



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/08978/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated
On Thursday 12 October
2017**

On Wednesday 4 October 2017

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M K

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer

For the Respondent: Mr N Paramjorthy, Counsel instructed by S Satha & Co

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Although an anonymity direction was not made by the First-tier Tribunal, as a protection claim, it is appropriate that a direction is made. Unless and until a tribunal or court directs otherwise, the Respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Respondent appeals against a decision of First-Tier Tribunal Judge Metzger promulgated on 13 March 2017 (“the Decision”) allowing the Appellant’s appeal against the Secretary of State’s decision dated 14 August 2016 refusing his protection claim.
2. The Appellant is a national of Sri Lanka. He arrived in the UK in February 2016 and claimed asylum on 22 February. His protection claim is based on the following factors. He claims that he is a Muslim from Jaffna. He says that his uncle was in charge of the intelligence division in Killinochi and his aunt was a member of the intelligence division of the LTTE in Vattakachi region. The Appellant says that he helped his uncle and aunt by reporting on the army’s location. He did this between December 2008 and January 2009 for two months when he last had contact with his uncle and aunt. He says that his uncle surrendered to the authorities in the last stages of the civil war and the Appellant has not seen him since. The Appellant says that he continued to report on army locations to men in his village until April 2009.
3. The Appellant does not claim to have been a member of the LTTE. He says though that he received compulsory training by them for three months. He also says that he made a complaint to the Human Rights Commission about the disappearance of his uncle and aunt.
4. The Appellant claims to have been arrested on 16 April 2009 and was detained for ten days during which time he says he was beaten, tortured and questioned about the whereabouts of his uncle and aunt. He says he was released on reporting conditions.
5. The Appellant says he then studied at Jaffna Hindu College who pay respects to LTTE heroes. He says that he attended a demonstration on 21 June 2014 against the actions of the Sinhalese people against the Muslim people. He says that he was detained thereafter by CID who he says suspected him of LTTE involvement due to his previous actions supporting his uncle and aunt and suspected him of continued support due to attendance at this demonstration.
6. The Appellant says that he was again detained, this time for six months, during which time he was tortured and sexually abused. He was again questioned about his uncle and aunt and his other activities. The Appellant says that he admitted to carrying out these activities because he was paid and committed to Tamil nationalism. He says he was released on payment of a bribe. He was never charged.
7. The Appellant also claims that he has assisted the Federal Party by delivering chairs to various locations and helping to conduct rallies.
8. The Respondent did not believe the Appellant’s claim. She raised various issues about the credibility of that claim, including, in particular, the (lack of) plausibility that the authorities would question

the Appellant about his uncle and aunt when, on his case, his uncle had already handed himself over to the authorities and the (lack of) plausibility that the authorities would take an interest in a demonstration that was pro-Muslim but not pro-Tamil independence. His claim to have supported the Federal Party was also disbelieved due to his inability to answer questions about that party.

9. The Appellant did not give evidence at the hearing of his appeal as he produced medical evidence, consistent with his claims to have been ill-treated in 2009 and 2014, which also stated that he was unable to give evidence due to his mental health condition. A further report confirms that the scars which the Appellant bears are “typical” of or “consistent” with the causes reported by the Appellant.
10. In support of his claim, the Appellant produced also a letter from his mother, corroborating his version of events and two letters from MPs, one attesting to his problems arising from the demonstration and the other confirming that the Appellant reported the disappearance of his uncle and that the Appellant remains of interest to the Sri Lankan authorities.
11. The Judge allowed the appeal on the basis that the Respondent’s credibility findings were based on lack of plausibility rather than credibility in the sense of inconsistencies in the Appellant’s account. The Judge noted that the Appellant had not given oral evidence and recognised the difficulties therefore in testing his evidence. Based on the other evidence though and that the Appellant had not provided any inconsistent account, the Judge accepted the claim as credible. He also considered the claim as against the country guidance and noted that this is an unusual case on its facts. However, since the categories in GJ were not said to be exhaustive and having regard also to what was said by the Court of Appeal in “NP”, the Judge found the claim to be made out to the lower standard of proof.
12. The Respondent’s grounds repeat much of what is said in the decision letter as to her reasons for not accepting the claim. She also asserts at [9] of the grounds that the Judge failed to have regard to the country guidance. Mr Jarvis though did not seek in his oral submissions to rely on the grounds other than what is said at [10] as follows:-

“It is further submitted that the judge appears to rely on the medical/psychiatric evidence as supporting the appeal and the letter from the two MPs and the appellant’s mother but gives the reader of the determination no clue what was in the reports/letters that specifically is relied on by the judge and that is material as the evidence is that the appellant was released by the authorities without charge in late 2014 and remained in Sri Lanka for 14 months before coming to the UK a fact which does not appear in the determination at all.”
13. Permission was granted by Tribunal Judge Doyle on 25 July 2017. Having summarised the grounds and the way in which the Judge

reached the Decision, the operative part of the grant appears as follows:-

“... ”

[4] The Judge’s findings are set out between [13] and [19] of the decision. At [18] the Judge declares that he does not need to consider the facts of this case against the country guidance given in the case of GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). In AF (2004) UKIAT 00284 the Tribunal said that failure by Adjudicators to follow country guidance cases was an error of law.

