



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07001/2017**

THE IMMIGRATION ACTS

**Heard at: Field House
On 3rd December 2021**

**Decision & Reasons
Promulgated
On 20th December 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KA

(Anonymity Direction made)

Respondent

Representation:

For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer

For the Respondent: Mr A Slatter, instructed by David Benson Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing KA's appeal against the respondent's decision to refuse his protection and human rights claim further to a decision to deport him pursuant to section 32(5) of the UK Borders Act 2007.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and KA as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

Immigration History

3. The appellant is a citizen of Sri Lanka of Tamil ethnicity, born on 6 December 1978. He claims to have entered the United Kingdom on 3 December 1999. He claimed asylum on 7 December 1999, but his claim was refused and his appeal against the refusal decision was dismissed on 21 March 2003. He became appeal rights exhausted on 10 June 2003. On 2 September 2010 he was granted indefinite leave to remain in the UK.

4. Between 24 February 2009 and 30 January 2017, the appellant was convicted of a number of criminal offences. The most recent was assault causing actual bodily harm, breaching a restraining order on conviction, threatening to kill and three counts of assault by beating, all in relation to his wife. He was sentenced on 3 February 2017 to a total of 39 months' imprisonment.

5. As a result of that conviction and sentence, the appellant was served with a notice of a decision to deport him on 8 March 2017, to which he responded citing Articles 2, 3 and 8 of the ECHR. On 14 June 2017 he was informed of the intention to deny him protection under the Refugee Convention under section 72 of the Nationality, Immigration and Asylum Act 2002. He was invited to rebut the presumption that he had been convicted of a particularly serious crime and constituted a danger to the community, but he did not respond. The respondent then issued a deportation order against the appellant on 6 July 2017 and made a decision on 7 July 2017 to refuse his protection and human rights claim.

6. The appellant appealed against that decision and that is the appeal giving rise to these proceedings.

Basis of Claim and History of the Claim

7. The basis of the appellant's asylum claim, as originally made in 1999, was that he feared for his life from the Sri Lankan Army and the LTTE. He claimed to be a Sri Lankan Tamil and claimed that whilst living in Jaffna he was detained by the army between 4 February 1998 and 10 June 1998 when he was repeatedly assaulted and ill-treated. He claimed that he moved to Vavuniya after being released and spending two weeks in hospital and that he worked in a relative's shop in Vavuniya until he was detained by the police on suspicion of being a member of the LTTE. On his release in September 1999, he went to Colombo and stayed there overnight before leaving Sri Lanka and travelling to Morocco and then to the UK. He claimed to be at risk from the LTTE as he would be forced to fight for them against the Sri Lankan Army and he feared the Sri Lankan authorities because of his previous arrests and detention.

8. The respondent, in refusing the claim in January 2001, noted discrepancies and inconsistencies in the appellant's evidence and did not accept his account as credible. The respondent considered that the appellant would not be at any risk on return to Sri Lanka.

9. Judge Jones, in dismissing the appellant's appeal against that decision on 21 March 2003, found the appellant's account to be unconvincing and unsatisfactory and found that it contained discrepancies and implausibilities and was false. The judge found that the accounts given by the appellant in his statement and his interview in relation to his arrest and detention were inconsistent and considered that the explanation offered by the appellant for the inconsistencies was not satisfactory. The judge found the appellant's delay in leaving Sri Lanka after his release from detention undermined his credibility and rejected his claim to have been involved with the LTTE and to have been detained and ill-treated in Sri Lanka. The judge found that the scarring on the appellant's body would not arouse suspicion and that he would not be at any risk on return.

10. In the written representations of 29 March 2017 responding to the notice of decision to deport, the appellant's representatives maintained the claim that he was at risk on return to Sri Lanka on the basis of his past arrest and detention, but also claimed that he would be at risk on the basis of his sur place activities in the UK which included his regular attendance at the Hero's Day celebrations in November each year. It was also asserted that the appellant's deportation would breach his Article 8 rights in relation to his private and family life in the UK, in particular his family life with his three British children, as it would unduly harsh for them to be separated from him.

