



**Upper Tribunal
(Immigration and Asylum Chamber)**
HU/15626/2016

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 5 February 2018**

**Decision & Reasons
Promulgated
On 18 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MANMATHARAJAH [K]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. P. Lewis, counsel instructed on public access basis

For the Respondent: Mr Lindsay, Home Office Presenting Officer

DECISION & REASONS

1. The Appellant is a national of Sri Lanka, born on born on 29.11.80. He entered the United Kingdom on 28 December 2005 and made a series of in-time applications for leave to remain valid to 28 December 2013. On 24 December 2013, he made an in-time

application for an EEA residence card as an extended family member. However, the Home Office recorded this application as having been made on 30 December 2013. This application was refused on 15 March 2014 and an appeal was lodged out of time on 31 March 2014 which was dismissed and the Claimant became appeal rights exhausted on 11 August 2015. On 27 August 2015, the Claimant applied for leave outside the Rules and/or on the basis of leave to remain on the basis of 10 years residence.

2. This application was refused but on appeal, First tier Tribunal Judge Paul allowed his appeal in a decision dated 8 January 2018. The Secretary of State sought permission to appeal in time, on the basis that the Judge had erred materially in law in allowing the appeal, in including the time spent from the application for an EEA residence card, on 24 December 2013 to 11 August 2015 as lawful residence, when EEA applications do not extend section 3C leave. In a decision and reasons promulgated on 15 April 2018, I found a material error of law in the decision of the First tier Tribunal and adjourned the appeal for a resumed hearing before the Upper Tribunal. A copy of the decision and reasons is appended.

3. The appeal came before the Upper Tribunal for hearing on 15 August 2018, when the parties made a joint application for an adjournment, in order to ascertain whether, at the time an application was made on the basis that the Appellant was an extended family member of an EEA national, he also made a human rights application. In light of the preserved findings by Judge Paul, the effect of this would have been that the Appellant had made an in time application. Thus I acceded to the request for an adjournment as this may prove determinative of the appeal.

4. The appeal then came before the Upper Tribunal for hearing on 28 November 2018, when Mr Lewis applied for an adjournment on the basis that the Appellant was unwell, albeit he had attended the Upper Tribunal. Mr McGirr was also content for the appeal to be adjourned as he did not have the Home Office file, due to the fact that it was with the Home Office owing to the fact that a subject access request for a copy of the file had been made. Mr McGirr undertook to retrieve the file and to make a decision in light of the contents of the application made by the Appellant in December 2013.

5. The appeal next came before the Upper Tribunal for a case management hearing on 19 December 2018, when Mr Mills, for the Home Office, stated that the application made on 24.12.13 was purely concerned with the Appellant's claim to be an extended family member of an EEA national, albeit article 8 had also been raised in the grounds of appeal. Although there is likely to be a missing covering letter, Mr Mills was unable to accept that even raising a human rights application in the grounds of appeal establishes 10 years long residence, thus the issues were confined

to article 8 and paragraph 276ADE of the Immigration Rules. Mr Lewis was content to proceed on this basis albeit he submitted that a new matter had been raised before the First tier Tribunal, which was the Appellant's activities in the UK with the TGTE. On the basis of Mr Lewis' undertaking that the Appellant was not raising an asylum claim, Mr Mills consented to this aspect of his private life being considered by the Upper Tribunal at the substantive hearing.

Hearing

6. The appeal came before the Upper Tribunal for hearing on 5 February 2019. Mr Lewis sought to adduce a letter from Sockalingam Yogalingam of the TGTE, which he stated was being submitted on the basis that it went to the issue of proportionality and not risk on return. In respect of the section 3C argument, in the absence of any evidence that a human rights application was made in December 2013, the GCID notes had not been served and there had been response to the subject access request. Mr Lindsay submitted that, as leave had been granted as Tier 1 post study worker to 28.12.13 only, whenever the EEA residence card application had been made, it could not extend the Appellant's section 3C leave.

7. I heard evidence from the Appellant, who adopted his statements. When asked by Mr Lewis why he had been so involved with the TGTE, he responded that they are fighting for a separate land for the Tamils and he was helping them with the cause. When asked why he wanted to obtain a separate state for the Tamils, he responded that the Tamils had been fighting for their rights since 1948, when Sri Lanka gained independence. He said that he did not like way of trying to obtain independence through civil war but that they are trying to find a separate land for the Tamils. When asked if he was to return to Sri Lanka whether he would want to continue his political activities in support of this aim, he said that he would not be able to continue his work because the Sri Lankan authorities would not allow this. He confirmed that he would want to continue otherwise. When asked why he would not be allowed to, he responded that the Sinhalese people are still in power and Tamil people are still encountering problems there. When asked if he supported the LTTE he denied this. When asked how he hoped to achieve his aims in respect of a Tamil state, he said that they would have to rely on international support.

