



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/08858/2012

THE IMMIGRATION ACTS

**Heard at North Shields
On 20th June, 2013**

**Date Sent
On 3rd July, 2013**
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Before

Upper Tribunal Judge Chalkley

Between

KUMARAGURUSAMY ARUNTHAVARAJA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

*For the Appellant: Ms K Reid of Counsel instructed by LG Law Chambers,
Solicitors*

For the Respondent: Mrs R Pettersen, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is male, a citizen of Sri Lanka and was born on 11th October, 1976. On 13th September, 2012, the respondent decided to remove the appellant as an illegal entrant. The appellant appealed that decision and his appeal was heard by First-tier Tribunal Judge Cope at North Shields at a hearing on 28th January, 2013.

2. In his determination, which was subsequently promulgated on 11th February, 2013, First-tier Tribunal Judge Cope dismissed the appellant's appeal and dismissed both his humanitarian protection appeal and his human rights appeal.

Immigration history

3. The appellant made an application for asylum in 1998, which was refused in March 2000. He then claims to have left the United Kingdom and went to France. The appellant maintains that he was deported from France and returned to Sri Lanka in September, 2002. The appellant then left Sri Lanka again on 30th March, 2008, using a false passport, and travelled by air to Germany. He remained in Germany for two weeks before travelling to France by car. From there, the appellant entered the United Kingdom, clandestinely, in a lorry, arriving in the United Kingdom on 14th May, 2008.

Basis of the asylum claim

4. The basis of the appellant's asylum claim was that he feared for his life because of his political opinion. He is of Tamil ethnicity and lived in the Jaffna area of northern Sri Lanka. The appellant maintained that he and his family members have had involvement with the LTTE, an armed opposition group which had been fighting for Tamil self-determination in the north and east of Sri Lanka. He claimed that he was forced to assist the LTTE and that his father was a committee member of a political wing. The appellant was detained by the Sri Lankan authorities for a three month period after his deportation from France. He was released into the care of his parents but subsequently had difficulties with the Sri Lankan authorities in 2002 and 2004. When he moved to a different area in 2006, he was forced to assist the LTTE. He went to Colombo in 2008, before leaving the country in March, 2008, with an agent. In November, 2008, the appellant met a lady to whom he is currently married. They have a daughter born in 2010, and a son born in 2012.

Grounds of application

5. The grounds of application to the Upper Tribunal are very brief and are as follows:-

- “1. The appellant has scars and this caused by torture [sic] and that some of the risk factors identified [sic] in TK (Sri Lanka) CG (Tamils – LP updated) [2009] UKAIT 00049 relate to the appellant. However there are many credibility issues were in his interview and his witness statement [sic] in connection to his involvement with the LTTE. But the Immigration Judge has failed to address most of them. It is respectfully argued that in failing to address and make findings on the credibility challenges, the Judge has erred in law, and the credibility findings are not safe, the whole determination is not safe.
2. The IJ has failed to consider the appellant's scarring. It is respectfully submitted in the medical report. However the IJ failed to consider the same and it is seems in the

determination [sic] that the appellant's scars were not considered and this renders the determination unsafe.

3. Finally the IJ failed to consider the appellant's wife's psychiatric report and this report reveals her depression and trauma.
4. The failed to consider the article 8 of the ECHR for his family and private live [sic].
5. For the above reasons, it is respectfully submitted that the IJ erred in law and that this is a proper case for the Upper Tribunal's consideration.
6. Permission is therefore sought."

6. Permission to appeal was granted.

The hearing before me

7. At the hearing before me Counsel told me that she was 'stuck' with the grounds of application submitted on behalf of the appellant. She accepted that the judge had not addressed the appellant's scars but, contrary to the claim made in the application, the appellant did not have any scarring and no medical report had ever been submitted suggesting that he did have any scars.
8. Ms Reid also, entirely properly, conceded that the judge had not failed to consider the wife's psychiatric report, because no psychiatric report had ever been prepared in respect of the wife. She accepted that the judge had dealt with the appellant's Article 8 rights, despite the claim to the contrary in the determination.
9. Counsel suggested, however, that the judge had erred in relation to what he said about TK. The judge failed, she submitted, to address the risk to this appellant because, contrary to the guidance given by the Tribunal at paragraph 125 of *TK (Tamils, LP updated) Sri Lanka CG* [2009] 00049, at paragraph 83 of the determination the judge refers to and categorises risk factors as "background". He identifies that the appellant is Tamil, that he will be returning to Sri Lanka from one of the overseas centres of LTTE activity or fundraising and that he has made an asylum claim abroad. The judge has however erred by referring to these risk factors as being background factors.
10. Mrs Pettersen suggested that, when read as a whole, the determination makes clear findings at paragraph 33 to 77. The Immigration Judge very carefully looked at the case in the light of both the background evidence placed before him and the case law. He was not satisfied that the appellant or any family members have ever had any involvement with the LTTE in relation to the appellant's Article 8 claim and the determination should be upheld.
11. Ms Reid told me she had no response to make. I reserved my decision.

