



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/03881/2013

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly
On 06 February 2014

Date Sent
On 27 February 2014

Before

The President, The Hon. Mr Justice McCloskey and
Upper Tribunal Judge Chalkley

Between

MANIKGAM SOMALINGAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr Mynott (of Counsel), instructed by Broudie Jackson Canter,
Solicitors

For the Respondent: Ms Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

THE IMPUGNED DECISION

1. The Appellant is a national of Sri Lanka, aged 37 years. He challenges a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 8th April 2013, refusing his applications for refugee international protection.

2. The Appellant advanced his claim for protection upon his arrival in the United Kingdom at Glasgow Airport on 15th March 2013, having travelled from Colombo to Dubai and from there by air. The claim involves consideration of, amongst other things, the activities of the "Liberation Tigers of Tamil EeLam" ["LTTE" in shorthand] and the Appellant's interaction with this organisation. When interviewed, he formulated his claim for asylum in the following way:

"I had been working in Sri Lanka for Govt institution from 2000. I was working in LTTE controlled area. I was living in area controlled by Sri Lankan army. I was facing trouble. I was asked by LTTE to purchase something for them. I was helping them when they fell to Sri Lankan forces, area Vahara in 2009. I was taken by Sri Lankan intelligence group. I experienced torture and injuries. I came to claim asylum. I returned to Sri Lanka 05 January 2013. During the night, 30th January 2013, I was arrested by an unknown man. I was tied, my hands, blind folded, put in a van my face on the floor. Driven for half an hour. I was accused of working for LTTE. Also whilst in the UK they said they have evidence of my involvement in campaign against Sri Lankan President in London.

I attended a Heroes' Day Celebration of Sri Lankan Tamils here in UK. Fasting campaign to support Tamils held in Olympic Time."

The Appellant repeated that he had been coerced into assisting LTTE. He first entered the United Kingdom in April 2010, via a student visa. The motive for his return to Sri Lanka in January 2013 was his wife's ill health. His apprehension and detention dated from 30th January to 13th February 2013, when he was released following the payment of a bribe. He then stayed with relatives in Manampity until travelling to the United Kingdom a month later.

3. The refusal decision expressed, *inter alia*, a rejection of one of the cornerstones of the Appellant's case, in the following terms:

"It is considered significant that you cannot accurately identify the dates of either when you were approached by the LTTE or when you actually stopped working for them. This is the fundamental core of your claim as had you never been approached or worked for the LTTE you would not have the problems you now claim to have had in Sri Lanka."

The decision maker then addressed the Appellant's assertion that he rejected the initial overtures from LTTE in either 2005 or 2006. Having recited various excerpts from country information sources, this discrete assertion is dismissed in these terms:

"Given that, especially at that time, the LTTE were vigorously adhering to a policy of forced recruitment that included children, and even young girls, it is not accepted that they would have allowed you to initially turn down their request for you to join them. Therefore, and based on these facts, it is not accepted that you were forcibly recruited into the LTTE as you have claimed."

The immediately succeeding passage is puzzling:

“Whilst it is acknowledged that this did happen, it is not, based on the fact that your accounts of your treatment are inconsistent with country information, accepted that you were involved with the LTTE as you claim.”

It is evident that this “this” can only be a reference to forcible recruitment into LTTE.

4. Next, the decision letter highlighted inconsistent answers given by the Appellant in interview relating to places where he had resided in Sri Lanka. Referring to a USSD report of 2010, the Appellant’s claim that following his release from CID detention in 2009 he travelled to and entered Colombo without passing through any military check points was rejected as not credible. His ability to leave Sri Lanka from Colombo airport travelling on his personal passport was considered indicative of the Sri Lankan authorities’ lack of interest in him. This was also considered to confound his allegation of earlier arrest by the authorities. A further identified indicator of lack of credibility was his failure to claim asylum having entered the United Kingdom in April 2010. Ditto his voluntary return to Sri Lanka in January 2013, coupled with his ability to re-enter without mishap. It was further considered that, based on his answers during interview, his claim to have attended an anti-Sri Lankan Government demonstration in the United Kingdom was not plausible. This, in term, made his claim of further arrest and ill treatment in Sri Lanka in January/February 2013 not credible. This lack of credibility was considered to be exacerbated by his ability to leave Sri Lanka without difficulty in March 2013, which was also considered a further indicator that he is of no interest to the Sri Lankan authorities. These miscellaneous assessments are encapsulated in the following sentence:

“In conclusion you have, essentially, come and gone as you have pleased from Sri Lanka and it is not accepted that a person with the profile you claim to have with the authorities would have either been able or allowed to do so.”

