



Neutral Citation Number: [2019] EWCA Civ 59

Case No: C5/2016/3429/AITRF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM
CHAMBER)

UTJ MCGEACHY

AA/06459/2015 and AA/07188/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/02/2019

Before:

LORD JUSTICE UNDERHILL
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE IRWIN
and
LORD JUSTICE HICKINBOTTOM

Between:

(1) KK (SRI LANKA)

(2) KK (SRI LANKA)

- and -

THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Appellants

Respondent

Stephanie Harrison QC and Antonia Benfield (instructed by **Birnberg Peirce**) for the
Appellants

Jean-Paul Waite (instructed by **The Government Legal Department**) for the **Respondents**

Hearing dates: 22 January 2019

Approved Judgment

Lord Justice Irwin:

1. The Appellants appeal against the determination of Upper Tribunal Judge McGeachy of 29 June 2016, in which he rejected the Appellants' appeal against the decision of First-tier Tribunal Judge Bennett of 16 February 2016.
2. These Appellants are brothers from Sri Lanka. Before the F-tT they made broad claims of involvement with the LTTE before they left Sri Lanka and in relation to their activities after arrival in the United Kingdom. The F-tT made wide findings that each lacked credibility. The Appellants took a number of points on appeal before the UT, which were rejected.
3. The Appellants now have leave to advance two grounds as follows:
 - i) That the UTJ erred in failing to consider Ground 4 of the Appellants' grounds of appeal in relation to the First Appellant having given evidence to the UN OISL [Office of the High Commissioner for Human Rights Investigations on Sri Lanka] inquiry through the ICPPG [the International Centre for Prevention and Prosecution of Genocide] and whether that placed him at risk of persecution;
 - ii) That the UTJ erred in considering the significance of the Appellants' diaspora activities and failed properly to apply the country guidance in *GJ and Others (post-civil war; returnees) Sri Lanka CG* [2013] UKUT 00329 (1AC) and *MP Sri Lanka) & Anr v Secretary of State for the Home Department* [2014] EWCA Civ 829.
4. In the course of submissions, Ms Harrison QC conceded that the second ground was, in effect, parasitic on the first. If the first ground was successful the second would be unnecessary. If the first ground failed, the second would not stand independently. She further acknowledged that since the first ground directly concerns the First Appellant only, the Second Appellant's case could only consist of his association with his brother. I will return to this below.

Background and Facts

5. The First Appellant was born in January 1990 and the Second Appellant in September 1993. The First Appellant arrived in the UK on 7 July 2010 with entry clearance as a student. His clearance was valid until July 2012. He first claimed asylum on 8 November 2013 and was substantively interviewed in February 2015. His application for asylum was refused in a letter of 13 March 2015.
6. The Second Appellant arrived in the UK on 15 June 2011, with entry clearance as a student valid until October 2012. His leave was extended so that it expired on 30 January 2012. He first claimed political asylum on 15 April 2014 and was interviewed substantively on 29 June 2014. The Respondent refused his application in a letter giving reasons of 8 September 2014.
7. The claim as advanced before the F-tT was broad-based. The First Appellant claimed that he had had close involvement with the LTTE and in particular with two named fighters, giving information to them and supplying food, medication and other assistance. His claim was that he and his father were arrested and detained on two

occasions, the release being achieved in each case by large bribes. The Second Appellant's case in relation to events in Sri Lanka was that he was never a member of the LTTE but on occasion gave some assistance, for example giving information and posting parcels containing medication.

