to doing that it decided that the Sri Lankan authorities present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. The focus was upon preventing the resurgence of the LTTE or any similar Tamil separatist organisation and preventing the revival of the civil war within Sri Lanka which has ended. Its focus was not on persecuting previous LTTE activists or taking revenge for historical matters.

23. The only risk category to which the claimant in this case could possibly belong is the one which was identified in *GJ* in these terms:

“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 relationship to post-conflict Tamil separatism within the diaspora and/ or a renewal of hostilities within Sri Lanka”.

24. The simple question with respect to the asylum aspect of the appeal, therefore, is whether or not it can be said that the claimant is able to bring himself, on my findings, within that category.

25. Mrs Aboni says that he cannot do that because his activities, even if everything he says is to be accepted, are of a low level. That is so, she says, with respect to both the previous activities in Sri Lanka and the more recent activities in the UK. Ms Mensah argues to the contrary relying upon an accumulation of factors being the activities, the history of family oppositionist activity reflected in the grant of asylum to the brothers and the evidence of continuing adverse interest through the visits to the family home.

26. If all there was to the claimant's case was the fact of his previous activities for the LTTE in Sri Lanka then I would have concluded, without any real difficulty, that he did not come close to bringing himself within the relevant risk category. That is because it is abundantly clear, following *GJ* that the focus of the Sri Lankan authorities is not simply upon what has happened in the past but upon what the current position is with respect to any threat to the unitary state. But I have accepted that the claimant has been persistently active whilst in the UK and that there is a real risk that that activity will have come to the attention of the authorities in Sri Lanka. Indeed, my acceptance to the lower standard of the fact of the two visits to his family home and what was said at the most recent visit supports the proposition that the Sri Lankan authorities are aware of the claimant's ongoing activity.

27. There is some force in Mrs Aboni's point that the UK based activities might not be characterised as anything other than relatively low-level ones. The claimant has not asserted to have been the organiser of any of the events and demonstrations he has attended. He does not claim any membership of a formal oppositionist organisation although he did say in oral evidence before me that he was in the process of securing membership of one such organisation. There is nothing to suggest that he has acted as the leader of any of the demonstrations. So, it might be argued that even if the Sri Lankan authorities were to perceive the claimant as having a role in relation to post-conflict Tamil separatism within the diaspora they would not regard that role as being significant. But the activity has been persistent. The evidence I have accepted offers support for the proposition that the Sri Lankan authorities continue to have some degree of interest in the claimant such that, notwithstanding his departure from Sri Lanka many years ago, it is considered worth spending time going to his home and asking his family questions about him and his activities. There is a history of past activity which is relevant when coupled with the current UK based activity with respect to a consideration as to how he will be perceived by the authorities. I have concluded to the lower standard that he is, perhaps narrowly, able to bring himself within that potentially applicable risk category.

28. I conclude, therefore, that the claimant has made out his claim to be a refugee. My having reached that view it is not appropriate for me to consider humanitarian protection at all. As to Article 3 of the ECHR I would conclude that he would be at risk of Article 3 ill-treatment upon return on the same basis and for the same reasons that I have decided to allow his asylum appeals. Having decided he is entitled to international protection it is not necessary for me to go on to consider the claims he has made on health grounds or under Article 8 of the ECHR.

29. Finally, I simply confirm that I have decided to continue the grant of anonymity originally given to the claimant by the tribunal.

Decision

The decision of the First-tier Tribunal involved an error of law and has, accordingly, already been set aside.

In remaking the decision the Upper Tribunal allows the claimant's appeal against the Secretary of State's decision of 13 May 2016 that he is not entitled to international protection. He is so entitled as a refugee.

Signed

**MR Hemingway
Judge of the Upper Tribunal**

Dated 9 May 2018

Anonymity

The claimant is granted anonymity pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to both parties to the proceedings. Failure to comply may lead to contempt of court proceedings.

Signed

**MR Hemingway
Judge of the Upper Tribunal**

Dated 9 May 2018

To the Respondent

Fee award

Since no fee is payable there can be no fee award.

Signed

**MR Hemingway
Judge of the Upper Tribunal**

Dated 9 May 2018