



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

Appeal Number: AA/11730/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 22 July 2015**

**Decision & Reasons Promulgated  
On 23 October 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

**Between**

**Master Tharshan SARAVANABAVANANTHAN**

Appellant

v

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Anne Heller, counsel instructed by Barnes, Harrid & Dyer solicitors

For the Respondent: Mr Chris Avery, Senior Home Office Presenting Officer

**DECISION & REASONS**

1. The Appellant is a national of Sri Lanka, of Tamil ethnicity, born on 4 August 1997. He arrived in the United Kingdom on 15 December 2010 and claimed asylum the following day. The basis of his claim is that when he was 10 years of age he became separated from his family when their village, near Kilinochchi, was attacked by the army. He was taken to a military camp where he remained for 2 years, undertaking chores. He resisted forcible recruitment and was beaten. A man "Uncle" who knew his father paid a bribe so that they were both able to leave the camp and they travelled to the United Kingdom, arriving by car. "Uncle" took him to the Home Office and he has not seen him

since. He has had no news from or contact with his family.

2. The Respondent refused the asylum claim on 18 March 2011 but granted the Appellant discretionary leave to remain until 14 March 2014. On that date the Appellant submitted an in-time application for further leave to remain on the basis that he had a continuing fear of persecution in Sri Lanka. This application was refused on 11 December 2014 but the Appellant was granted a further period of discretionary leave thus his appeal was brought under section 83(2) of the Nationality, Immigration & Asylum Act 2002.

3. The appeal came before Judge of the First Tier-Tribunal Oscar del Fabbro for hearing on 9 April 2015. In a decision promulgated on 6 May 2015 he dismissed the appeal on the basis that he did not find the Appellant had demonstrated he is likely to be at risk of harm on return to Sri Lanka as at the date of the hearing [22]. He was quite satisfied on the evidence that the Appellant was not detained in a military camp but that it would have been a camp for displaced persons and there was no evidence that the Appellant was considered at that stage to be an LTTE combatant or in any way associated with them [24]. He did not find the Appellant's evidence that he left the camp without leave on payment of a bribe to be credible or that the bribe and subsequent arrangements to facilitate his unlawful entry to the United Kingdom was paid for by the "uncle" [25]. He also did not find credible the Appellant's concerns that he would be of adverse interest to the Sri Lankan authorities for a Convention reason based on the claim that he left without documentation and spent several years in the United Kingdom, as there is no connection either directly or indirectly with the LTTE or any *sur place* activity in the United Kingdom and he would be able to return to Sri Lanka without fear of falling into one of those categories of post-civil war returnees identified in GJ [2013] UKUT 00319 (IAC)[27]. He did not find on the evidence that the situation in Sri Lanka is such that penury, abuse and exploitation would be a likely outcome for a young person returning there as a 17 year old [28].

4. The Appellant sought permission to appeal to the Upper Tribunal on the basis that the First Tier Tribunal Judge erred: (i) in failing to give any or adequate consideration to the possibility of the Appellant being at risk as a witness to war crimes and (ii) in failing to specify the objective evidence upon which his finding was based that "*penury, abuse and exploitation would be a likely outcome for a young person returning here as a 17 year old.*" Permission to appeal was granted by First-Tier Tribunal Judge Astle in a decision dated 4 June 2015 notwithstanding the grounds of appeal but on the basis that it was arguable that there was no right of appeal.

#### *Hearing*

5. The appeal came before me for hearing on 22 July 2015. The parties both agreed that there was a valid right of appeal because although the most recent grant of leave was from 11 December 2014 to 4 February 2015, leave had previously been granted from 18 March 2011 to 14 March 2014 and thus the Appellant had aggregated sufficient periods of leave to qualify for the right of appeal pursuant to section 83(2)(b) of the Nationality, Immigration & Asylum

Act 2002.