8. It is not necessary to review the details of the claims as then presented. The claims in relation to such events were rejected by the F-tT and no ground of appeal before this court relates to those matters. The F-tT considered the scarring on the First Appellant's body and the medical evidence bearing on that. Judge Bennett accepted that he may have been arrested, detained and tortured at some time during the civil war, but such things may not have been at the hands of the Sri Lankan authorities, and for detailed reasons expressed in the judgment were not occasioned in the manner claimed. It may be that the only relevance at this stage is that the F-tT made wide-ranging findings against the Appellants as to their credibility.
9. Those conclusions as to credibility were supported by the Upper Tribunal.
10. As will be clear from the Grounds of Appeal set out above, Ms Harrison QC for the Appellants submits that the F-tT and then UT failed to give adequate consideration to the risk said to derive from the First Appellant "having given evidence to the UNOISL inquiry through the ICPPG".
11. The First Appellant gave evidence before the F-tT. As background to Ground 1, his evidence was that following the arrest of his father in Sri Lanka in June 2015, he and his brother both joined the British Tamils Forum ["BTF"]. When asked, he said he had done so because he wanted to support his countrymen. He attended Tamil events in Britain after July 2015, going to Hero's Day in November at Wembley Arena and participating in a march. He also participated in a march organised by the Trans-national Government of Tamil Eelam ["TGTE"]. His brother the Second Appellant had accompanied him on these occasions.
12. The First Appellant said he also had been helping the TGTE by organising meetings, rallies and political campaigns. He went to weekly meetings at the TGTE's offices in Wembley. Part of this activity had involved distribution of leaflets substantiating allegations against the government of Sri Lanka for atrocities with a view to a case before the International Criminal Court.
13. In my judgment the F-tT made careful and full findings about these *sur place* activities, concluding that they were not significant enough, and neither Appellant could be thought to have played a senior enough role, to place them at risk on return to Sri Lanka. Hence, I regard the concession by Ms Harrison on Ground 2 to be appropriate and realistic.
14. The evidence before the F-tT bearing on Ground 1 was slight. In his witness statement of 51 paragraphs, dated 24 September 2015, there appeared only the following passage:

"I submitted evidence to the UN appointed investigating team, which looked into the allegations of mass killings and human rights violations during the last phase of the war in Sri Lanka. I submitted my evidence through the TGTE. I assist the TGTE in collecting evidence from the Sri Lankan war victims in the UK,

who are affected by the Sri Lankan government and its armed forces.”

15. In the course of his oral evidence it appears the Appellant did not expand on that passage, or refer to it.
16. The Appellant’s case did include a letter dated 22 September 2015 to “Immigration UK, Home Office” from the Country Coordinator of the ICPPG. That organisation is located at the same address as the TGTE and is clearly closely associated with the TGTE. The relevant passages of the letter read as follows:

“As an International Non-Governmental Organisation and an Independent Legal Body, one of our primary objectives is to collect evidence against perpetrators of genocide and work towards justice, peace and reconciliation.

[KK1] has actively participated in Human Rights Issues and Genocide meetings/events that exposed Government of Sri Lanka as a genocidal government. He has provided written evidence, under oath, to be submitted to the UN and other commissions and prosecutions.

We are also working with international prosecutors with a view to bringing criminal and civil prosecutions following the release of the report UNHRC’s OISL commission report. [KK1] has also consented that his evidence should be used in such prosecutions. These prosecutions will be against Sri Lankan government and military officials.

He is one of the potential witnesses to the genocide committed by successive Governments of Sri Lanka including the current regime. He is one of the witnesses who are more likely to be asked to provide evidence in person in establishing the justice and truth.

Tamils continue to face systematic genocide, since 1948, by the successive Government of Sri Lanka with impunity. In the event of [KK1] being deported back to Sri Lanka, he is more likely to be tortured to death as a Tamil who has worked against the terrorist Government.”

17. The skeleton argument submitted to the F-tT had attached the Country Information and Guidance document of September 2015, issued by the Home Office, in relation to “*Sri Lanka: journalists, media professionals and human rights activists*”. The “Policy Summary” in the document was drafted in the light of the Country Guidance case *GJ*, and in the light of the change of government in January 2015. It reads as follows:

“In relation to the previous Government the country guidance case of *GJ & Others* found that journalists, media professionals and human rights activists who have, or are perceived to have, criticised the Sri Lankan government, in particular its human

rights record, or who are associated with publications critical of the Sri Lankan government, may be at real risk of persecution or harm on return to Sri Lanka.