8. I asked the Appellant whether, in accordance with his statement, he was a supporter of the LTTE when studying at Jaffa University, which he agreed he was and that this was during the peace process and that the LTTE had been part of that which is why he supported them. Mr Lewis then asked the Appellant to confirm when he had left Sri Lanka, to which he responded that it was in

December 2005 and there was still peace, although it was at breaking point. When asked if he were allowed to remain in the UK what he would want to do, the Appellant said that he would like to start a business and to proceed with his work with the TGTE fighting for the separatist land.

9. In cross examination by Mr Lindsay, the Appellant was asked if he went back to Sri Lanka the Sri Lankan authorities would have no reason to suspect he had been involved with the TGTE, to which he said they would have reason because they would have evidence he had been working with the TGTE so he would be suspected. When asked what evidence he thought they might have or be able to obtain, the Appellant said when they go for demonstrations the government obtain photographs of people attending. It was pointed out to the Appellant that he had not mentioned this before, in his witness statement. When asked why he thought that the Sri Lankan authorities have photographed him at demonstrations he said that they want to curb all the demonstrations that are happening internationally. When asked if he had seen someone from the Sri Lankan authorities taking photos at a demonstration, the Appellant replied that when there was a demonstration in front of the Sri Lankan Embassy he saw people taking photographs. It was pointed out to the Appellant that he had not previously stated this either.

10. At this juncture, Mr Lindsay stated that the Appellant appeared to be putting forward an asylum claim, albeit expressed through different legal provisions. I told Mr Lindsay that at the last hearing Mr Mills consented to the Appellant raising his TGTE activities in the UK as a new matter within the confines of Article 8, on the basis, which Mr Lewis confirmed, that consideration was confined to whether this amounted to very significant obstacles to integration in Sri Lanka or rendered his removal there disproportionate.

11. Mr Lindsay continued with cross-examination, asking the Appellant why he had not raised any of this evidence before, to which he responded that he did not have any necessity to give that information previously. The Appellant was asked if he was telling the truth he would have mentioned it before and that now he was lying, to which the Appellant responded that he is not lying and that what he had said was true.

12. The Appellant was re-examined by Mr Lewis in order to clarify when he said he had been photographed at demonstrations whether he meant him specifically or the demonstration. Mr Lindsay objected to this question so I asked Mr Lewis to re-phrase. He asked the Appellant to explain when he said he had been photographed what he meant, to which he replied that they take photographs of everyone and when people have returned back to Sri Lanka, they have encountered problems.

13. In his submissions, Mr Lindsay sought to rely on the decision letter of 3.6.16. He submitted that the scope of the appeal is confined to proportionality of proposed return to Sri Lanka and that it had not been argued that there is any family life. Mr Lindsay submitted that the Appellant's immigration status has always been precarious *cf.* Rhuppiah [2018] UKSC 58 from his entry in 2005 to 28.12.13, since which time the Appellant has been an overstayer because his application for an EEA residence card was unsuccessful. Mr Lindsay submitted that sections 117B(4)(a) and (5) of the NIAA 2002 bite and since 2013 little weight should be given to the Appellant's private life since he has been in the UK unlawfully and little weight given to his private life prior to that because it was at all times precarious. Mr Lindsay acknowledged that no doubt private life has been established and is of great importance to the Appellant, however, it does not carry enough weight for the appeal to succeed on this basis.

14. In respect of the question of whether there would be very significant obstacles to the Appellant's integration in Sri Lanka, Mr Lindsay sought to rely on the judgment in Kamara [2016] EWCA Civ 813 as set out in the Appellant's skeleton argument at [15] and the test set out therein. He submitted that the Appellant has been resident in Sri Lanka for the majority of his life and for a great number of years. He would be enough of an insider to operate on a day to day basis. The issue which requires more thought is whether the Appellant's claimed involvement with the TGTE would give rise to very significant obstacles on return. He submitted that the Appellant's credibility is damaged by his failure to claim asylum, despite the fact that he has had ample and reasonable opportunity to do so; that the Appellant's claim is, in substance, an asylum claim and it should be processed through the normal channels. On this basis he submitted that the Appellant's behaviour falls foul of section 8 of the Treatment of Claimants Act 2004.