12. The First-tier Tribunal Judge properly considered the decision of the Tribunal in *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 00702* [2003] Imm AR1. He applied *Devaseelan* in respect of an earlier determination made following the appellant's original claim for asylum, in August, 2000. He noted that the First-tier Tribunal Judge found that the appellant's family had not been members of the LTTE. The judge noted that there was no credible explanation given for the direct contradiction in what the appellant had been saying in his current asylum claim about his father being actively involved in the LTTE in the 1990s, and an explicit statement in his claim for asylum which he made in 1998, to the effect that no members of his family were involved with the LTTE.
13. The judge believed that such a fundamental contradiction damaged the credibility of the appellant to a very significant extent. The judge did not believe the appellant. He believed that the fact the appellant made claims which he regarded as highly implausible damaged his credibility further. He did not accept that the appellant had ever been a sympathiser with, or supporter of, the LTTE, that he was ever forced to work for them or that he had ever come to the adverse attention of the Sri Lankan authorities. He did not accept that the appellant had been detained or tortured by the Sri Lankan authorities, that his father was ever a member or supporter of the LTTE or a committee member of any political wing or that the authorities had any continuing interest in the appellant. He also found that the appellant had not shown that it was reasonably likely that he had left Sri Lanka on any form of illegal basis.
14. The Immigration Judge had considered the case law and accepted that there were a number of factors which needed to be considered, namely the appellant's Tamil ethnicity, the fact that he would be returning from one of the overseas areas of LTTE activity or fundraising and that he had made an asylum claim abroad. At paragraph 83 of the determination the judge said this:-

"Most of these specific factors have been categorised by the Asylum and Immigration Tribunal in *AN and SS [AN and SS (Sri Lanka)]* [2008] UKIAT 00063] as background factors; by this is meant that they are not likely in themselves to give rise to a reasonable likelihood of persecution but would have the effect of intensifying the degree of risk when taken with any more of the direct factors which do actually apply in a particular case."

He went on to find that in the circumstances, and given his credibility findings, he did not believe that there were any direct factors which had been identified in *LP [LP (Sri Lanka)CG]* [2007] UKAIT 00076].

15. Criticism is made of the judge for having described the factors he identified which might cause the appellant to be at risk as "background factors". I am satisfied that in doing so he did not materially err in law.
16. In *TK* at paragraphs 123, 124 and 125 the Tribunal said this.

“In LP at para 238 the Tribunal stated:

“During the course of the determination we have considered a list of factors which may make a person's return to Sri Lanka a matter which would cause the United Kingdom to be in breach of the Conventions. As in previous country guidance cases, this list is not a checklist nor is it intended to be exhaustive. The factors should be considered both individually and cumulatively. Reference should be made to the earlier parts of this determination where the factors are considered in more detail but for ease of reference they are set out here. There are twelve and they are not in any order of priority:-

- "(i) Tamil ethnicity.
- (ii) Previous record as a suspected or actual LTTE member or supporter.
- (iii) Previous criminal record and/or outstanding arrest warrant.
- (iv) Bail jumping and/or escaping from custody.
- (v) Having signed a confession or similar document.
- (vi) Having been asked by the security forces to become an informer.
- (vii) The presence of scarring.
- (viii) Returned from London or other centre of LTTE activity or fund-raising.
- (ix) Illegal departure from Sri Lanka.
- (x) Lack of ID card or other documentation.
- (xi) Having made an asylum claim abroad.
- (xii) Having relatives in the LTTE."

124. To some extent the assessment we have just given of particular items of evidence has already adumbrated our understanding of risk factors presently, but it makes sense to deal discretely with the central issue raised in this case of whether the risk factors, as set out in LP and further analysed by the ECtHR in NA require modification in the light of recent developments in Sri Lanka. We have already stated that we do not seek in this case to decide whether recent events merit the adding of two entirely new risk factors (journalists and NGOs). As heralded earlier, we are only concerned, as was LP, with factors affecting Tamils and to what extent they need modifying or modified application.

125 In AN & SS, the Tribunal adopted the refinement suggested by Collins J in Thangeswarajah & Others [2007] EWHC 3288 (Admin) who considered that several of the LP risk factors were better characterised as “background factors” – namely: (i), (vii), (viii), (ix), (x), (xi) – in that “they do not in themselves indicate a real risk, but they are matters which if there is a factor which does give rise to a real risk that the individual will be suspected of involvement in the LTTE, add to the significance of that”. So too did Toulson LJ in VS (Sri Lanka) [2008] EWCA Civ 271. However, we note that in NA, despite referring to this observation of Collins J, the Court did not expressly adopt it and on balance we consider the LP risk factors continue to hold good as they stand. The desire for refinement is a valid one, especially when the risk factors run into double figures, but it

seems to us that it can be achieved without any subdivision. **We see an intrinsic danger in differentiating between “risk factors” and “background factors” if the former are then elevated to de facto risk categories, which they are not.** The wisdom we derive from the ECtHR’s analysis of the LP approach is that it treats each factor as furnishing a point of focus for considering related indicators and also allows for adjustment in respect of each in the light of new evidence (in LP and in NA some factors were considered to be merely contributory, others as more significant). Further it seems to us that the process adopted in LP itself at paragraphs 207-222 is not in practice substantially different from that suggested by Collins J. [My emphasis]”