However, since the new Sri Lankan government came to office in January 2015 they have taken steps to review, case – by – case, those detained under the Prevention of Terrorism Act, lifted restrictions on media reporting, ended Internet censorship and appointed non-military personnel as governors to the North and East provinces.

Journalists, media professionals and human rights activists are reportedly able to express themselves more freely and communicate publicly. However, some individuals may still be at real risk.

The onus will be on the person to demonstrate that they are at real risk from the current, rather than the previous, government

The onus is on the person to demonstrate that effective state protection against non-state actors is not available.

Internal relocation is not an option for a person at real risk from the Sri Lankan authorities.

Where a claim based on the person’s activities as a journalist, media professional or human rights activist is refused, it is unlikely to be certifiable as ‘clearly unfounded’ under section 94 of the Nationality, Immigration and Asylum Act 2002.”

18. The material mentioned above was all that was introduced in evidence. Although I have not made extensive reference to the evidence and conclusions not relevant to the extant Ground of Appeal, it is clear that the case was wide-ranging, as was the evidence. This issue was not a prominent or central part of the Applicant’s appeal as then presented. The written submissions made to the F-tT were brief on this point.
19. Before considering that judgment, it is worth considering what was not placed in evidence before the F-tT. The Appellant did not add to the very short passage from his statement quoted above. He gave no account of what he had said to the ICPPG. No copy of a statement or statements from him to them was produced. The witness statement has the phrase “submitted evidence”, and the letter from ICPPG simply describes him as having “provided written evidence, under oath, to be submitted to the UN and other commissions and prosecutions”, and as one of those “more likely to be asked to provide evidence in person”. Hence, there is no actual confirmation before the F-tT that personal evidence from the Appellant had gone to the UN, never mind to “other commissions and prosecutions”.
20. The material before the F-tT speaks of the UN OISL report as being in the future: see the letter of 22 September 2015. The OISL report was not before the F-tT, but it has been produced to us, and we have looked at it *de bene esse*. The “Advance Version” which has been copied to us is dated 16 September 2015. The hearing before the F-tT

took place on 15 January 2016, and the Decision and Reasons were promulgated on 16 February 2016. The Advance Copy is marked “Distribution restricted”. However, the May 2016 version of the Home Office “*Country Information and Guidance: Sri Lanka: Tamil Separatism*” report demonstrates (page 11, footnote 1) that the UN OISL report was available on open internet access by 2 November 2015. Had that report been before the F-tT two months later, the Tribunal would have been able to observe that the report does not name the ICPPG as a source, never mind this Appellant. I address other material below.

The F-tT Judgment

21. A critical part of the background to the F-tT’s judgment was the case of *GJ*. Part of the consideration in the Country Guidance Case was as to the Lessons Learned and Reconciliation Commission [“LLRC”] established in May 2010 by the government of Sri Lanka. The establishment of the LLRC is dealt with in paragraphs 330 to 334 of the *GJ* judgment. For reasons set out in the judgment, the UT identified those who gave evidence to the LLRC as being a group at real risk of persecution or serious harm. They did so in the following terms:

“356(7)(c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.”
22. It is also relevant to note that the country guidance reinforces the point recognised, as we shall see, by the F-tT in this case, that the Sri Lankan authorities have penetrated opposition groups in the diaspora and that there exists a number of informers addressing Tamil activists and their activities abroad.
23. Against that backdrop, Ms Benfield submitted to the F-tT:

“... that the First Appellant would be at risk because he had given evidence to the ICPPG which, she argued, should be equated to giving evidence to the Lessons Learned and Reconciliation Commission.” (F-tT judgment, paragraph 43)
24. The judgment records no fuller submissions than that on behalf of the Appellant. On behalf of the Home Office, the presenting officer Mr Choudhury made wide-ranging submissions as to the Appellant’s *sur place* activities but no direct submission on this point.
25. It is important to note that the LLRC enquiry took place between May 2010 and late 2011, organised by the Sri Lankan Government and conducted in Sri Lanka. It was clearly conducted under the eye of the government authorities.