11. The respondent, in her decision of 7 July 2017 refusing the appellant's protection and human rights claim, considered the appellant's criminal offending, which involved going around to his wife's house in breach of a restraining order and attacking her and threatening to kill her in front of their children, as well as a previous incident whereby he put an electric cable around her throat and almost strangled her. In light of the appellant's offending history, the respondent certified that the presumption under section 72 of the Nationality, Immigration Act 2002 applied, that he had been convicted of a particularly serious crime and constituted a danger to the community and considered that Article 33(2) of the Refugee Convention excluded him from the protection of the Refugee Convention. In regard to the appellant's claim to be at risk on return to Sri Lanka, the respondent, noting the change in the country situation since the previous appeal hearing and having considered the country guidance in GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319, concluded that he did not fall into any of the risk categories and that his diaspora activities were not such as to put him at risk on return to Sri Lanka. As for the appellant's Article 8 claim, the respondent did not accept that he had a genuine and subsisting relationship with his wife and children and noted that they were the victims of his criminal behaviour. It was noted that they were well-known to the Barking and Dagenham Children's Services and the police because of the appellant's violent behaviour towards them and that a Child

Protection Plan had been put in place to protect them from his violent behaviour. It was not accepted that it would be unduly harsh on the appellant's wife and children if he was deported, and it was not accepted that the appellant was socially and culturally integrated into the UK or that there were very significant obstacles to his integration in Sri Lanka. The respondent concluded that the family and private life exceptions to deportation were not met and that there were no very compelling circumstances outweighing the appellant's deportation.

12. The appellant's appeal against that decision was heard by First-tier Tribunal Judge Singer on 18 May 2021. Following the hearing, the decision in KK and RS (Sur place activities: risk) Sri Lanka CG [2021] UKUT 130, updating the Sri Lanka country guidance, was promulgated by the Upper Tribunal. Judge Singer granted the parties leave to file and serve additional written submissions on the impact of that decision on the appellant's case. Both parties produced written submissions.

13. Judge Singer then promulgated his decision on 22 June 2021. In his decision he recorded the oral evidence from the appellant, his wife's friend and his wife. He also referred to documentary evidence which included an OASys report concluding that the appellant posed a high risk of harm to his wife and children, a report from Mr Schaapveld, a consultant clinical and forensic psychologist, and a report from the Corporate Parenting Team for the London Borough of Dagenham referring to the children being taken into care on 6 April 2018 and having supervised face to face contact with their mother once a month and no authorised face to face contact with the appellant. The judge did not find credible the appellant's claim that he did not pose a risk to his wife, and he upheld the section 72 certification, finding that the appellant had failed to rebut the presumption that he constituted a danger to the community.

14. As for the appellant's protection claim, the judge considered the adverse credibility findings made by the previous First-tier Tribunal against the medical evidence suggesting that he was suffering from PTSD at the time. The judge concluded that the discrepancies in the appellant's account of his detention and ill-treatment in Sri Lanka were attributable to his mental health and that there had previously been a failure to give proper consideration to his scarring, such that it was right to depart from the adverse credibility findings previously made and to conclude that his account of detention and ill-treatment was a credible one. The judge found that the appellant would therefore feature on the stop-list at the airport and that it was reasonably likely that there was an unexecuted arrest warrant in his name due to the irregularity of his release from detention. The judge also concluded that the appellant would feature on a stop list as a result of his diaspora activity which was reasonably likely to be known to the Sri Lankan authorities. The judge considered it reasonably likely that the appellant, as a result of his repeated attendance at Heroes Day and other diaspora events, would be perceived by the Sri Lankan authorities as somebody who had committed to the establishment of Tamil Eelam and who held separatist views, and that he would therefore be at risk on return to Sri Lanka.

