



**Upper Tribunal
(Immigration and Asylum Chamber)
AA/07246/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 11 February 2016**

**Determination
Promulgated
On 29 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ARCHER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

KA

Respondent

Representation:

For the Appellant: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer

For the Respondent: Ms Antonia Benfield, Counsel, instructed by Vasuki Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make the order because the appellant is an asylum seeker who might be at risk just by reason of being identified.

2. The appellant (hereafter the Secretary of State) appeals against the decision of the First-tier Tribunal (Judge Eban) allowing the respondent's appeal against a decision taken on 10 April 2015 to refuse to grant asylum to the respondent and to remove him from the UK.

Introduction

3. The respondent is a citizen of Sri Lanka born in 1983. He arrived in the UK in September 2010 as a dependent of his wife who had leave to enter as a Tier 4 student. She was granted further leave to remain until October 2015 but in September 2014 was served with an IS151A notice on the basis that she had relied on false English language certificates. The respondent claimed asylum on 23 October 2014.
4. The respondent claims that he had his own coconut business in Sri Lanka and started to support the LTTE in June 2007. He collected money from shops and provided accommodation for LTTE members. He was arrested at his home in January 2010. He was detained for two days and beaten. The authorities knew that he had supported the LTTE and he was photographed and fingerprinted. He was then taken to the CID office in Colombo where he was detained for two weeks. He then spent six months in Welikada prison before being released in August 2010 after his father helped to arrange an agent. He then stayed with the agent until he left for the UK in September 2010. Since arriving in the UK the authorities have been visiting his family home and asking about his whereabouts.
5. The Secretary of State accepted the respondent's identity and nationality but decided that his account of his LTTE involvement was vague and lacking reasonable detail as were the details of his release. There was no medical report to support his claimed injuries. There were fundamental inconsistencies in the psychiatric report. Dr Dhumad stated that the respondent spoke Tamil through a Tamil interpreter. There was no evidence that the authorities had visited the respondent's home in Sri Lanka.

The Appeal

6. The respondent appealed to the First-tier Tribunal and attended an oral hearing at Hatton Cross on 24 November 2015. He was represented by Mr Paramjorthy, Counsel. The First-tier Tribunal found that the respondent was regarded by the authorities as someone who wished, during the war, to undermine the unitary state. The respondent was a clear and consistent witness and the psychiatric evidence supported a diagnosis of PTSD arising from his experiences in Sri Lanka. The judge found that the respondent was Sinhalese, assisted the LTTE as claimed, was arrested and released on a bribe as claimed, was photographed and fingerprinted, left Sri Lanka with his wife with the assistance of an agent using his own passport and did not claim asylum on arrival in the UK as he relied upon what he had been told by the agent.
7. The judge found that the fact that the respondent was of Sinhalese ethnicity and assisted the LTTE during the war put him at risk

notwithstanding that he had not been involved in diaspora activities. That was because he had sympathised with and assisted the Tamil cause at a time when the government was at war with the LTTE even though there was no pressure on him to side with the LTTE. There was a real risk that the authorities would consider that he retained his formed political convictions and that he would pose a current threat to the integrity of Sri Lanka as a unitary state. There was a real risk that he would be detained for questioning on return.

The Appeal to the Upper Tribunal

8. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law in finding that the respondent would be regarded to have a significant role in post-conflict Tamil separatism as there was no evidence that he had undertaken activities of any type in the last four years. The authorities had access to sophisticated intelligence and the judge had failed to adequately explain why the government would want to detain him after he returned to Sri Lanka. The judge also failed to consider that the release after a bribe would not be recorded as an escape and was more likely to indicate that the authorities were not interested in the respondent.
9. Permission to appeal was granted by First-tier Tribunal Judge Davidge on 23 December 2015 on the basis that it was arguable that the judge's finding that the respondent would pose a current threat to the integrity of Sri Lanka even absent involvement in diaspora activity ran contrary to the country guidance in GJ and Others (post-civil war returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). The finding that the respondent wished during the war to undermine the unitary state was arguably insufficient to fall within the risk categories. It was also arguable that the judge had failed to consider that the authorities had concluded historically that they had no interest in the respondent.
10. In a rule 24 response dated 10 February 2016 the respondent submitted that the judge had given adequate reasons for the findings that were entirely open on the evidence and on correct application of the country guidance. The judge had made a clear finding that the respondent was released on a bribe and that was not inconsistent with risk on return.
11. Thus, the appeal came before me

Discussion

12. Ms Brocklesby-Weller relied upon the primary ground. There was only a very brief assessment of risk at paragraph 29 of the decision. That was completely contrary to GJ because it was wholly unclear why the appellant would be perceived to be a current threat to the integrity of the unitary state. Previous links are not enough and there was only a very historic LTTE association. The second ground (failure to consider release on a bribe as evidence of lack of interest from the authorities) was not pursued by Ms Brocklesby-Weller.

