



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/01385/2019

**THE IMMIGRATION ACTS**

Heard at: Field House  
On: 16<sup>th</sup> July 2019

Decision & Reasons Promulgated  
On: 23<sup>rd</sup> July 2019

**Before**

**UPPER TRIBUNAL JUDGE BRUCE  
UPPER TRIBUNAL JUDGE OWENS**

**Between**

**CG  
(anonymity direction made)**

Appellant

**And**

**Secretary of State for the Home Department**

Respondent

**For the Appellants: Mr Bandegani, Counsel instructed by M & K Solicitors**  
**For the Respondent: Mr Melvin, Senior Home Office Presenting Officer**

**DECISION AND REASONS**

1. The Appellant is a national of Sri Lanka born in 1973. He appeals with permission the decision of the First-tier Tribunal (Judge Bowler) to dismiss his appeal on protection and human rights grounds. Permission to appeal to this tribunal was granted on the 10<sup>th</sup> June 2019 by First-tier Tribunal Judge Osbourne.

2. The protection claim advanced before the First-tier Tribunal was that the Appellant has a well-founded fear of persecution in Sri Lanka for reasons of his political opinion. He has been in the United Kingdom since 2010 but believes that if returned to Sri Lanka today he would face a real risk of serious harm because the authorities there believe him to have been involved in supplying and assisting the Liberation Tigers of Tamil Eelam (LTTE) during the period of armed conflict in Sri Lanka. The crux of the Appellant's case is that he helped a family friend from Vavuniya by *inter alia* permitting him to store vehicles at his premises in Colombo. One of these vehicles was subsequently used to carry a truck bomb. The Appellant asserts that officers investigating this bombing came to his home in February 2009 and arrested him. He was detained for approximately five months during which time he was subjected to serious and sustained torture. Whilst undergoing hospital treatment for his injuries he managed to escape following payment of a bribe, and after a period of recuperation in hiding managed to travel to the United Kingdom.
3. The Respondent had rejected the Appellant's account for a want of credibility and refused to grant protection.
4. When the matter came before the First-tier Tribunal there were two matters in issue. First, was the 'historical account' given by the Appellant true. Second, did it give rise to a well-founded fear of persecution in Sri Lanka today. The burden in respect of both matters lay with the Appellant, and the lower standard of proof applied in respect of each: the question was whether it 'reasonably likely'.
5. The First-tier Tribunal did not accept that the account was true. It gave the following reasons for that conclusion:
  - i) There were inconsistencies arising from the evidence given in the screening and asylum interviews;
  - ii) It was not plausible that the Appellant, a person of Sinhalese ethnicity, would have supplied goods to the Tamil areas in the manner described;
  - iii) It was not plausible that the Sri Lankan security services would have transferred the Appellant to hospital after they had tortured him;
  - iv) Little weight could be given to the medico-legal report submitted (prepared by a Dr Briggs) because the author was not qualified to evaluate scars;
  - v) The doctor had further failed to consider the possibility that the scars borne by the Appellant were self-inflicted /self-inflicted by

proxy, in accordance with the decision of the Upper Tribunal in KV (Scarring – medical evidence) [2014] UKUT 230 (IAC);

- vi) The weight to be attached to the claimed subjective fear was diminished by the failure to claim asylum at the earliest opportunity: Section 8 of the Asylum Immigration (Treatment of Claimants etc) Act 2004 applied;
  - vii) It was not plausible that family homes in Sri Lanka had been recently visited by the security services, since the person responsible for the bombing had been arrested in 2009.
6. Applying the extant country guidance in GJ & Ors [2013] Sri Lanka CG UKUT 319 (IAC) the Tribunal rejected Mr Halim's contention that the Appellant would be on a 'stop list' or that he would be regarded as a threat to the unitary integrity of the Sri Lankan state. The determination concludes with a finding in the alternative: even if the account given were true the Appellant would not be at risk today because he is not, and never has been, a Tamil activist.

### **The Grounds of Challenge**

7. The Appellant submits that the decision of the First-tier Tribunal is flawed in the following material respects:

- i) Legal Misdirection. *In particular:*

The Tribunal erred in its application of the guidance in KV (scarring – medical evidence) on the possibility of scarring having been self-inflicted or 'self-inflicted by proxy'. The Tribunal failed to apprehend that that Tribunal's guidance on this point had been overturned by both the Court of Appeal and the Supreme Court in KV v Secretary of State for the Home Department [2019] UKSC 10.