6. In respect of the grounds of appeal, Ms Heller acknowledged that it was not clear on what basis Judge Astle had granted permission to appeal but sought to rely on the grounds of appeal. She submitted that even if the camp was for internally displaced persons it was run by the military and the Appellant's evidence of seeing Tamils shot by the army is credible. Consequently, there would be a risk to the Appellant as a witness of war crimes. She noted that the Respondent's rule 24 reply by implication says that the camp was civil rather than military but emphasized that those in charge would have been military rather than civil. In respect of the second ground of appeal, she pointed out that the Appellant was a minor and continues to be a minor. The Judge's conclusion that penury, abuse and exploitation would not be a likely outcome is unsustainable given that the Appellant has stated that he has had no contact with his family and he lost that contact in pretty dire circumstances.. The return of a young man with no family back-up whatsoever returned to Colombo would mean that he would be at risk of being a street child subject to all the dangers that go with that.

7. In response, Mr Avery submitted that it was not clear that the argument that the Appellant was a witness of a war crime was advanced at the hearing. It was pointed out in that it was in counsel's skeleton argument before the First Tier Tribunal. He went on to submit that this was not the sort of point that is covered in GJ [2013] UKUT 00319 (IAC) which refers merely to persons identified as witnesses to that enquiry and there was nothing from that to show or indicate that there would be follow up. Consequently, he submitted that this was not a material matter as it does not fall within the Country Guidance risk categories. He referred to the Respondent's rule 24 response which indicated that the Judge had some concerns about the Appellant's credibility on this issue. He did not accept the military would have allowed Tamil youths to handle guns. He submitted that the primary issue is whether it is a material factor and it was not because there was nothing beyond the fact the Appellant might have witnessed something. In respect of the second ground of appeal, and the risk to the Appellant as a child, he submitted that as the case is an asylum claim the Appellant still has to make out his case. With regard to the background evidence he submitted that there was nothing that specifically addressed the issue of children. Consequently, there was no objective evidence to support the contention that he would become a street child. He pointed out that the Appellant is 17 and although he might be a minor he could not properly be termed a child. Even if the Judge had the United States State Department report before him it was difficult to say that it would have made a difference. On the basis of the evidence and the Appellant's account the Judge's findings at [28] were perfectly justifiable and there was no error of law.

8. In reply, Ms Heller relied upon E9 of the Respondent's bundle which raises the issue of particular social group as a minor; also E14, the Operational Guidance Note which refers to minors claiming in their own right; E17 which quotes the United States State Department report with regard to child abuse and sexual exploitation of children; E20 in respect of the absence of family support; E22 as to the risk of orphans becoming destitute upon return. She

submitted that there was evidence to show that there were risks to a destitute child and that the Judge at [28] failed to distinguish the United States State Department report in any way. Ms Heller accepted the Appellant does not fall squarely into risk categories in GJ [2013] UKUT 00319 (IAC).

### *Error of law*

9. It would appear that permission to appeal was granted by First Tier Tribunal Judge Astle simply on the issue of whether or not there was a valid appeal, rather than in respect of either or both of the grounds of appeal. In respect of Ground 1, this was in issue before First Tier Tribunal Judge del Fabbro as it was expressly raised at [5] of the skeleton argument which provides: *"The Appellant as eye witness to a human rights crime committed by a member of the Sri Lankan military against a camp inmate."* This would appear to be based on the Appellant's response in his asylum interview at Q.134 when asked if there was anything else he feared when he responded: *"They will shoot me because I know a person they killed because they refused to join the army."* However, it does not appear that his case was put on this basis in terms of the oral evidence and submissions before the First Tier Tribunal, which focused on the risk to him because he left the camp without leave on payment of a bribe and then left the country without documentation. Therefore, whilst it is the case that the First Tier Tribunal Judge did not engage with the issue of risk as an eye witness to a human rights crime I do not consider that this an error of law given that this aspect of the case does not appear to have featured at all at the hearing and no evidence was called nor further details provided as to when this incident took place; whether there were any other witnesses and whether there were repercussions at the time. Moreover, even if I am wrong about this and it does amount to an error of law it is not a material error as it would not have placed the Appellant in a risk category covered by the most recent country guidance in GJ [2013] UKUT 00319 (IAC) given that [356](7)(c) relates specifically to those who gave evidence before the Lessons Learned and Reconciliation Commission (LLRC) whose report was submitted to the GOSL at the end of 2011. I have also in this respect taken into account the judgment of Lord Justice Maurice Kaye at [38] on appeal to the Court of Appeal [MP (Sri Lanka) & Anor v Secretary of State for the Home Department [2014] EWCA Civ 829].