26. That was the background to the F-tT's conclusions on this issue, set down as follows:

“79. That leaves the First Appellant’s activities with the ICPPG. He says that he has given evidence to the ICPPG, which has been confirmed by the ICPPG (AB1-65). The ICPPG says that its primary objective is to collect evidence against perpetrators of genocide and that it is working with international prosecutors with a view to bringing criminal and civil prosecutions against the Sri Lankan Government and military officials. My attention was not drawn to any evidence that any such prosecutions or proceedings are pending or are expected to be announced imminently. At this juncture, it is premature to equate those who have provided evidence to the ICPPG to those who gave evidence to the Lessons Learned and Reconciliation Commission. If any such prosecution or proceedings are launched, it is far from clear that the First Appellant’s testimony will be used or otherwise made available in the course of such prosecution or proceedings. The ICPPG says that the First Appellant has provided written evidence but the First Appellant did not produce a copy of this evidence. This means that I am unable to form any view about his written evidence, including about whether he has said anything about himself or about anyone else that would make him of adverse interest to the Sri Lankan Government *if* his evidence has reached them through one [of] its informers. On the evidence before me, I can only see his concerns about this as being speculative. I do not therefore accept that it is reasonably likely that he is of adverse interest to the Sri Lankan Government because of anything he has done thus far for the ICPPG.”

27. The appeal before us is directed at the decision of the UT not to permit an appeal from the F-tT. There were wide-ranging grounds advanced to the UT. Ground 4, as then formulated, concerned the relevant issue. Part of Ground 4 reads as follows:

“22. Secondly, the FTTJ considers that as the appellant had not provided a written copy of his evidence, he was unable to come to a view as to whether this would place him at adverse interest. This was not a concern expressed by the FTTJ at the hearing either to the appellant or Counsel. Had this point been raised, Counsel would have submitted that evidence is given to the UN inquiry on the basis that it is confidential. No individual or the ICPPG has permission to disclose witness evidence that forms part of the UN inquiry.

23. It is submitted that the FTTJ materially erred in his assessment of whether the first appellant, as someone who had provided witness evidence in the UN inquiry into war crimes was at risk on return and this was a material point which should have been considered.”

It therefore will be seen that the submission at that stage on behalf of the Appellant was that evidence submitted to the UN in the course of this inquiry was confidential. The point was made to explain why the Appellant had not produced the evidence, but of course it would also affect the level of risk to the Appellant.