[5] At [14] & [15] the Judge places significant weight on the medical and psychiatric evidence, but the Judge does not analyse the reports, nor does he explain why he places such weight on them. The Judge’s findings of fact are brief. It is arguable that the Judge’s fact finding exercise is inadequate. The grounds arguably identify material errors of law. Permission to appeal is granted.”

14. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

Decision and Reasons

15. I can deal briefly with what is said at [4] of the permission grant. This is based on [9] of the Respondent’s grounds on which Mr Jarvis did not rely. He was right not to do so. The Judge deals with the country guidance at [16] to [17] of the Decision. First, the Judge finds that the Appellant might, arguably, come within the categories in GJ because he is someone perceived to be a threat to the integrity of the Sri Lankan State. The Judge clearly recognised at [15] that the demonstration in 2014 was in support of Muslims and not Tamils per se but found (and was entitled to find) that the demonstration was nonetheless about separatism and that the authorities may have perceived that as a pro-LTTE demonstration particularly since it took place in a Tamil dominated area.

16. Second, the Judge does not claim to be entitled to ignore GJ as is suggested by the permission grant. Instead, he points to the Court of Appeal’s judgment in MP (Sri Lanka) and NT (Sri Lanka) v Secretary of State for the Home Department [2014] EWCA Civ 829 (wrongly referred to in the Decision as NP), in particular what is said by Underhill LJ at [50] which is as follows:-

“...The clear message of the Upper Tribunal’s guidance is that a record of past LTTE activism does not as such constitute a risk factor for Tamils returning to Sri Lanka, because the Government’s concern is now only with current or future threats to integrity of Sri Lanka as a unitary state; and that that is so even if the returnee’s past links with the LTTE were of the kind characterised by UNHCR as “more elaborate”. I respectfully agree with the Vice-President that that is a conclusion which it was entitled to reach. It is also clear that the Tribunal believed that “diaspora activism”, actual or perceived, is the principal basis on which the Government of Sri Lanka is likely to treat returning Tamils as posing a current or future threat; and I agree that that too was a conclusion which

it was entitled to reach. But I do not read para. 356(7)(a) of its determination as prescribing that diaspora activism as 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.”

17. The Judge was therefore entitled to reach the view that this was one of those untypical cases and therefore did not run counter to country guidance and consideration of that country guidance in other cases.
18. I turn then to the basis on which the Respondent put her case, via Mr Jarvis, at the hearing before me. He submitted that the errors appear at [13] and [14] of the Decision which read as follows:-

“[13] The parties agreed that the reasons for refusal letter dealing specifically with credibility at Paragraphs 32-41 were essentially more about plausibility than strictly credibility. There was the issue as to whether the Appellant would assist his aunt and uncle and continue to advise the LTTE following their disappearance was challenged and it was noted that in relation to the demonstration in June 2014, that was essentially a demonstration in support of Muslims and not in support of the LTTE. Essentially, the Respondent did not accept the Appellant was involved with the LTTE.

[14] Having considered the medical and psychiatric evidence and taking into account the letters from the Appellant’s mother and the two MPs, noting that it was always difficult in relation to disputed issues on credibility (although possibly less so in relation to plausibility) when the Appellant does not give evidence or even provide a witness statement, I find that the Appellant has established to the relevant standard that he is credible in relation to the background of his claim. The date of the initial arrest was 16.04.09, about a month before the end of the war and the guidance dated August 2016 in relation to Tamil separatism supports the contention that the Sri Lankan authorities are concerned about persons falsely accused of working to re-start the LTTE or bringing the country into disrepute (at Paragraph 6.2.8). There are ongoing arrests detailed in the guidance in the period 2014 to 2016 of Tamils connected and suspected of links to the LTTE”

19. I can deal shortly with the complaint made at [10] of the Respondent’s grounds as pleaded that the Judge has failed to say what it is about the mother’s letter, the letters from the MPs and the medical evidence which is relied upon to support the Appellant’s case. The content of the Appellant’s mother’s letter is set out at [7] of the Decision. Although the MPs’ letters are not cited in any detail, they are referred to at [8] of the Decision as “supportive” and even a cursory glance at their content would tell the reader why the Judge concluded that they were in support of the Appellant’s case. Dr Martin’s report is

set out in short summary at [9] of the Decision and, as there recorded, confirmed that the scarring was typical of the causation alleged. The report in relation to the Appellant's mental health is summarised at [10] of the Decision. The point is again made that it concludes that the Appellant's clinical presentation is consistent with what he says happened to him. Whilst the factual findings may be short, the Respondent has failed to show that the Judge does not explain how the other evidence supports the Appellant's case.