15. With regard to Article 8, the judge considered that the appellant's removal would not adversely affect the children's best interests, noting that the children had been taken into care by the local authority. The judge accepted that the appellant and his wife were now back in a genuine and subsisting relationship and were desperate to have their children back. He found that it would be unduly harsh for the appellant's wife and children to move to Sri Lanka with the appellant but did not accept that it would be unduly harsh for them to remain in the UK without him. The judge found that the exception to deportation in section 117C(5) of the 2002 Act did not apply to the appellant. However, in light of his findings on the risk on return, he concluded that there were very compelling circumstances outweighing the public interest in the appellant's deportation and that accordingly his deportation would be a disproportionate breach of Article 8. The appeal was allowed on Article 3 and 8 grounds.

16. The Secretary of State sought permission to appeal to the Upper Tribunal on the following grounds: that the judge had erred by seemingly undertaking a retrospective error of law consideration in relation to the adverse credibility findings and decision of the previous Tribunal; that the judge's assessment of the risk to the appellant on the basis of sur place activities was flawed, that it was contaminated by the errors made in relation to the appellant's past risk and profile, and that it failed to give anxious scrutiny to the guidance in KK and RS (Sur place activities: risk) Sri Lanka CG [2021] UKUT 130; and that the judge's findings on section 117C(6) were contaminated by the errors in the Article 3 assessment.

17. Permission was granted and the appeal then came before me. Both parties made submissions before me.

18. Ms Cunha submitted that the judge had erred by going behind the adverse credibility findings made by Judge Jones on the basis of Mr Schaapveld's medical report. The expert had expressed an opinion of the appellant's PTSD being re-ignited as a result of what he had told him of his previous experiences in Sri Lanka which related to an incident where he had been shot at, at the age of 14, during fighting between the LTTE and the Sri Lankan army. There was no basis for concluding that the expert found the appellant's PTSD to be related to being detained in Sri Lanka. There was nothing in the expert report to explain why the appellant may have a poor memory of events occurring in Sri Lanka. The judge was accordingly wrong to consider that the adverse credibility findings made by Judge Jones could be explained by the expert report. Judge Singer did not have evidence enabling him to go behind the adverse credibility findings previously made and neither did he have any evidence to suggest that the appellant's name would appear on a stop list as a result of any separatist sympathies and sur place activities.

19. Mr Slatter submitted that there was no material error of law in the judge's decision. It was open to the judge to find that the appellant had been detained and would be on a stop list and in any event, even if he erred in that respect, that did not contaminate his findings on the appellant's sur place activities

which were independent of his findings on previous risk. Mr Slatter submitted that Judge Singer's positive findings were also made on the basis of the appellant's scars and injuries and on matters which Judge Jones had previously wrongly found to be implausible and therefore any concerns arising from his findings on the appellant's mental health at [63] did not lead to material errors in his findings on risk on return at [67]. The grounds were wrong when they asserted that the judge had made no findings on the guidance in KK and RS, when it was clear that he gave the parties an opportunity to make submissions on the case and that he gave anxious scrutiny to the matter.

20. Ms Cunha responded, reiterating the respondent's view that the judge's error in departing from the adverse credibility findings made by the previous Tribunal contaminated his findings on the appellant's sur place activities and was therefore material.

Discussion

21. I have no hesitation in finding the Secretary of State's grounds of appeal to be made out in so far as they challenge the basis for the judge's decision to go behind the findings previously made by Judge Jones. I agree with the assertion in the grounds that Judge Singer undertook what was a retrospective error of law consideration in relation to Judge Jones's decision and I agree that his reason for so doing was based upon little more than tenuous reasoning and speculation. The justification given by Judge Singer for going behind Judge Jones's adverse credibility findings was that the appellant was suffering from mental health issues at the time he provided his account and that that provided an adequate explanation for the discrepancies and inconsistencies in his account. That conclusion was based upon the psychological report from Mr Schaapveld, a Consultant Psychologist.

