



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02572/2017

THE IMMIGRATION ACTS

Heard at Field House
On 7 August 2018

Decision & Reasons Promulgated
On 24 August 2018

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SR

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms S Iqbal, Counsel, instructed by Jein Solicitors

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

Unless and until a Tribunal or court directs otherwise, SR is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. This is an appeal against the decision issued on 19 April 2018 of First-tier Tribunal Judge Frankish which allowed the appellant's appeal on Article 3 grounds.

2. For the purposes of this decision I refer to the Secretary of State for the Home Department as the respondent and to SR as the appellant, reflecting their positions before the First-tier Tribunal.
3. The appellant was born in Sri Lanka in 1989. He came to the UK in September 2004 and claimed asylum. On 4 October 2004 his asylum claim was refused but he was granted discretionary leave to remain for a year as he was still a minor. On 5 September 2005 he was granted leave to remain until 6 August 2010.
4. The appellant has an extensive criminal history. I do not in any way seek to undermine the seriousness of that history by merely referring to it as being set out in paragraph 3 of the decision of First-tier Tribunal Judge Frankish and considered further in paragraphs 5 - 7 and 29-37 of that determination. In addition to his lengthy history of convictions, the appellant has been subject to Operation Nexus as he was considered to be a harmful individual without British citizenship, in particular his involvement with a criminal Tamil gang.
5. The appellant's most serious conviction was one on 4 April 2012 for violent disorder for which he was sentenced to two years and nine months' imprisonment. The respondent quite rightly sought to deport him in light of his criminal record. A decision to deport him was made on 8 August 2013. His appeal against the deportation decision was dismissed by the First-tier Tribunal in a decision issued on 21 November 2013. At that time his appeal was brought on the basis of a relationship with a German national and his length of residence in the UK and argued on Article 8 ECHR grounds. The appeal was refused with generally negative findings against the appellant. He became appeal rights exhausted on 14 February 2014.
6. On 16 June 2014 the appellant submitted a claim for asylum. The respondent refused that claim, applying Section 72 of the Nationality and Immigration Act 2002 as the appellant had been convicted of a particularly serious crime and was assessed as being a danger to the community. The respondent also initially sought to apply a certificate under Section 96 of the Nationality, Immigration and Asylum Act 2002 where the asylum claim could have been raised as part of the earlier appeal but, following judicial review proceedings, this aspect of the refusal was set aside and this statutory appeal ensued.
7. Judge Frankish found that the s.72 certificate was applied correctly and that the appellant was excluded from the protection of the Refugee Convention and humanitarian protection as a result. The appellant did not cross-appeal that finding and that aspect of the appeal is no longer in issue.
8. It remains undisputed that the s.72 certificate did not prevent the appellant from seeking to rely on a protection claim under Article 3 ECHR. His Article 3 ECHR claim before Judge Frankish comprised two elements. The first was that his brother had been a significant member of the LTTE and this had led to the appellant being detained in Sri Lanka in 2004 whilst a minor and very seriously mistreated. He provided three psychiatric/psychology reports addressing, amongst other matters, why his mental health problems had prevented him from putting forward this part

of his claim earlier. The appellant also adduced evidence of poor legal advice having also led to the Sri Lanka based protection claim being raised late.

9. The second aspect of the protection claim arose from *sur place* activities. The appellant maintained that he had become involved with the Tamil cause after coming to the UK, first attending Heroes' Day on 27 November 2005 and doing so every year thereafter. He had attended demonstrations outside Parliament daily for a period in 2008/2009. He had volunteered for work with the Transitional Government of Tamil Eelam (TGTE), attending committee meetings and fundraising events. He distributed leaflets and posters and collected signatures to petitions for the organisation. As set out in paragraph 17 of the First-tier Tribunal decision, he was interviewed on Sky News in 2015 in a piece about illegal immigrants and during that interview criticised the Sri Lankan government for serious mistreatment of him and his family. He provided evidence of that interview being broadcast and remaining accessible on the internet as of the date of the hearing before the First-tier Tribunal. The appellant was also shown in another video on the internet to be attending a high-profile meeting of the British Tamil Forum which was attended by Tony Blair. A TGTE MP in exile had provided a letter confirming that he was a co-ordinator and fundraiser for the organisation. He provided evidence, including photographs, of being a member of a campaign group aiming to stop arms sales to Sri Lanka which included organising meetings with UK MPs.
10. Of particular significance, during Independence Day demonstrations outside the Sri Lankan High Commission on 4 February 2018 the appellant was approached by the Sri Lankan military attaché, Brigadier Fernando, who made a throat slitting gesture towards him. Brigadier Fernando had a significant profile in the defeat of the LTTE and in opposing Tamil separatism. Photographs of this incident were provided. The matter was reported to the police and in the absence of a response from them a private prosecution had been brought by the appellant against Brigadier Fernando in Westminster Magistrates' Court. Brigadier Fernando was suspended by the Sri Lankan authorities following the release of a video of the incident, a report of which also appeared in the Colombo Telegraph. Approaches were made to the UK Foreign Secretary to have the Brigadier declared *persona non grata*, the appellant's MP also lobbying the Foreign Office to expel him.
11. Mr Tufan identified at the hearing that the determinative issue in this case was whether the findings of the First-tier Tribunal on the Article 3 *sur place* claim were in error. First-tier Tribunal Judge Frankish addressed the *sur place* claim in paragraph 42 of the decision. The judge noted that the *sur place* activities had escalated in recent years and took into account the proposition that this might have been out of self-interest. A correct self-direction was made that this did not necessarily preclude those activities from making out a valid claim for protection; see Danian v SSHD [2002] Imm AR96, YB (Eritrea) v SSHD [2008] EWCA Civ 360, SS (Iran) v SSHD [2008] EWCA Civ 310 and BA (Demonstrators in Britain - risk on return) Iran CG [2011] UKUT 36 (IAC).
12. The First-Tier Tribunal went on in paragraph 42 to scrutinise the *sur place* activity carefully. The judge concluded that the appellant's political activities were not self-

serving, in light of the appellant becoming active soon after coming to the UK and maintaining his activities consistently thereafter, becoming relatively prominent within the Tamil opposition diaspora. The judge then assessed this *sur place* profile against the Country Guidance case of GJ and Others (post-civil war returnees) CG [2013] UKUT 00319 (IAC). The head note of GJ sets out:

“(3) The government’s present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state enshrined in Amendment 6(1) to the Sri Lankan Constitution in 1983, which prohibits the ‘violation of territorial integrity’ of Sri Lanka. Its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka.”

and

“(4) If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.”

and


“(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.”

13. Judge Frankish concluded that the appellant was “a diaspora activist of sufficient prominence to have come to the attention of the authorities”. Given the relatively high profile of the appellant’s activities in the UK, culminating with the media coverage in the UK and Sri Lanka of the incident involving Brigadier Fernando, an incident the authorities in Sri Lanka were clearly aware of given that the Brigadier was suspended from his position as military attaché shortly afterwards, it is not arguable that the First-tier Tribunal took an irrational or otherwise unlawful approach in concluding that the appellant was of sufficient prominence to be of adverse interest on return to Sri Lanka and had made out his Article 3 ECHR protection claim. This is an unpalatable conclusion given the appellant’s criminal history but Article 3 is a non-derogable right and the duty to provide protection not diluted by his serious and very concerning criminality.
14. For these reasons, the decision of the First-Tier Tribunal does not disclose an error on a point of law.

Decision

15. The decision of the First-tier Tribunal does not disclose a material error on a point of law and shall stand.

Signed: 

Date: 16 August 2018

Upper Tribunal Judge Pitt