10. However, I do find that the First Tier Tribunal Judge made a material error of law for the reasons set out in Ground 2 of the grounds of appeal. The Judge at [28] held: *"I do not find that on the objective evidence that the situation in Sri Lanka is such that penury, abuse and exploitation would be a likely outcome for a young person returning there as a 17 year old."* Ms Heller drew my attention to the background evidence before the Judge that supported her contention that the Appellant would be at risk on return of destitution and possible abuse and sexual exploitation as a minor. This is not reflected in the Judge's finding at [28] and no reasons were provided as to why the Judge reached that conclusion. Consequently, the Judge failed to give proper consideration to the Appellant's best interests as part of the assessment of his asylum claim *cf.* AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC) at [32] and [33]. I gave my decision in this respect at the hearing.

### *Submissions*

11. I then proceeded to re-make the decision. The parties were content to proceed on the basis of submissions only. Ms Heller relied upon the submissions she had already made in respect of the error of law and evidence relied on, particularly the United States State Department report of 2013 and surmised that the 2014 report will have the same content. She submitted that the Appellant would be returned to Sri Lanka, a country he knows but he would be returned to Colombo, an area he does not know, as he is originally from Vanni, which is part of the LTTE heartland. His evidence is that he lost touch with his family and although he agreed to the Home Office undertaking tracing enquiries, nothing has come of this. He has no experience of the employment situation in Sri Lanka and he will be returned with nowhere to live and crucially no family support. She submitted that in Sri Lankan families the males live with the family even after the age of 18 and it could not possibly be said to be in his best interests for him to be returned in the circumstances she outlined.

12. On behalf of the Respondent, Mr Avery submitted that the evidence the Appellant would be at risk is extremely limited to a generic paragraph in the United States State Department report. He submitted that that had to be balanced against the Appellant's actual age and that in less than a month he would be 18 and the closer the Appellant gets to 18, the less there would be of a risk of the type of treatment set out in the United States State Department report which was, in any event, very general. He submitted that the Appellant has been in the United Kingdom and has learned skills that would avail him in the job market in Sri Lanka. If he wanted he could seek assistance to return from the voluntary return scheme. The Appellant would not be destitute and would get assistance, although he was unable to assist as to how much money or what assistance the Appellant would receive from VARP or RA. He submitted that the burden was upon the Appellant to show he would be at risk on return. The Judge did not make a finding as to alleged loss of contact with his family but proceeded on the basis that the Appellant does not have a family. He submitted that the Appellant had not made out his case. Ms Heller did not exercise her right to reply.

### *Decision*

13. The Appellant's case before me was confined to whether or not he would be at risk of persecution on return to Sri Lanka as a member of a particular social group *viz* a (Tamil) minor, without family support. The Appellant's case is that he is effectively an orphan, his father having been drowned and at the same time, aged 10, the Appellant became separated from his mother and sister. The First Tier Tribunal Judge at [28] proceeded on the basis that the Appellant was without family support thus accepting his evidence on this point. Therefore, the issue that I am required to resolve is the likely treatment the Appellant would experience on return to Sri Lanka and whether this would amount to persecution.