15. Mr Lindsay further submitted that the Appellant has not produced any photographic evidence of his own claimed involvement in demonstrations and the letter from TGTE dated 27.11.17 at AB 19 did not set out the Appellant's role. The Appellant has failed to show this evidence is reliable. He submitted that the new letter had been produced extremely late and that significantly reduces the weight that could be attached to it. Mr Lindsay submitted that, even taken at its highest, the Appellant would not be suspected of having any significant role in the Tamil diaspora or seeking to establish a separate Tamil state. He submitted that there was no reason to find on the evidence that the Appellant would face any significant difficulties on return; that this was not an asylum appeal and it has not been shown that there is any right for the Appellant to continue to involve himself with the TGTE on his return, as he had not shown any genuine desire to or would continue his

activities on return, or he would be able to stop such activity and would be able to establish a private life.

16. Mr Lindsay sought to rely on the Home Office guidance in respect of private life at page 59, in particular that the Appellant's private life should be measured against standards on return, not the UK. He submitted that the Appellant would be able to establish a private life in all its material elements, albeit friendships would be differently constituted and that the Appellant has failed to show very significant obstacles to establishing a private life according to standards in Sri Lanka. He submitted that regard should be had to the fact the Appellant has been an overstayer for more than 5 years and that there was a significant public interest mitigating in favour of his removal.

17. In his submissions, Mr Lewis sought to rely upon his updated skeleton argument. He asked that I accept the Appellant's account of his activism with the TGTE, which is totally legitimate in the UK, but not in Sri Lanka and is a respectable organization, involved in the democratic process in the UK campaigning in respect of Tamil rights in Sri Lanka. As the Appellant and the witness have confirmed the aim is to establish a separate Tamil state. Mr Lewis submitted that there were ongoing political problems within Sri Lanka, particularly between Sinhalese and ethnic Tamil groups.

18. Mr Lewis drew attention to the detailed statement from the Appellant, which addresses his motivation for becoming involved, which is entirely consistent with the Appellant's activities in Sri Lanka albeit he did not come to the UK to create an asylum claim. He has simply continued activities he commenced in Sri Lanka at which time the LTTE was involved in the peace process. Over a significant period of time the Appellant has been identified by leaders within that organization and the first witness about whom concerns have been raised has been elected as an MP. The TGTE consider themselves to be a government in waiting and have MPs, including Mr Sockalingham. The Appellant has a long standing role within the organization and also has an organizing role and has organized others within his area. Thus he is not simply an individual who has attended a few demonstrations but clearly has a political interest and commitment, which is an important part of his persona and life.

19. Mr Lewis submitted that the Sri Lankan authorities very clearly prevent people undertaking political activities and that this is exactly an instance where the Home Office have identified very significant obstacles to integration. Page 58 of the guidance at the final paragraph makes reference to the relevant national laws. The question is whether the Appellant would be at risk of prosecution or harassment. Mr Lewis drew attention to UB (Sri Lanka) [2017] EWCA Civ 85 where at [10] the Court noted that the Home Office guidance had not been drawn to the attention of the Tribunals. The Appellant

is an individual who has at all times been pursuing leave and has undertaken significant qualifications including an MBA and has clearly established himself with a private life and close family members. He has commenced business of his own and all of this can be considered as part of proportionality. He has not claimed that his family has been targeted. The fact that he has not claimed asylum is entirely consistent with his profile and goes to his credibility in that he is not attempting to exaggerate or embellish his claim. Mr Lewis submitted that the Appellant fulfilled the requirements of the Rules and his removal would be contrary to Article 8 of ECHR, thus the appeal should be allowed.

Decision and reasons

20. The Appellant has resided continuously in the UK since 28 December 2005, thus for over 13 years. He was lawfully resident as a student from the date of entry until 28 December 2013. Whilst he claimed to have made an in-time application to vary his leave on 24 December 2013, the Respondent asserted that it was not made until 30 December 2013 and was thus out of time. In his decision and reasons promulgated on 8 January 2018, First tier Tribunal Judge Paul found in light of the evidence, including a receipt, bar code and evidence of recorded delivery and registered delivery, that the Appellant had sent the application on 24 December 2013 and had thus been made in time in light of paragraph 34G of the Rules [10] refers.

21. Whilst I set that decision aside on the basis that the application for an EEA residence card did not satisfy the requirements of section 3C of the Immigration Act 1971 so as to extend the Appellant's leave within the meaning of the Rules, Judge Paul's finding that the application was made in time was expressly preserved as a finding of fact. Whilst Mr Lindsay took a different view, he was not previously involved in the proceedings and thus did not properly apprehend this point. I find that, given the preserved finding that the application was made in time and the Appellant's current application under appeal was made within 28 days of the date his appeal was dismissed on 11 August 2015, he can properly be considered as a person who has remained in the UK lawfully, albeit his leave was at all time precarious and he does not qualify under paragraph 276A of the Rules because the time spent pursuant to his application as an extended family member does not count as lawful residence.

