



**Upper Tribunal
(Immigration and Asylum Chamber)
AA/09974/2014**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 14 March 2016**

**Decision & Reasons Promulgated
On 16 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

S S
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms B. Jones, Counsel, instructed by the Tamil Welfare Association
For the Respondent: Mr D. Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Sri Lanka, born on 26 April 1985. His case came before me for an error of law hearing on 10 December 2015 and in a decision dated 7 January 2016, I found an error of law and adjourned the appeal to be heard before me at a resumed hearing, which took place on 14 March 2016. The decision of 7 January 2016 is appended.

Hearing

2. The Appellant was called to give evidence. An original letter and envelope with Sri Lankan stamps was handed up. He was briefly cross-examined by Mr Clarke, when he confirmed that when unknown people came to his mother's house they did not show any form of identity and that his family did not report this to the police but informed the Gramasekava. The Appellant confirmed that he did not know if there is an outstanding warrant for him in Sri Lanka but he was asked to sign on and did not and came to the United Kingdom. He was not re-examined.

3. In his submissions, Mr Clarke for the Home Office sought to rely upon the refusal letter. He acknowledged that there are a number of preserved findings regarding the Appellant's brother and sister being LTTE members; that the Appellant was involved when he was 11 years old; his evidence was that he was very much limited to bathing and feeding fighters and specific to working in LTTE camp; that he had no rank or LTTE name and an incredibly limited profile in 1996. He was arrested in 2005 and 2009 and the First tier Tribunal Judge accepted that the security forces came to his house in January 2010, which was post conflict, following his return to Sri Lanka to see his sick mother, having passed through the airport without difficulty.

4. Mr Clarke acknowledged that in light of the country guidance decision in GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) a person seeking to destabilize the government of Sri Lanka was a matter of perception that potentially put that person in a risk category. In respect of MP (Sri Lanka) [2014] EWCA Civ 829, he submitted that at [50] the Court noted the considerable vagueness of UNHCR guidelines and that Underhill LJ held that past activism does not, as such, constitute a risk factor for Tamils returning to Sri Lanka. The government's concern now is only with current or future threats to the integrity of Sri Lanka as a unitary state. He submitted that the Appellant does not come anywhere close to a risk category and that his diaspora activities had been found not to be credible. Whilst it has been found that the Appellant was detained and looked for in 2010, this was due to the agenda the government had at that time but this is no longer the focus of the government and it is quite clear from GJ at [323] that when looking at returned asylum seekers that the government of Sri Lanka have very good intelligence and they would know when the Appellant returns that he is not someone involved with separatism. The Appellant has provided more documents relating to alleged interest in him since 2010, but this is not consistent with the country guidance decision and the Appellant's profile. He submitted that the credibility of those assertions should be considered in the round along with the Appellant's *sur place* activity.

5. Mr Clarke submitted that PP (Sri Lanka) [2014] EWCA Civ 1828 does not assist the Appellant because it is expressly about Tamil women in

the conflict zone/Jaffna and was not to do with someone identified as a past activist. In respect of 1.3.8 of the CIG dated 28.8.14. in relation to Tamil separatism and the statement that government forces continue to detain suspected Tamil sympathisers, he submitted that the Appellant does not fall into this category and this evidence is simply a consideration of separatism. He also relied on the decision in DSG & Others (Afghan Sikhs: departure from CG) Afghanistan [2013] UKUT 00148 (IAC) which sets out guidance on departing from country guidance at [20] that unless expressly superseded or inconsistent country guidance is authoritative and at [26] that it must be followed unless “very strong grounds supported by cogent evidence are adduced”. He submitted that the CIG evidence was not enough to depart from GJ. He further submitted that if the Appellant was returned to Sri Lanka there was no evidence of a warrant or court order and he is not on a stop list cf. [339] of GJ. The Appellant has not instructed lawyers to see if he is of interest. His mother was visited by persons unknown but this was not reported to the police. A copy of his passport is in the Respondent’s bundle and it expires in 2019 so he would return on his own passport and would be able to walk through the airport even if on stop list cf GJ at [323]. The Appellant is not reasonably likely to be detained and is not going to be considered as an activist/separatist. Even if he is on a watch list he is not in any danger. He invited me to dismiss the appeal.