14. The evidence before me consisted of bundle from the Respondent and the Appellant. Ms Heller drew my attention to extracts from the Respondent's

bundle. E14-E15 contain an extract from the Respondent's Operational Guidance Note, 14 July 2013 at [4] in respect of minors claiming asylum in their own right and provides at 4.2. that there is *"insufficient information to be satisfied that there are adequate alternative reception, support and care arrangements in place for minors with no family in Sri Lanka. Those who cannot be returned should be considered for leave as unaccompanied asylum seeking children."* I find that the Respondent has complied with her duty in this respect as she granted the Appellant discretionary leave to remain until he was 17 and a half years of age, in accordance with her policy. E17-E18 contain an extract from the United States State Department country report on human rights practices for 2013 which make reference to child abuse, sexual exploitation of children and displaced children. The report provides *inter alia* that: *"NGOs continued to attribute exploitation of children to the lack of enforcement of child abuse laws rather than inadequate legislation. There are no specific examples provided in respect of the sexual exploitation of displaced children. That sub-section provides: "Displaced Children: Children in IDP welfare centers and relocation sites were exposed to the same difficult conditions as adult IDPs and returnees in these areas. Many school facilities were in poor condition and lacked basic supplies. Medical care in these areas was limited, but improvements continued throughout the year."* The United States State Department country report on human rights practices for 2014 is in identical terms. Unfortunately, none of the reports in either bundle address the likely situation for a displaced minor.

15. I have also considered the available jurisprudence, particularly GJ [2013] UKUT 00319 (IAC) but similarly there is a paucity of evidence as to the situation for a displaced Tamil minor on return to Sri Lanka as that was not the focus of the linked cases. The most recent reported case involving a minor is that of ST (Child asylum seekers) Sri Lanka [2013] UKUT 00292(IAC) where the Upper Tribunal found that the Appellant in that case would not be at risk of persecution [76] in part because he had a grandmother in the North of the country but also because: *"The authorities in Sri Lanka do not appear to be indifferent or unwilling to take action against those who abuse children whether as foreign tourists or disreputable care home guardians. The problem may be a significant one but raids, arrests and prosecutions may follow. There seem to be a number of institutions to receive unprotected children in the event that family or foster care was not feasible, some may be of a poor standard but not all are, and the homes and centres run by international organisations seem alert to the challenges facing children and committed to make some difference"* [73[b].

16. In the absence of evidence to support a well-founded fear of persecution simply on the basis that he is a minor without family support, I find that the Appellant has failed to demonstrate that there is a real risk or reasonable degree of likelihood that he would face persecution for this reason on return to Sri Lanka. It was not argued that the Appellant was entitled to humanitarian protection and I find that he is not so entitled on the basis of the evidence before me.

17. I have in reaching my decision taken account of the fact that it is

necessary to consider the Appellant's best interests and in so doing I note that this is a primary consideration *cf.* ZH (Tanzania) [2011] UKSC 4 per Baroness Hale.

However, the appeal before me was brought under section 83(2) of the Nationality, Immigration & Asylum Act 2002. In ST (Child asylum seekers) Sri Lanka [2013] UKUT 00292(IAC), Mr Justice Blake at [23] - [25] drew a distinction between the welfare of a child in a section 82(1) appeal where the decision is to remove a child out of the jurisdiction and a section 83 appeal, which is confined to consideration of refugee or equivalent status and there is no duty to consider whether any reception arrangements on return are sufficiently well established to be in accordance with the child's best interests. Whilst the statutory appeals regime has changed in light of the Immigration Act 2014 since the decision in ST, I consider that this issue will need to be revisited by the Respondent at such time she seeks to make a decision to remove the Appellant, bearing in mind Lord Toulson's judgment in TN, MA & AA (Afghanistan) v Secretary of State for the Home Department [2015] UKSC 40 at 73 that: *"There would be force in the argument that it should not make a difference whether the appellant has by then turned 18, since that would not remove an obligation which had arisen under the Reception Directive and the effects of which were intended to last beyond their minority (as the OCC has submitted)."*

18. For the reasons set out at [14]-[16] above the appeal is dismissed.

Deputy Upper Tribunal Judge Chapman

20 October 2015