22. It is relevant to note, however, that the psychologist report was commissioned with the purpose of addressing the appellant's risk of re-offending and not in relation to assessing the credibility of his account of past persecution. Further, there is nothing in the report that confirms a formal diagnosis of mental health problems such as PTSD at the time the appellant was interviewed and when he provided his evidence in his claim, and indeed, as Ms Cunha submitted, there was no firm diagnosis made of PTSD at all. That is apparent from [38] and [43] of Mr Schaapveld's report. At its highest, the report concluded that the appellant may have been suffering from depression and symptoms associated with PTSD in the past. According to [43], that was during the period of his incarceration and following notification that his children were being taken into care, which was plainly some years after his hearing before Judge Jones. In so far as [43] and [46] refer to the triggering of the appellant's traumatic recollection, the report provides little detail and, as Ms Cunha submitted, is based upon the appellant's own suggestion to Mr Schaapveld of past incarceration by the Sri Lankan security forces, as referred to very briefly at [46]. Neither is there anything in the report which indicates that any mental health problems could have impacted upon the appellant's evidence and his ability to give a consistent account of dates and timings of

events. There is nothing in the report or the judge's findings to suggest that the nature of the inconsistencies in the evidence were such that they could be explained by the appellant's mental health status at that time.

23. Looking at Judge Jones's decision, it is clear that there were material inconsistencies between the accounts provided by the appellant as to the dates and periods of detention he claimed to have undergone in Sri Lanka and that further inconsistencies arose from a letter from his GP referring to ill-treatment at a different period of time. Those inconsistencies were set out in the decision at [9]. Judge Jones made it clear that his adverse findings were reached after having made "all allowances for the appellant". There was no evidence before Judge Jones to suggest that the appellant was suffering from any mental health problems at the time, despite the fact that some medical evidence had been produced from his GP. Judge Jones's adverse findings were made with the benefit of a full consideration of the evidence. The decision reached was not successfully challenged and accordingly there is no proper or adequate reason given by Judge Singer to justify departing from those findings. I do not accept Mr Slatter's submission that the judge's other findings, at [64] to [66], in relation to the nature of the questions at the appellant's interview, the appellant's scars and the plausibility of his escape, are sufficient in themselves to justify such a departure when it is clear that these were all matters considered together with the appellant's mental health arising from Mr Schaapveld's report. Accordingly, and for all of these reasons, it seems to me that Judge Singer's acceptance of the appellant's account of being detained and ill-treated is materially flawed and cannot stand.

24. It was Mr Slatter's submission that that does not, however, affect the judge's findings on the appellant's sur place activities in the UK, which were completely independent of his findings on past risk. However, I have to agree with the respondent's grounds and with Ms Cunha's submissions that they are inextricably linked. That is made plain, it seems to me, by the judge's drawing together of the evidence at [70], whereby he referred to the appellant's genuine commitment to the Tamil separatist ideology and thus the perceptions held about him by the Sri Lankan authorities, as a result of the combined effect of his diaspora activities and his past involvement with the LTTE. Likewise, the judge's findings at [71] to [73] on the risk posed to the appellant at the point of return if questioned about his activities in the context of the guidance in HJ (Iran) v Secretary of State for the Home Department (Rev 1) [2010] UKSC 31, were based upon an acceptance of his account of past detentions leading to him being on a stop list and having an unexecuted arrest warrant in his name. It is accordingly clear that the judge's findings on the risks to the appellant as a result of his sur place activities were based upon an acceptance of previous and genuine commitment to the political cause and a profile on such a basis. It is not possible to treat the judge's findings on risk on return as a result of diaspora activities as being separate and independent from his findings on past involvement and thus the judge's error in respect to the latter inevitably infected his findings on the former.

25. Accordingly, the judge's conclusions on risk on return, based upon his flawed credibility assessment, are unsustainable and cannot stand. The Secretary of State's grounds are made out. Judge Singer materially erred in law in his decision and his decision has to be set aside in its entirety. Given the nature and extent of the errors, the appropriate course would be for the matter to be remitted to the First-tier Tribunal to be heard afresh, with no findings preserved.

DECISION

26. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside.

27. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b) (i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard before any judge aside from Judge Singer.

Anonymity

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed: S Kebede
Upper Tribunal Judge Kebede
December 2021

Dated: 9