6. In her submissions, Ms Jones relied upon her skeleton argument. She stated that she was not arguing that the Tribunal needs to depart from GJ but what she was saying is that this case fits within sub-category 356(7)(a) of GJ. What it says is that individuals who are or perceived to be a threat to the integrity of Sri Lanka as a single state. It is all about the government’s perception but also about the LTTE. Although they may be a spent force militarily they are not out of the minds of the government of Sri Lanka. The 2014 CIG report demonstrates this in that the government of Sri Lanka continues to be obsessively worried about the resurgence of the LTTE. This is why the government has still declined to suspend the Terrorism Act and continues to hold people under anti-terrorism powers. In this situation she was not arguing there is a separate risk factor of people going back to the north or bail jumpers, but as simply put in MP, the factors that may indicate whether or not one falls within the risk category of GJ. This was how it was put on behalf of the Home Office at [11] where the primary submission is that there is no inconsistency in the guidelines and is consistent with them; it is not adding to risk categories and it is the case that the Tribunal did find that the risk categories were more stringent than UNHCR guidelines cf Underhill LJ’s judgment in last paragraph of MP. There is a demonstrated risk in this case, particularly about the fact the last time the Appellant returned to Sri Lanka; it is beyond the watch list that he should be allowed to return to home area and be monitored – if it is considered he would be at risk he would be at risk. The authorities did not wait for him to return to Jaffna. They went to his last known address in Colombo where he stayed with his aunt straightaway. There is no reason to believe they would have been

attending at her home other than to pick him up for interrogation. Nothing has changed in terms of the country evidence. By January 2010 post conflict arrests are intelligence lead.

7. Ms Jones submitted that the updating letter from the Appellant's mother was mildly corroborative. She submitted that if I was concerned that the Appellant's case is outside risk category (a) she would say the DSG test is met: the USSD report 2014 and OISL [of 16.9.15] and expert report all post date GJ. If 356(7)(a) is read as saying only diaspora activity is included that is too narrow. GJ says diaspora activism places a person at risk but he could still be at risk on basis of activities in Sri Lanka after the end of the conflict. She asked me to allow the appeal.

Findings

8. The First tier Tribunal Judge who heard the Appellant's appeal accepted material parts of his claim at [46] viz:

- (i) the Appellant's brother and sister were previously LTTE members;
- (ii) the Appellant became involved with the LTTE for about 1 and a half months when he was 11 years of age and helped care for the wounded but received no military training;
- (iii) he was arrested in 2005 on suspicion of being an LTTE member, detained for 5-6 hours and beaten;
- (iv) he went to Malaysia for 2 years, returning on 2 April 2009. On 5 April 2009, he was arrested, detained, tortured and interrogated about his time in Malaysia. He was released on 28 April 2009 subject to residence and reporting conditions;
- (v) he left Sri Lanka for the United Kingdom on 10 October 2009 but returned to Sri Lanka on 20 January 2010 to see his mother who was unwell and was able to pass through the airport without difficulty, however, security forces called at his uncle's house in Colombo, where he had last resided, within 3-4 hours of arrival but his uncle said he was abroad so they left.

9. The Judge further found at [47] that the Appellant had no significant LTTE involvement after the age of 11; he was not on a stop list nor the subject of an arrest warrant [48]; but he is on a watch list, possibly as the result of a record of his past detentions [49]. The First tier Tribunal Judge did not accept as credible the Appellant's evidence as to his *sur place* activities [50]-[51].