5. The decision maker then proceeded to consider certain country information sources and, in particular, the FCO report of October 2009, concluding:

“From the information above it is not accepted that you would encounter any problems from the Sri Lankan authorities on return from the UK as a failed asylum seeker. This is due to the fact that it is not accepted that you satisfy any of the six risk factors set out in [the FCO report] and you had no problems when returning from the UK in similar circumstances.”

Next, the photographic evidence of injuries to the Appellant's body was addressed in the following terms:

"In the circumstances, it is considered that little weight can be placed upon these documents and whilst they indicate injuries to your person they do not indicate how, or when, you came to receive them."

This was not considered to be "credible evidence". The decision maker then considered paragraph 339L of the Immigration Rules, concluding:

"In light of the inconsistencies in your account and your delay in claiming, your general credibility has not been established. This means the benefit of any doubt is not given to you regarding these aspects of your claim for asylum. Consequently, the unsubstantiated claims that you were employed by the RDA; that you were arrested in 'I think July 2009' or that you were beaten and tortured in detention are not accepted. It is not accepted that you have a well founded reason to fear return to Sri Lanka on this basis."

The omnibus conclusion was that the Appellant did not qualify for the grant of refugee status or humanitarian protection and that his removal from the United Kingdom would not infringe his rights under Article 8 ECHR.

APPEAL TO THE FIRST-TIER TRIBUNAL

6. Following the making of removal directions dated 11th April 2013, the Appellant appealed to the First-Tier Tribunal [the "FtT"]. The Notice of Appeal, prepared by his solicitors, was couched in relatively formulaic terms. The determination of the FtT contains the following identifiable findings and assessments:
 - (i) The Appellant's account of events in Sri Lanka was accepted as truthful. The Judge found specifically that the Appellant had assisted the LTTE, while working for the Sri Lankan Road Development Authority, as claimed.
 - (ii) The Judge **appeared** to find that, related to (i), the Appellant was, as asserted, arrested and ill treated by the Sri Lankan authorities in 2009.
 - (iii) The Appellant's claim for refugee status was not based on the events concerning the aforementioned detention. Rather, it was founded on his apprehension, detention and ill treatment in January/February 2013.
 - (iv) The Appellant had attended two anti Sri Lankan Authority demonstrations in London. In consequence, it is "reasonably likely" that this will attract "adverse attention" from such authorities.
 - (v) (By implication) this is what came to pass, in January/February 2013.

- (vi) The Appellant had been ill treated and injured as alleged by him in 2009 and again in 2013. This constituted persecution and its cause was his perceived support of LTTE.

Pausing here, it is clear that the Judge accepted the core elements of the Appellant's claim in full.

7. The Judge then set himself the task of determining "*whether it is reasonably likely that he will or may be persecuted upon his return to Sri Lanka now.*" He referred to the decision of the Upper Tribunal in GJ (and Others) - v - Secretary of State for the Home Department [2013] UKUT 319 (IAC). He noted that the Civil War in Sri Lanka is over and that LTTE is now "*a spent force*". However, the Sri Lankan authorities "*..... have an interest in those who they perceive as threatening the future security of Sri Lanka*". The Judge then stated that those who participated in the aforementioned demonstrations "*... may be of interest and indeed adverse interest to the Sri Lankan authorities.*" Arrest and detention would entail "*a substantial risk of treatment which clearly amounts to persecution.*". The Judge then made the following conclusion:

"I am able to conclude on the basis of the decision in GJ that the Appellant as at the date of my decision is not at risk of treatment that amounts to persecution. Whilst the Sri Lankan authorities may have had an adverse and persecutory interest in the Appellant upon his last return to Sri Lanka I do not accept that that will or may be the case if he is returned to Sri Lanka again."

The Judge supported this conclusion by referring to the Appellant's ability to enter (once) and depart (twice) from Sri Lanka without mishap and the procurement of his release from the more recent period of detention by a bribe. He also described the Appellant as a person not possessed of "*a high profile*". He continued:

"He has carried out no activities which could be perceived as threatening to the Sri Lankan state since his attendance at the demonstrations in London."

