



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

Appeal Number: AA/06807/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 28 January 2015**

**Decision & Reasons Promulgated
On 6 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

**MR GULUVITAGE SASHIE PRABHA PEIRIS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Jegarajah, Birnberg Peirce & Partners

For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant's appeal against a decision to refuse him leave to enter, made on 27 August 2014, was dismissed by First-tier Tribunal Judge Plumptre ("the judge") in a determination promulgated on 24 November that year.
2. The appellant arrived in the United Kingdom with valid leave in September 2001. He claimed to be at risk on return to Sri Lanka as a person of adverse interest to the authorities, as a result of his support for the Tamil cause. In addition to fearing ill-treatment at the hands of the authorities

and non-state agents, the appellant claimed that his removal would breach his rights under Articles 3 and 8 of the Human Rights Convention, by reason of his mental ill health. He also relied upon Article 8 in the context of private life ties established here since his arrival.

3. There was a considerable amount of evidence before the judge, including reports prepared by Dr Chris Smith, a country expert, and Dr Saleh Dhumad, a medical expert. Evidence was also given by other witnesses, regarding the appellant's political activities in the United Kingdom. A DVD was relied upon as showing attendance at a conference held in September 2013 and the appellant's participation by means of a speech. Sadly, the DVD could not be played fully at the hearing although it appears that efforts were made by several of those present to overcome a technical problem. The judge gave weight to evidence given by a witness that the appellant was one of those who received an award at the conference but she was unable to find whether the appellant simply expressed his thanks or made a political statement.
4. Overall, the judge found that the appellant's political profile was not such as to show a reasonable degree of likelihood that he would be on any "stop" or "watch" list. She gave little weight to Dr Smith's report. She found that although the appellant was not particularly well, there was no risk of suicide. She concluded that Articles 2, 3 and 8 of the Human Rights Convention were not engaged in the appeal.
5. So far as the appellant's claim to have been tortured before his arrival here was concerned, the judge found that he returned to Sri Lanka on three occasions, in 2004, 2005 and 2006, to visit family members. She concluded that he would not have done so had he been ill-treated in the manner claimed.
6. In an application for permission to appeal, it was contended that the judge erred in several aspects. There was no proper consideration of the appellant's pro-Tamil activities in the diaspora, the principles in HJ (Iran) were not applied, the appellant was not treated as a vulnerable witness as he should have been in the light of Presidential Guidance and the judge made no reference to some of the evidence supporting his claim to be at risk on return. So far as the appellant's human rights are concerned, it was contended that the judge failed to properly determine the Article 3 claim and confined her analysis to suicide risk. Her finding that much of the psychiatric evidence was unreliable and undermined by the appellant's returns in 2004, 2005 and 2006 was not sustainable. In those years, there was a ceasefire between the authorities and the LTTE and the fact that the appellant returned during that period did not indicate that he was not tortured prior to his arrival in this country in 2001.
7. In final grounds, it was contended that the judge failed to consider the appellant's case under Article 8 of the Human Rights Convention. This was raised as a ground of appeal in the light of his presence in the United

Kingdom since 2001. His private life included his right to respect for physical and moral integrity, an aspect of his health claim. The judge failed to engage with submissions made in relation to this aspect.

8. Permission to appeal was granted in December 2014 on the basis that it was arguable that the judge had erred in law by failing to consider the appellant's Article 8 case, which was clearly raised in the skeleton argument prepared by his Counsel in relation to mental ill-health and private life.
9. In a Rule 24 response, the Secretary of State opposed the appeal on the basis that the judge had directed herself appropriately. The determination was detailed and well reasoned and took into account the various pieces of evidence and relevant factors. The Article 3 claim had been thoroughly considered. In dealing with Article 8, the judge noted submissions made by the Presenting Officer and by the appellant's Counsel. Given the appellant's precarious immigration status, it was inconceivable that the judge could have concluded that the appellant might succeed under Article 8 and so there was no material error.