10. These findings were preserved by me as part of the error of law decision. The issue for me to now decide is whether the Appellant would be at risk of persecution or treatment in breach of Article 3 of ECHR on return to Sri Lanka, in light of the preserved findings of fact and the Appellant's evidence at the hearing on 14 March 2016, which was very brief and essentially confined to his statement of 11 March 2016, in which he states that his family have informed him that unknown people continue to visit the family home in Jaffna, asking

about him. The Appellant also adduced the original of a letter from his mother dated 10 February 2016 in which she informs him that the same men who came to the family home in Jaffna in December 2015 returned in February 2016, to enquire about him, in terms of his whereabouts and what he is doing. They were angry because he was not there and broke the computer screen and the telephone. This evidence was not subject to serious challenge by Mr Clarke except as to submit that these visits have not been reported to the police. In cross-examination, the Appellant stated that they have not, however, they have been reported to the Gramasekava. I find that the Appellant's evidence, that persons unknown in civilian clothing have paid at least two visits to the family home in Jaffna seeking the Appellant, is reasonably likely to be true, particularly given that it has already been accepted that the authorities called at his uncle's house in Colombo in January 2010 enquiring as to his whereabouts within hours of his return to Sri Lanka. The issue is whether, considered in the round, there is a serious possibility or reasonable degree of likelihood that the Appellant would be subject to persecution on account of the authorities' perception of him as a former LTTE member and from a family where his brother and sister were also formerly LTTE members.

11. In GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) the UT found at [356] that:

“(7) The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, are:

(a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, 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...

The First tier Tribunal Judge rejected the Appellant's account of his activities in the diaspora, therefore, the issue is whether the Sri Lankan authorities would perceive him to be a threat to the integrity of Sri Lanka as a single state because he is perceived to have a significant role in relation to the renewal of hostilities within Sri Lanka.

12. I note that the civil war ended in May 2009 and therefore, the Appellant is an individual who has attracted the attention of the authorities after the cessation of hostilities. This attention has taken the form of enquiries by the authorities at his uncle's home in Colombo within hours of his return to Sri Lanka from the United Kingdom on 20 January 2010 and ongoing enquiries at his family home in Jaffna, most recently in February 2016. I also bear in mind the following:

- (i) adverse attention towards Tamils has been intelligence-led since the end of the civil war: GJ at [310], [354];
- (ii) the Appellant has been found to be on a watch list, which the Upper

Tribunal in GJ found meant that he will be monitored by security services after his return [356(9)] and if considered to be a destabilisation risk, may be picked up from his home area [309]; (iii) it was accepted by the Respondent that, due to the prevalence of bribery and corruption, having left Sri Lanka without difficulty was not probative of a lack of adverse interest in an individual: GJ at [170];

13. An expert report of Dr Nadarajah dated 8 March 2016 has been submitted, which asserts that:

- (i) human rights abuses, surveillance and a heavy militarised presence in Tamil areas continues: [14]-[23];
- (ii) the Prevention of Terrorism Act remains in force and prolonged detention of hundreds of people held since the end of the civil war on suspicion of LTTE connections continues: [15]-[37];
- (iii) the risk of torture and death in custody continues and is particularly prevalent in the interrogation of suspected LTTE cadres, members and supporters: [38]-[42];
- (iv) harassment, intimidation and arrests of actual or suspected former LTTE members and supporters and their families, including returnees continues: [43]-[53];
- (v) the authorities remain convinced that the revival of the LTTE is a genuine security threat in the country and “*remain committed to a general mobilisation against potential LTTE resurgence and Tamil separatism*”: [60];
- (vi) his past history, particularly his past arrests based on suspicion of involvement with the LTTE in Malaysia and the UK, his violation of reporting conditions in 2009 indicate that he is of adverse interest to the authorities and were he to be forcibly returned to Sri Lanka, would place him at risk of arrest and ill-treatment or worse in custody: [74].