20. The point made by Mr Jarvis is more subtle. He says that what the Judge has failed to do is to consider whether the Appellant is credible. That required consideration whether the claim is a consistent one which is consistent with the background evidence. As he points out, even criticisms based on lack of plausibility are points to be considered in relation to credibility.
21. Further and in any event, Mr Jarvis pointed to [33] of the Respondent's decision which took issue with the Appellant's claim to be of interest to the authorities because of their interest in the Appellant's uncle and aunt when, on the Appellant's own case, his uncle had already surrendered to the authorities and had on his case disappeared (and was therefore presumably still in detention). Whilst Mr Jarvis accepted that many of the points raised in the Respondent's decision were about (lack of) plausibility of the claim, he said that this element goes further. The claim that the authorities are interested in the Appellant because of his uncle and aunt is inconsistent with his claim that the authorities already have his uncle in their control. He said that this point was not sufficiently dealt with at [13] of the Decision.
22. I accept that the Judge has not referred directly to this part of the Respondent's decision at [13] and [14] of the Decision or to the apparent tension between the uncle having surrendered and the authorities still asking about him, the general point made by Mr Jarvis is answered, as Mr Paramjorthy submitted, at [15] of the Decision. Having recorded the medical evidence and found that to be consistent with the claim which the Judge had indicated he was minded to accept, he continued as follows:-

"...The fact that [the Appellant] claims to have been arrested in 2014 as being a Muslim as opposed to because he was Tamil in my opinion can be disregarded as essentially it was a demonstration about separatism and was anti-government and the authorities may well have perceived that as being in favour of insurrection and in support of the LTTE in a Tamil dominated area. I find that the Appellant has established to the lower standard that he is continuing interest to the authorities by reason of his family profile concerning his uncle and aunt which resulted in his arrest and detention in both 2009 and 2014 which although post-conflict was consistent with the guidance and objective evidence of arrest and detention that they themselves or their family members being connected to the LTTE."

23. Thus, the Judge found that the original interest in the Appellant arose from his association with his uncle and aunt and interest in them but, that interest having been excited in 2009, the attendance at the demonstration is found by the Judge to be what triggered the arrest and detention in 2014. That is consistent with the reasons given by the Appellant at Q95 in interview that the arrest and detention was triggered by his previous problems with CID and connected with the demonstration as giving rise to a perception of ongoing support for the LTTE.
24. I note incidentally that the Appellant's case in relation to his uncle and aunt is that he has not had any contact with them since January 2009 but that he understands that his uncle surrendered "during the final stages of the war". He does not specify a date. It is therefore conceivable that, at the time that he was arrested in April 2009, his uncle had not yet surrendered (the conflict did not end until May 2009). That is not a reason given by the Judge but might conceivably explain the lack of plausibility of the Appellant's account on the Respondent's case.
25. Be that as it may, even if the Judge did not explain why he thought the authorities might be interested in the Appellant because of his uncle when on the Appellant's case, the uncle had surrendered, that is immaterial. It is the 2014 arrest and detention which is and must be the focus of the claimed risk, being the longer and more serious of the two detentions claimed and also coming as it did some years after the end of the conflict. On the basis of the Judge's reasoning at [15] of the Decision, his finding that this detention did occur as claimed and for the reasons given was open to him and he has provided adequate reasons for his finding. No issue is taken by the Respondent that the Appellant did have the association which he claimed with his uncle and aunt or that they assisted the LTTE as claimed.
26. Insofar as the Respondent's grounds as pleaded at [10] criticise the Judge's failure to take issue with why the Appellant would remain in Sri Lanka after his release from the 2014 detention for a further fourteen months, there is no error. This is not a point put to the Appellant at interview nor raised by the Respondent in her decision letter. Further, the Appellant does not actually give a date for when in 2014 he was detained and he was detained for six months. I accept though that he must have remained in Sri Lanka for a number of months after he was released, not least because he says he last supported the Federal Party in August 2015. However, the Respondent did not take issue with this and, since there was no cross-examination of the Appellant for the reasons I have already given, it was not a point which the Judge should have raised of his own volition.
27. For the above reasons, I am satisfied that the Decision does not contain a material error of law. I therefore uphold the Decision.

DECISION

I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge Metzger promulgated on 13 March 2017 with the consequence that the Appellant's appeal stands allowed

Signed

Dated: 11 October 2017

A handwritten signature in black ink, appearing to read 'E. Smith', written in a cursive style.

Upper Tribunal Judge Smith