28. As I have noted, the Appellant seeks admission of further evidence in the appeal, notably the UN OISL report itself and a report from “Together Against Genocide” [“TAG”]. While I feel able to make some brief reference below to some of the content of the UN OISL report for other purposes, I would refuse this application, which is opposed by the Respondent. As Mr Waite put it for the Secretary of State, the admission of further material would mean that the Appellant’s case was being put on a basis which was not advanced, or not advanced with any clarity, before the F-tT. Although quoted in the Grounds of Appeal to this Court, the UN OISL report was neither included in the bundle before the F-tT or the grounds to the UT, nor in the Appellant’s skeleton argument before the Ft-T or the UT.
29. The renewed application for permission to appeal in this case was supported by a skeleton argument on behalf of the Appellants which quoted reasonably extensively from the UN OISL report. The skeleton submitted that the F-tT had failed to take account of the UN OISL report. It was said that the F-tT “was furnished with evidence in relation to the UN OISL inquiry and that detailed oral submissions were made on the point” (paragraph 14). The report had not in fact been before the F-tT or the UT but the skeleton reads as if the UN OISL report was in evidence below. I accept the assurance from counsel that oral submissions made reference to the ICPPG letter as the “evidence in relation to the UN OISL inquiry”. However, the inference from the remarks of Flaux LJ in granting permission is that he thought the report itself had been relied on below.
30. The TAG report also appears to have been placed before Flaux LJ in the course of the application for permission to appeal. There was apparently no application to introduce fresh evidence, and it seems possible that Flaux LJ was unaware that the TAG report had not been before the Tribunals below. The copy of the TAG report placed before us is undated, but the latest reference in the report is to the UN OISL report, which is dated to “September 2015”. So it is at least possible that the TAG report predated the F-tT hearing as well.
31. Insofar as the Appellant seeks to rely upon some of the observations in the UN OISL report (and potentially the TAG report), this would serve to change the nature of the material relating to this ground in a significant way and would undermine the finality of the judgments below. Moreover, as Mr Waite also observes: “there does not appear to have been any clear assertion before the F-tT that [the Appellant’s] testimony had been passed to the OISL or indeed used by [them]”.
32. The submission that giving evidence to the UN OISL falls to be equated to giving evidence to the LLRC would require considerable exploration of evidence to be satisfactorily assessed. Even then it would leave open a considerable evidential lacuna in relation to this Appellant, since it is unclear whether any of his evidence actually reached the OISL or was deployed by them in any way.
33. Therefore, in my view this appeal must be concluded on the basis of the evidence which was before the tribunals below.

34. Ms Harrison's submissions on this ground can be simply stated. There was no evidence before the F-tT to show the detail of what the Appellant said or wrote to the ICPPG. However, Ms Harrison submits that it would be obvious that the content of anything supplied by the Appellant would in broad terms be hostile or condemnatory of the Sri Lankan authorities and their actions in 2009-10. Although it is impossible to be more specific, I accept that broad proposition. However, it must be qualified by the consideration that the Appellant (and his brother) were found to lack credibility about the traumatic events they say they themselves experienced. That factor might reasonably be thought to reduce the likelihood, at least for the future, that their evidence will be adduced or relied on by anyone.
35. Further, Ms Harrison concedes that even now there is no clear evidence that anything the First Appellant wrote or said will be known or will become known to the Sri Lankan authorities. She emphasises that the "primary purpose" of giving such evidence must be to stimulate further action. However, as will be clear from the passage from *GJ* quoted above in relation to the LRRC, it is only when the identity of the witnesses is known to the Sri Lankan authorities that the relevant risk arises. In the absence of any direct evidence, Ms Harrison's submission was that the known degree of penetration of Tamil opposition groups means that the Government of Sri Lanka would be likely to be aware of the content of anything that the Appellant said or wrote. She was frankly unable to go beyond that broad proposition.
36. In my judgment these submissions are quite inadequate to demonstrate that the approach taken by the F-tT was wrong. Rather it seems to me that Judge Bennett was right to conclude that the concerns here were "speculative" and was right to dismiss this aspect of the case.
37. I would therefore dismiss the appeal of the First Appellant.
38. Since the appeal of the Second Appellant is parasitic on that of the First Appellant it follows that I would dismiss his appeal also. I should note that I cannot for myself see how the Second Appellant, who has not given evidence in any form to the ICPPG or the UN OISL, could possibly succeed in his appeal, even if his brother had established a risk on this basis. There is no credible basis for saying that the relatives of those who have given evidence attracting the risk of prevention or reprisal, would themselves be at the relevant level of risk so as to establish an asylum claim.