17. However, they went on to consider what the Tribunal had said in LP in relation to Tamil ethnicity and said:-

“129. In the light of the most recent evidence it is clear that it remains the case that young male Tamils are at relatively higher level of risk than other Tamils; it is they who are more likely to be subject to incidents of arrest and detention. Because most of the TamilNet reports refer simply to “persons”, we cannot be sure females are not involved, but the virtual absence of any reference to them is striking. The Sri Lanka Guardian article referred to earlier made mention of a recent incident involving a female returnee, but we have found this report unreliable. However, in view of the fact that in the August 2009 FCO report the Swiss Embassy representative stated that “females with a Vanni National Identity card (NIC) may also be targets”, we consider it right to be cautious. Whilst therefore we conclude that on balance young female Tamils will not face the same level of risk as young male Tamils, we concur with Dr Smith and Professor Good’s assessment that relative youth remains a more important indicator of risk than gender. ”

18. In relation to return from London or other centre of LTTE activity or fundraising they said this:-

“Return from London or other centre of LTTE activity or fund-raising (viii)

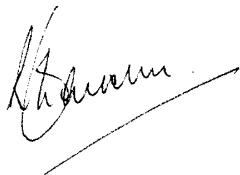
145. In LP this factor was seen as highly case-specific and so dependent on the presence of other significant factors giving rise to suspicion of a returning failed asylum seeker. Mr Chelvan pointed out that that Dr Smith regarded one of the new priorities of the Sri Lankan government as being to dismantle the overseas procurement network, a priority it can put more resources into now it is no longer tied up with fighting the LTTE in Sri Lanka. Professor Good also identified this factor as one that had increased in significance for this reason. However, in our assessment, whilst such increased concern is likely to enhance the level of risk to persons who are principal or high profile figures in overseas fund-raising activities, it will not raise the level of risk to failed asylum seekers returned from the UK who simply happen to arrive back in Sri Lanka following removal from London. The appellant’s submissions on this point were based on mere supposition. Evidence to indicate that the Sri Lankan authorities take a greater interest in returnees from a specific location is somewhat inconclusive: in any event, none of the recent TamilNet evidence recorded any incident affecting a returnee from the UK. ”

and in relation to having made an asylum claim abroad they said:-

“Having made an asylum claim abroad (xi)

149. Like the Tribunal in LP we have no hesitation in accepting that the process for putative returnees applying for travel documentation (or replacement passports) from the Sri Lankan High Commission in London is likely to result in information regarding such persons being passed on to the authorities in Colombo. Indeed, at least in the context of returns by way of a charter flight, there would appear to be specific liaison between the UKBA, the BHC, ILM and the Sri Lankan authorities. Whether, however, such information is treated by the Sri Lankan authorities as a cause for any particular interest appears even more doubtful now than before, in view of the evidence concerning the January 2009 charter flight return of thirteen failed asylum seekers. Given the likely fact they were known in advance by the Sri Lankan authorities at the airport to be failed asylum seekers, we regard it of some significance that there is no evidence whatsoever that any one of them met with difficulties. Professor Good posits that for individual returnees, the process would be quite different, but on our analysis of the recent evidence in recent media reports and the August 2009 FCO report, the evidence does not indicate that it would. We accept that the January 2009 return pre-dates the end of the conflict, but if anything it seems to us that at that (conflict-intensive) point in time scrutiny of returnees would have been higher than now. Given the importance the Tribunal in LP attached to BHC evidence that in the past, at least, lists of failed asylum seekers have been in the hands of Sri Lankan police conducting cordon and search operations in Colombo, we think it justified to retain this as a risk factor, but would regard it as likely now to be a relatively minor contributing factor at best.”

19. Given the judge’s findings concerning the appellant’s credibility and the wholesale rejection of the account he had given of events in Sri Lanka, the judge was entitled in the circumstances to conclude that it had not been shown to be reasonably likely that the appellant would be at any risk of persecution or serious ill-treatment were he to be returned to Sri Lanka. The judge did not elevate “to de facto risk categories” the background factors, and did not err in law,
20. Counsel did not address me in respect of the appellant’s Article 8 claim. It was asserted in the grounds that the judge failed to consider the appellant’s Article 8 claims. He did not. At paragraphs 96 to 127 he very carefully considered the appellant’s Article 8 claim. His conclusion that the decision of the respondent was proportionate cannot be said to be perverse
21. The appellant’s appeal is dismissed. **There being no error of law in the determination of First-tier Tribunal Cope, his decision shall stand.**



Upper Tribunal Judge Chalkley