- ii) Failure to consider material facts/evidence (I). *In particular:*

The Tribunal drew adverse inference from a number of discrepancies arising from the records of both screening and asylum interviews. At paragraphs 23-24 of its decision, the First-tier Tribunal notes that the Appellant had not requested that any changes be made to those records and on that basis the Tribunal found that the weight to be attached to those records should not be reduced. The Appellant submits that in so finding the Tribunal failed to have regard to correspondence in the file in which the Appellant's representatives had a) requested that the

interview be recorded b) repeatedly requested a copy of any such tape and c) raised concerns about errors in the typed record concerns that arose from the fact that the Appellant has mental health issues, that the record was never read back to him and that at one at least one occasion he did not even have an interpreter.

iii) Failure to consider material facts/ evidence (II). *In particular:*

The Tribunal finds the account to be implausible, and current risk not made out, because the Appellant is not an ethnic Tamil. It is submitted that in so finding the First-tier Tribunal failed to have regard to objective country background material to the effect that there is a political/social group in Sri Lanka pejoratively described as the 'Sinhalese Tigers' or the 'Sinhala Kotiya', and that there have been documented instances of Sri Lanka nationals of Sinhalese ethnicity being detained and ill-treated upon suspicion of assisting the cause of Tamil separatism.

### **The Respondent's Defence**

8. By his Rule 24 response dated the 12<sup>th</sup> July 2019 the Secretary of State submits that the decision of the First-tier Tribunal contains no material error of law and that it should be upheld. The first point made is that the Tribunal in the alternative rejected the claim at its highest, and so any deficiencies in its assessment of the historical claim are immaterial. In respect of the interview records, the Secretary of State submits that the Appellant has to date still not requested that any changes should be made to those records. The Tribunal acknowledges in the determination that they did request the tapes of the interview. Overall the Secretary of State submits that this was a carefully worded determination in which the First-tier Tribunal reached a conclusion open to it on the evidence.

### **Discussion and Findings**

#### *Ground (i): Scarring*

9. We are satisfied that there is a clear error of law at paragraph 50 of the determination where the Tribunal reduces the weight to be attached to the medico-legal report of Dr Briggs because he has not given consideration to whether the injuries he observed on the Appellant's body might have been self-inflicted, or self-inflicted by proxy. It is first an error of fact because Dr Briggs *does* in fact so direct himself, but moreover it is a legal misdirection: the UKUT

case upon which the First-tier Tribunal relies, KV, had in fact by that time, been overturned by the Supreme Court, the decision being handed down the week before the First-tier Tribunal decision.

10. We are further satisfied that there was a second error in approach to the medical report. At paragraph 49 the First-tier Tribunal finds that the HOPO on the day was correct to have challenged Dr Briggs' qualifications to evaluate the Appellant's scars. Two problems here arise. The first is that in his detailed supplementary refusal letter of the 12<sup>th</sup> March 2019 the Respondent nowhere takes issue with Dr Briggs' qualifications or expertise. Had issue been taken in advance of the hearing, Dr Briggs would have had an opportunity to address any concerns raised. The second difficulty is that the CV attached to the report manifestly demonstrates that Dr Briggs is "qualified". He is a doctor of some 40 years standing, with experience in Accident and Emergency medicine and General Practice. He is a surgeon and was a member of teaching staff at the Royal Free Hospital for 30 years. He has also received specialist training from Medical Justice and has prepared reports for that organisation and the Helen Bamber Foundation. It is hard to see what other qualification the Tribunal thought he should have.
11. We find that this ground is therefore made out.

*Ground (ii): the Interviews*

12. When the Appellant was called for interview in June 2018 his representatives wrote to the UKVI at Harmondsworth, where the interview was due to be conducted, and requested that in their absence the interview be taped. Four days after the interview, on the 26<sup>th</sup> June 2018, they wrote again, requesting a copy of the tape as a matter of urgency. In that email they said this:
 

"We have gone through the interview with our client and there are numerous errors but unfortunately we could not go through all of the interview. It should be noted that as our client suffers from mental health problems it has been difficult to obtain this correction from him due to the fact that every time the client discusses what he has been through, he becomes emotional and it is extremely difficult because he is in a detention centre".
13. It would appear that the Respondent wrote back on the 27<sup>th</sup> June stating that no recording was available. On that same date the Appellant's representatives wrote again pointing out that had they been informed that recording facilities were not available, they would have attended the interview. They reiterated their concerns about the record, and the lack of interpreter. A further letter of complaint was sent on the 20<sup>th</sup> February 2019 in which the firm again raised the

issue of the recording of the interviews, and the failure to provide an interpreter at the screening interview.