13. Ms Benfield submitted that the sole ground of challenge was on asylum grounds and nothing had been said about Article 3. It was not a pre-requisite that the respondent was involved in diaspora activities. The judge correctly relied upon paragraph 356(7)(a) of GJ. It was open to the judge to find that the respondent would be perceived as a risk to Sri Lanka. There was a history of voluntary support for the LTTE. The authorities had been to the respondent's home and he was likely to be perceived as traitorous. However, Ms Benfield conceded that there was no express finding that the Sri Lankan authorities were looking for the respondent. There were no adverse credibility findings so the issue could be presumed in the respondent's favour.
14. Ms Brocklesby-Weller observed that there was no finding at paragraph 24 of the decision that the authorities had been looking for the respondent nor was the issue mentioned at paragraph 29. Ms Benfield responded that it was not necessary for the judge to make every finding of fact. If a material error of law was found then the appeal could still be re-determined by the Upper Tribunal.
15. Ms Brocklesby-Weller submitted in response that the historic diaspora activity point was important because the decision centred on current risk from the Sri Lankan authorities. Recent interest in the respondent was not borne out in the reasons.
16. I find that Ms Brocklesby-Weller was correct not to pursue the second ground of appeal which asserted that the judge erred in law by failing to take into account and/or resolve conflicts of fact or opinion on material matters. That ground is based upon the failure of the judge to resolve whether the respondent was released on a bribe and if he was whether that indicated that he was of no adverse interest. The ground is clearly misconceived. In GJ, Professor Good gave evidence summarised at paragraph 113 (approved at paragraph 262) confirming that release through payment of a bribe was extremely common and release did not necessarily indicate a lack of further adverse interest. Mr Anton Puethanayagam, Attorney at Law, gave evidence at paragraph 146 (found at paragraph 275 to be useful and reliable) that it cannot be argued that only people of low interest to the authorities are able to secure release through a bribe. Detainees may be released following payment of a bribe even if they are of significant adverse interest to the authorities. I find that the judge did not err in law on this issue.
17. The first ground of appeal has more substance. At paragraph 29 of the decision, the judge found that the respondent was at risk because he was Sinhalese and assisted the LTTE during the war. The judge considered that there was a real risk that the authorities would consider that the respondent retained his political convictions and as a result would pose a current threat to the integrity of Sri Lanka as a single state. The difficulty with the judge's approach is that any Sri Lankan of Sinhalese ethnicity who supported the LTTE during the civil war would qualify. That is a category not recognised in GJ and the judge's approach runs contrary to the general recognition in GJ that the Sri Lankan authorities operate on the basis of

sophisticated intelligence rather than simply assessing threat on the basis of ethnicity. I find that the judge has failed to give sufficient reasons for finding that the respondent was at risk of detention on return.

18. However, the findings of fact are incomplete and there is no reason why the respondent should be deprived of the favourable findings of fact that appear at paragraphs 24-25 of the decision. In particular, there is no finding of fact in relation to the respondent's evidence that the authorities had been visiting the family home and asking about his whereabouts. If the Sri Lankan authorities have been actively seeking the respondent since he left Sri Lanka then that might be compelling evidence of risk of detention on return. I reject the submission that the issue can be presumed in the respondent's favour. Further findings of fact are required but there is no reason why those findings cannot be made by the previous judge.
19. Thus, the First-tier Tribunal's decision to allow the respondent's appeal on asylum grounds involved the making of an error of law and its decision cannot stand.

Decision

20. Both representatives invited me to consider a further hearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I preserve the findings of fact made at paragraphs 23-25 of the decision.
21. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined by First-tier Tribunal Judge Eban. The purpose of the further hearing is to determine the outstanding matters of fact and then to apply the country guidance to the respondent's asylum claim.

Signed



Judge Archer
Deputy Judge of the Upper Tribunal
February 2016

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