14. I find that the opinions of the expert are consistent with the general background evidence, in particular, the Home Office Country Information Guidance: “*Sri Lanka: Tamil Separatism*” August 2014 and the USSD report 2014. The former, relying on a Swiss Refugee Council report of 15 November 2012, records at 2.2.3: “*Although the LTTE may have been defeated and there is not the slightest sign that this organisation has survived, the State machine of Sri Lanka is extremely paranoid and is trying to contain any resurgence of this group, of the germination of tendencies of independence alongside the Tamils ... According to several reports, people who return from abroad are often suspected of maintaining links with the LTTE and are particularly threatened.*”

15. I have also considered the post GJ caselaw as invited so to do by both representatives. In MP (Sri Lanka) [2014] EWCA Civ 829, the Court of Appeal considered an appeal against the findings and conclusions in GJ (whose appeal had been allowed). I note that at [43] in allowing the appeal of NT and remitting it back to the UT, Maurice Kay LJ expressly acknowledged that paragraph 356(7)(a) embraces the possibility of an applicant who has or is perceived as having a “*significant role in ... a*

renewal of hostilities within Sri Lanka" absent some diaspora activity, even though such activity will usually be the touchstone. My attention was also drawn to the judgment of Lord Justice Underhill at [50] where he held *inter alia*:

"... I do not read para. 356(7)(a) of its determination as prescribing that diaspora activism is the only basis on which a returning Tamil might be regarded as posing such a threat and thus of being at risk on return. Even apart from cases falling under heads (b)-(d) in para. 356(7) there may, though untypically, be other cases (of which NT may be an example) where the evidence shows particular grounds for concluding that the Government might regard the applicant as posing a current threat to the integrity of Sri Lanka as a single state even in the absence of evidence that he or she has been involved in diaspora activism."

Thus it is clear that whilst a record of past LTTE activism does not as such constitute a risk factor for returnees, such a person may be at current risk if perceived or regarded as posing a current threat to the integrity of Sri Lanka as a single state and I accept Ms Jones' submission in this respect.

16. In respect of PP (Sri Lanka) [2014] EWCA Civ 1828, the key finding is at [35] where Lady Justice Arden held that: *"The high level of militarisation may be such as to put vulnerable individuals such as members of household headed by women at risk."* However, I agree with Mr Clarke's submission that this judgment is not pertinent to the particular facts of this Appellant's case because PP was expressly concerned with the position of Tamil women (who have suffered sexual violence).

17. Both parties also addressed me in respect of the decision of the Upper Tribunal in DSG & Others (Afghan Sikhs: departure from CG) Afghanistan [2013] UKUT 00148 (IAC) as to the circumstances in which a Judge may depart from country guidance. At [21] the Upper Tribunal cited the Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011 No 2, at paragraph 11:

"If there is credible fresh evidence relevant to the issue that has not been considered in the country guidance case or, if a subsequent case includes further issues that have not been considered in the CG case, the judge will reach the appropriate conclusion on the evidence, taking into account the conclusion in the CG case so far as it remains relevant."

And at paragraph 12:

"Where country guidance has become outdated by reason of developments in the country in question, it is anticipated that a judge of the First-tier Tribunal will have such credible fresh evidence as

envisaged in paragraph 11 above."

18. However, I find that, whilst much of the evidence relied upon by the Appellant postdates the CG decision in GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) it is all of a part with it, in that it shows that the Sri Lankan authorities continue to commit human rights abuses against those it suspects may be involved in a resurgence of the LTTE and Tamil separatism. The background and expert evidence makes clear that the risk of persecution or treatment in breach of their human rights continues for such individuals.

19. Therefore, there is no need to depart from the CG decision of GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) on the particular facts of this case. I am satisfied on the basis of the findings of fact that there is a reasonable degree of likelihood or a serious possibility that the Appellant would be of adverse interest to the Sri Lankan authorities if he were to be returned.

20. I allow the appeal on the basis that the Appellant has a well-founded fear of persecution in Sri Lanka on account of perceived political opinion. In the alternative, I allow the appeal on the basis that there is a real risk that he would be subjected to treatment contrary to Article 3 of ECHR, in light of the current country information and evidence.

Deputy Upper Tribunal Judge Chapman

9 May 2016