Future Consideration

39. In the course of his judgment in *MP and NT* [2014] EWCA Civ 829, Maurice Kay LJ noted that similar risks to those arising for witnesses to the LLRC might arise for those who wish to or do in fact "give evidence to any future inquiry or investigation", see paragraph 36.
40. He went on to observe:

"37. At the moment, the evidence about these circumstances is understandably vague and speculative. It may well be that, if international pressure were to lead to the establishment of a different form of inquiry, the position would call for further

consideration in a case **in which appellants could give and adduce evidence about specific difficulties.**” [emphasis added]

41. At paragraph 38, Maurice Kay LJ recognised that this might mean that a further potential risk category should be recognised. He took the view that at that stage “The position is either hypothetical, un-evidenced, or both. It may need to be revisited by the UT in the future”. I agree with this view. There is material included in the UN OISL report capable of the inference that identified witnesses to the UN inquiry, and potentially to criminal prosecutions or other inquiries, will be at risk. There exists other evidence which might possibly bear the inference that such a risk will persist beyond the recent change of government in Sri Lanka. I stress the word “identified” since that aspect of risk would be consistent with the ruling in *GJ* and accords with common sense. It would seem inherently unlikely that anonymised evidence channelled through one or more submissions from organisations feeding information to such an inquiry as the UN OISL could be a proper basis for establishing the necessary level of risk. I acknowledge that the UN OISL report itself emphasises a continuing risk for those who give such evidence and are identified. That appears to have determined their approach in declining to take evidence from those still in Sri Lanka and in maintaining strict confidentiality and anonymity for those who provided evidence whilst outside the country. However, all of this is for the future if a suitable case or cases arise.

Postscript

42. In this case, as in some other recent cases, preparation for the appeal was late. Material and skeleton arguments on behalf of the Appellants arrived as late as the night before the hearing. In his witness statement of 21 January 2019 (that is to say the day before the hearing) the Appellants’ solicitor Mr Gananathan sets out the history. It is not necessary to repeat all of it. The nub of it is as follows. Permission to appeal in this case was given as long ago as 12 December 2017. On the same day, the Appellants made “delegated function applications” for legal aid. Further information was requested of them in January 2018. It was supplied on 31 January 2018. Legal aid was granted in March 2018 but revoked on a question of means in June 2018. The appeals were listed at that stage for 3 October 2018. That date had to be vacated because the Legal Aid Agency had not responded to representations and then a pre-action protocol letter in August 2018. Thus, there was already unnecessary delay.
43. Judicial review proceedings were commenced against the Legal Aid Agency in late September 2018. Subsequently, the Legal Aid Agency conceded that their Means Team’s assessment was flawed and they agreed to reconsider. That agreement was placed in a Consent Order from the Administrative Court of 30 November 2018. However, the full certificate of public funding was not issued until 11 January 2019 (ten days before the hearing) and authority to instruct leading counsel was granted on 14 January 2019 (seven days before the hearing). It is in those circumstances that the documentation, exchange of skeleton arguments and applications were late.
44. Obviously, I am unable to make any enquiry as to the problems faced by the Legal Aid Agency. However, it remains the fact that late decisions of this kind inevitably incur extra cost, inhibit the court’s proper preparation for a significant appeal such as this one, and run the risk of unnecessary further adjournment of cases which should be heard. We are, in late January 2019, only now able to dispose of an appeal arising from a hearing in February 2016. The cost to the public purse of such delay is enormous.

That cost and the human cost of delay would be considerably reduced if legal aid decisions were taken quickly and with a clear view as to the court's timetable.

Lord Justice Hickinbottom:

45. I agree with both the conclusions and the reasoning of Irwin LJ, and his comments at paragraphs 39-40 on future cases. I particularly align myself with his observations at paragraphs 42-44.

Lord Justice Underhill:

46. I agree that this appeal should be dismissed, for the reasons given by Irwin LJ. Although we have refused permission for the OISL report to be relied on when it was not before the tribunals below (despite, most regrettably, the impression arising in the permission application in this Court that it was), I would not want the First Appellant to think that that was the reason why his appeal has failed. For the reasons given by Irwin LJ any argument based on the references in the report to the risks to witnesses would only have gained traction in his case if a proper basis had been shown for believing not only that he had in fact given evidence to OISL but that his doing so had or might become known to the Sri Lankan government. I also associate myself with what Irwin LJ says at paragraphs 42-44.