22. The current appeal is now based firmly on the argument that there are very significant obstacles to his integration pursuant to paragraph 276ADE(vi) of the Rules and Article 8 outside the Rules. Mr Lewis sought, in particular, to rely upon the Appellant's voluntary

activities with the TGTE in the UK as constituting a very significant obstacle to his integration in Sri Lanka.

23. In Kamara [2016] EWCA Civ 813, Lord Justice Sales held as follows at [14]:

“The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.”

24. The Home Office guidance in respect of Private life, published for Home Office staff on 23 January 2019, provides at pages 59-60 of 104:

“Relevant country information should be referred to when assessing whether there are very significant obstacles to integration. The decision maker should consider the specific claim made and the relevant national laws, attitudes and country situation in the relevant country or regions. A very significant obstacle may arise where the applicant would be at a real risk of prosecution or significant harassment or discrimination as a result of their sexual or political orientation or faith or gender, or where their rights and freedoms would otherwise be so severely restricted as to affect their fundamental rights, and therefore their ability to establish a private life in that country.

“The decision maker must consider the degree of difficulty that would be faced as a result of the applicant's faith, political or sexual orientation or gender identity based on the situation in practice in the country of return and not necessarily solely what is provided for in law.”

25. In UB (Sri Lanka) [2017] EWCA Civ 85 the Court of Appeal allowed the appeal on the basis that the Respondent had failed to bring his policy guidance on Tamil separatism to the attention of the Tribunal who were thus unaware of the fact that the TGTE were a proscribed terrorist group in Sri Lanka and that letters from the British High Commission dated 1.6.14 and 25.7.14 appended to the guidance confirmed that it was “normal practice” for returnees to be questioned about their activities, including involvement with proscribed organisations and that they may be detained.

26. It is clear from the CG decision in GJ [2013] UKUT 00329 (IAC) at [168] that the Respondent accepted that individuals in custody in

Sri Lanka continued to be at risk of physical abuse, which was persecutory.

27. The only real argument put forward on the Appellant's behalf that would amount to a very significant obstacle is his involvement with and support for the TGTE in the UK, since at least 2017. Mr Lindsay submitted that, even taken at its highest, the Appellant would not be suspected of having any significant role in the Tamil diaspora or seeking to establish a separate Tamil state, however, although that may be correct, that is not the test I am required to apply. Mr Lindsay also sought to rely upon the Appellant's failure to make an asylum claim, in light of sections 8(1) and (4) of the Asylum and Immigration (Treatment of Claimants) Act 2004. However, given that the Appellant has made a human rights claim he is not obliged to also make an asylum claim as both section 8(1) and 8(4) make provision for the making of either an asylum claim or a human rights claim. Given that this was the only credibility issue, I proceed on the basis that the Appellant's account is credible.

28. I accept that, as a Tamil who has resided abroad in the UK since 2005 and who has some profile as a volunteer with the TGTE, that it is reasonably likely to the lower standard of proof in light of the letters from the British High Commission appended to the Home Office policy guidance in respect of Tamil separatism, that he would face questioning on return to Sri Lanka as to his activities in the diaspora. RT (Zimbabwe) (2012) UKSC 38 established that he cannot be expected to lie in order to avoid persecutory action.

29. Thus, whilst I accept the force of Mr Lindsay's submission that, given the Appellant's previous long residence in Sri Lanka he would be enough of an insider to establish a private life there, I find that the Home Office guidance in respect of private life at [25] above is applicable and there is a real risk that the Appellant would face persecution on account of his political opinion, which amounts to a very significant obstacle to his integration. Even if that did not prove to be the case in practice, I find that, in light of the current circumstances in Sri Lanka, the Appellant would neither be unable to assert his belief in a separate Tamil state nor to undertake any political activities in this respect, which would amount to a very significant obstacle, in light of the Home Office guidance. The Appellant was clear in his evidence that he would want to continue his political activities if returned to Sri Lanka but that the authorities would not permit this.

30. Consequently, I find that the Appellant meets the requirements of paragraph 276ADE(vi) of the Rules and I allow the appeal on the basis that removal of the Appellant would be disproportionate and contrary to Article 8, in light of the judgment of Lord Justice Longmore in TZ (Pakistan) [2018] EWCA Civ 1109 at [34]:

"... where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement,

then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed."

31. For the avoidance of doubt, I find that whilst the Appellant speaks English and is financially independent in that he is not in receipt of benefits and continues to live with and receive support from his sister in the UK, the public interest does not require his removal in light of the fact that he is able to meet the requirements of the Rules.

Decision

32. The appeal is allowed on human rights grounds (article 8).

Rebecca Chapman
Deputy Upper Tribunal Judge Chapman

13 March 2019