Submissions on Error of Law

10. In a skeleton argument filed with the Tribunal shortly before the hearing, it was contended that there was nothing in the grant of permission indicating that grounds of appeal other than those relating to Article 8 were not arguable and so the appellant sought to rely upon them. In the Rule 24 response, the respondent had not confined her submissions to Article 8 and so all the grounds remained arguable.
11. Ms Everett said that the Secretary of State, having considered the matter, could see some merit in the first of the grounds, regarding the appellant's profile in the diaspora. At paragraph 113 of the determination, the judge adopted guidance in GJ to the effect that diaspora activists are not necessarily at risk and went on to find that there was no evidence that the appellant had been a fund raiser or that he had supplied arms. However, the guidance given in GJ was not confined to those matters.
12. At paragraph 114, the judge found that the country expert had made a sensible point, that *if* the DVD showed the appellant speaking out against the Sri Lankan government at the conference, that would of itself put him at risk. She went on to find that neither she nor Dr Smith had viewed the DVD and that the evidence given by a witness who was present at the conference was equivocal. The Secretary of State's concern was that the DVD was clearly highly material evidence and was available to the Tribunal. Steps might have been taken to resolve the technical difficulty, in view of the importance of it.
13. Secondly, as the author of the grounds noted, the only mention of Article 8 in the determination was at the end of it, in paragraph 146, where the

judge found that the Article was not engaged. The author of the Rule 24 response correctly pointed out that the judge had referred earlier in the determination to submissions on Article 8 but there were, nonetheless, no findings made by the judge regarding this aspect of the case (save for her finding that Article 8 was not engaged). It was clear that Article 8 was relied upon, in relation to the appellant's ill-health and his private life ties.

14. Moreover, the judge clearly found that the appellant's return to Sri Lanka on three occasions between 2004 and 2006 told against him in relation to his claim to have been tortured earlier, prior to his arrival here. However, there was a ceasefire in those years, again as noted by the author of the grounds, and many people returned to Sri Lanka. The Secretary of State accepted that the inference drawn by the judge was unsafe, in the light of the weight she gave to this factor and in the absence of further findings that took into account the ceasefire.
15. Ms Jegarajah agreed that Miss Everett had highlighted the key concerns, in relation to errors of law.

Conclusion on Error of Law

16. The determination is extremely thorough and has been prepared by a very experienced judge, with characteristic concision. Taking into account the submissions from the parties, I conclude, however, that the decision does contain a material error of law. So far as Article 8 is concerned, it is clear that the appellant relied upon his human rights, in relation to mental ill-health and private life ties. He arrived here in 2001 and has been present ever since, save for the three visits to Sri Lanka made between 2004 and 2006. Although the judge considered suicide risk in some detail, her overall conclusion was that Article 8 was not engaged. That conclusion required supporting reasons. If, on the other hand, the proper conclusion was that Article 8 was engaged, then a full assessment of the position under the rules and, perhaps, outside them, was required instead.
17. A salient feature of the appellant's case was his claim to have been tortured in Sri Lanka prior to his arrival in this country in 2001. The judge gave weight to his three visits to Sri Lanka as an adverse factor but without expressly taking into account the ceasefire in those years, which encouraged many supporters of the Tamil cause to return. The adverse weight given to the visits featured in the assessment of the reliability of some of the medical and psychiatric evidence, as well as in the assessment of the appellant's claim to be of adverse interest to the authorities.
18. Finally, the DVD showing the appellant's attendance at the conference in September 2013 was plainly material evidence. It is most unfortunate that technical problems prevented it from being shown in full. Of obvious importance in the appellant's case that his diaspora activities put him at risk is precisely what he said (or did not say) at the conference. Of course,

the burden of proof lay with the appellant but, on the other hand, it appears that the technical fault lay with the DVD player rather than the disc itself.

19. The decision of the First-tier Tribunal must be set aside and remade.
20. In a brief discussion regarding the appropriate venue and the extent of any fact finding required in the remaking of the decision, Ms Everett suggested that the appropriate venue was the First-tier Tribunal and Ms Jegarajah said that it should be the Upper Tribunal. On reflection, I conclude, in the light of the Presidential Practice Statement, that extensive fact finding will be required in this unusual case. The appeal is remitted to the First-tier Tribunal at Hatton Cross, to be remade by a judge other than First-tier Tribunal Judge Plumptre.
21. So far as directions are concerned, I have no doubt that there will be a Case Management Review hearing at Hatton Cross in due course. There will obviously be a need for a DVD player at the hearing (and this should be tested beforehand to ensure that it is in working order). As noted above, the case is unusual and highly complex, with the attendance of at least four witnesses. In my view, a day should be set aside for the hearing of the appeal (and an allocation of six points made). No findings of fact are preserved.

Notice of Decision

22. The decision of the First-tier Tribunal is set aside. It is remitted to the First-tier Tribunal at Hatton Cross to be remade, by a judge other than First-tier Tribunal Judge Plumptre.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction may amount to a contempt of court.

Signed

Date **28 January 2015**

Deputy Upper Tribunal Judge R C Campbell