Based on this reasoning, the Judge concluded that the Appellant had failed to discharge the relevant standard of truth.

8. The central complaint enshrined in the grounds of appeal is that the Judge misdirected himself in relation to the decision in GJ. Based on the Appellant's very recent persecution in Sri Lanka (as found by the Judge), linked with his account of being monitored and visited at home between his arrival in Sri Lanka and subsequent detention and ill treatment, it was contended by Dr Mynott (and repeated in this forum) that the Appellant belongs to one of the risk categories identified in GJ. Permission to appeal was granted in terms which acknowledged that the FtT had arguably erred in law in this respect. The grant of permission highlighted specifically that the Judge had failed to address the "*watch list*" category of persons at risk identified in GJ.

CONSIDERATION AND CONCLUSIONS

9. The findings made by the Judge could not conceivably have been more favourable to the Appellant. Factually, every material ingredient of his case was accepted by the Judge. The resolution of this appeal hinges on the application of the decision in GJ to the findings made.

10. The country guidance decision of the Upper Tribunal in GJ (and Others) was promulgated in July 2013. The Tribunal conducted an exhaustive enquiry into current conditions in Sri Lanka. Its decision is multi-faceted. For the purposes of this appeal, it suffices to record that the Upper Tribunal held as follows:
 - (i) The detention of any person by the Sri Lankan Security Services generates a real risk of ill treatment or harm requiring international protection.
 - (ii) The Sri Lankan government is now in control of the entire country.
 - (iii) One of the categories of persons at real risk of persecution or serious harm on return to Sri Lanka is constituted by those who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they have, or are perceived to have, a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka.
 - (iv) The Sri Lankan authorities operate a sophisticated intelligence gathering machinery, both at home and abroad. They are aware that many Sri Lanka Tamils travelled abroad as economic migrants and, further, that everyone in the Northern Province had some level of involvement with the LTTE during the civil war.
 - (v) In post-conflict Sri Lanka a person's past history is relevant to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan State or the Sri Lankan government.
 - (vi) The Sri Lankan authorities maintain a computerised intelligence led "watch" list. Those on this list are not reasonably likely to be detained at the airport upon return to the country. However, they will be monitored by the security services thereafter.

At this juncture, we observe that, as regards the "watch" list, there is a breakdown of two discrete sub-categories of persons:

- (a) Those who, following monitoring, are not considered by the authorities to be Tamil activists working to destabilise the unitary Sri Lankan State or to revive the internal armed conflict.

- (b) Those who, in contrast, are considered or perceived to be involved in such activities.

The members of group (a) are not reasonably likely to be detained (and, hence, ill treated), by the Sri Lankan authorities. In contrast, membership of group (b) stimulates this very risk to a degree of probability. Finally, in considering the generic “watch list” category, the Tribunal held that each case will be fact sensitive, dependent on any diaspora activities of the person concerned.

11. In our judgment, there is a basic error of law in the determination of the FtT. This consists of the Judge’s failure to recognise that, based on her findings of fact, the effect of the decision in GJ (and others) is to place the Appellant in at least one, and probably two, of the recognised categories of persons at risk in contemporary Sri Lanka. In our view, the Judge’s findings of fact impelled inexorably to this conclusion. They did so on account of her acceptance of the Appellant’s story in full, the key elements whereof are his former employment by the Government; his active assistance to LTTE in such capacity; his 2006 arrest, detention and ill treatment on this account; his act of fleeing the country in consequence; his anti-Sri Lankan government activities in one of the diaspora “hot spots”; his further arrest, detention and ill treatment by the Sri Lankan security forces in January/February 2013; and his ensuing flight from the country. In our view, the error of law in the judgment is clearly demonstrated. We would add that it is underscored by the Judge’s evident failure to attribute any weight to the very recent events involving the Appellant in Sri Lanka and her failure to give effect to the unequivocal finding that the Appellant has been the subject of persecutory treatment on two separate occasions and, further, that this was motivated each time by his perceived support of LTTE and anti-government orientation.

DECISION

12. Given the Judge’s findings, we consider that the only rational conclusion available to her was that the Appellant is a person at risk of persecutory treatment in Sri Lanka, having regard to the decision in GJ (and Others). This gives rise to a twofold conclusion:
- (i) The decision of the FtT must be set aside.
 - (ii) We remake the decision by allowing the appeal.

Sernand McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 19 February 2014