14. It was against this background that the Tribunal was tasked with evaluating the evidence recorded in both screening and asylum interviews. This it does by stating, between paragraphs 22 and 24, that the Appellant has not sought to amend any of the records and so the weight to be attached to them cannot be regarded as diminished. With respect, that rather misses the point. The point was that the representatives had stated that they were having difficulty working from the typed record and taking instructions from a client with mental health difficulties. They wanted the recording so that they could better understand what had been said, and take instructions on it.
15. Mr Bandagani concentrated his submissions on the commentary of the Court of Appeal in Diirshe [2005] 1 WLR 2685 to the effect that fairness requires that interviews conducted in the absence of representatives be taped. We would endorse those comments. Where, as here, an interview record forms the centrepiece of a decision-maker's assessment on whether a claimant qualifies for international protection, it is obviously important that such interviews are conducted fairly, and that they contain an accurate representation of the claim. Whether that is so in this case we cannot know, since there does not appear to have been any such recording. Whilst the Judge was obliged to take those records into account, he was also in our view obliged to have regard to the concerns that had been repeatedly raised about the contents of the transcripts. At the very least they should have been approached with some caution, and with the history of the correspondence in mind.
16. We find that ground (ii) is also made out.

*Ground (iii): Ethnicity*

17. In the written grounds Mr R. Halim of Counsel asserts that the First-tier Tribunal failed to have regard to country background material when it found it to be unlikely that someone of Sinhalese ethnicity might get involved in assisting the Tigers in the manner claimed. He cites a Human Rights Watch report, an article from the Colombo Telegraph and the report of the Special Rapporteur, Ben Emmerson QC, to the effect that there is a grouping referred to as 'Sinhalese Tigers'. We were unable to find either the article or the HRW report in the papers before us. The Ben Emmerson report was handed in with Mr Halim's skeleton at the First-tier Tribunal hearing, but having read it we can find no reference to Sinhalese individuals facing harm as a result of association with the Tamil cause. It is therefore unfortunate, to say the least, that the grounds are drafted in the way that they are.

18. That said, we are satisfied that the Tribunal erred in apparently rejecting the account given on the grounds that the Appellant himself is not a Tamil. As his claim makes clear, the alleged difficulties he faced arose from association with the Tamil cause arising from a personal friendship and business arrangement. We can find nothing inherently improbable in that. We would also note that the Secretary of State saw nothing implausible in this aspect of the claim: it does not feature in either of the refusal letters, nor in the submissions made on the day. If it was a matter that concerned the judge, it should have been put to the Appellant.

## Conclusions

19. We accordingly find that the First-tier Tribunal did err in its assessment of the 'historical claim'. Whilst adverse findings were made that were arguably open to it on the evidence (see §5 above) the Tribunal's overall findings were infected by the errors in approach to the medical evidence, the inter-parties correspondence about the interviews and the issue of the Appellant's ethnicity. We are satisfied that these errors are such that none of the credibility findings can stand.
20. As to the question of current risk, Mr Melvin understandably pointed to the findings from paragraph 70 of the decision, the 'in the alternative' risk assessment. We are satisfied that this too must be set aside. This part of the determination is infected with the error at ground (iii), but also a failure to consider this claim with anxious scrutiny. In the case of a man who claims to have been detained and tortured for five months for his alleged role in a huge bomb attack, and who escaped from detention after the conclusion of military hostilities in 2009, it is not sufficient to conclude without reasons that he would not today be at risk. Applying the criteria in GJ it is at least arguable that there may be a warrant outstanding against him, or that his name is on a 'stop list', and those matters should have been given careful consideration.

## Anonymity

21. This appeal concerns a claim made under the Refugee Convention. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders we therefore consider it appropriate to make an order in the following terms:

"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 to, amongst others, both the Appellant and the Respondent.

Failure to comply with this direction could lead to contempt of court proceedings”

### **Decisions**

- 22. The decision of the First-tier Tribunal is set aside for error of law.
- 23. The hearing is to be re-made *de novo* in the First-tier Tribunal.
- 24. There is an order for anonymity.

Upper Tribunal Judge Bruce  
16<sup>th</sup> July 2019