



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/07014/2017

THE IMMIGRATION ACTS

Heard at Glasgow
on 5 July and 28 September 2018

Determination issued
on 5 October 2018

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MOHAMMED [F]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr E MacKay, of McGlashan MacKay, Solicitors
For the Respondent: On 5 July, Mr A Mullen, and on 28 September Mr A Govan, Senior Home Office Presenting Officers

DETERMINATION

1. This determination is to be read with:
 - (i) The respondent's decision dated 27 June 2017, refusing the appellant's claim.
 - (ii) The appellant's grounds of appeal to the First-tier Tribunal, filed on 25 July 2017.

- (iii) The decision of FtT Judge Handley, dismissing the appeal, promulgated on 6 October 2017.
 - (iv) The appellant's grounds of appeal to the UT, stated in the application for permission to appeal filed with the FtT on 20 October 2017.
 - (v) The decision of Designated Judge Woodcraft, dated 7 December 2017, refusing permission.
 - (vi) The grounds of appeal (substantially the same) stated in the application for permission filed with the UT on 23 January 2018.
 - (vii) The decision of UT Judge Finch dated 5 March 2018, granting permission.
 - (viii) The respondent's rule 24 response, dated 28 March 2018, to the grant of permission.
2. The substance of my decision dated 5 and issued on 11 July on error of law is repeated herein.
 3. The decision of the respondent, although dated 27 June 2017, was issued under cover of a letter dated 13 July and stamped as received by the appellant's solicitors on 18 July. The appeal was filed on 25 July. On 26 July the FtT issued notice of a pre-hearing review on 9 and a hearing 23 August.
 4. By letter faxed to the FtT on 15 August the appellant's solicitors sought an adjournment because an expert report had been instructed on risk to the appellant in Sri Lanka arising from his *sur place* activities in the UK.
 5. The FtT refused that application on 16 August, stating, "We see no need for an expert witness on the issue stated in the correspondence".
 6. The application for adjournment was renewed at the hearing. Paragraph 20 of the judge's decision notes the previous refusal, and goes on, "In the absence of any other information or evidence I did not consider it was necessary or appropriate to adjourn the hearing for production of an expert report".
 7. In addition to the authority cited in the grounds, Mr MacKay founded on *Nwaigwe* [2014] UKUT 00418 for the test, "Was there any deprivation of the right to a fair hearing?" He referred to paragraphs 32, 33 and 37 of the decision where the judge refers to "little or no evidence", "little evidence", and "no credible reports" of the risk alleged. He submitted that these comments went precisely to the matters the appellant sought to cover, if granted an adjournment. He said that on the above timetable, there had been no delay in identifying an expert, applying for legal aid, and instructing a report. The expert had been advised not to proceed further once it became clear his report could not be produced to the FtT. Instructions had been renewed once permission to appeal to the UT was granted. The report had been

received only yesterday. It contained material which might significantly have advanced the appellant's case.

8. Mr Mullen did not adopt the line of the FtT. He did not argue that an expert could add nothing useful. He pointed to the longer timescale, in that this is a repeat application by way of a fresh claim, the appellant having been in the UK since 2004. He said that issues in the refusal letter could not have come as a surprise; the time to advance materials had been with the fresh submissions; and that overall, the appellant had ample opportunity to prepare.
9. Mr Mackay in reply said that materials advanced with fresh submissions had been thought at the time likely to be sufficient, and that the appellant could not reasonably have justified the expense of an expert until he had the refusal decision.
10. I indicated that the decision of the FtT would be set aside.
11. Mr Mullen made a reasonable case of the appellant having time to prepare, but cases evolve, and there was also force in the counter-argument that the report was sought promptly and at the appropriate stage.
12. More significantly, the adequacy of time to prepare was not the reason given by the FtT for refusing to adjourn. It gave no reason for the view that an expert report could be of no value. That matter was not so obvious as to speak for itself. The expert is one acknowledged in the country guidance on related matters. The report was sought on developing issues, precisely those on which the FtT went on to decide against the appellant for lack of evidence.
13. The appellant's case in fairness ought not to have been decided without enabling him to produce a relevant report which had been promptly instructed.
14. The case falls within the presumption of remaking by the UT. It was agreed that a further hearing should be fixed for that purpose, and that no further oral evidence was likely to be offered. The case was then listed for 28 September.
15. Mr Mackay presented the case for the appellant by reference to evidence of his website, "Sri Lankan Muslims against the Sri Lankan Government and Sinhalese Racist Groups", at pp 89 - 123 of his FtT Inventory of Productions III; the report of Dr Chris Smith, senior research fellow at the Institute of Commonwealth studies, London, dated 4 July 2018; and further evidence submitted with an application dated 25 September under rule 15 (2A), to show the appellant's activities on various social media, YouTube analytics to show the number of views and comments made thereon.
16. Mr Govan did not oppose admission of the further evidence.
17. The respondent's decision accepted that the appellant was an internet blogger, writing and publishing articles about problems facing Muslims in Sri Lanka, and that he had acted as a steward at protests in the UK. However, it was not accepted that

his content was widely viewed or that it “would have gained the attention of the Sri Lankan authorities from the millions of blogs on the internet”, or would do so on his return (paragraphs 20, 28 and 50).

18. The website materials are highly critical of the Sri Lankan government. The appellant’s name is prominent on title pages and as the author. The issue is not whether they are such as to give rise to a risk but whether there is a risk of the authorities making the connection to the appellant on his return. Any such connection would bring the appellant within the categories explained in *GJ and others Sri Lanka CG [2013] UKUT 00319* - in particular 7 (b), as a journalist or human rights activist critical of the government’s human rights record.
19. The appellant has not shown show that he might be on a “stop” list, based on a court order or warrant, but the evidence might support the possibility of being on a “watch” list.
20. There are some weak points in the appellant’s case.
21. The appellant exhibits total numbers of views of his website - 513,400 - and of YouTube views, over 50% of which are from Sri Lanka - 4,954 in the last 90 days. The numbers sound quite large, but they are not shown to be more than minute fractions of internet activity of this type.
22. The appellant’s website and social media accounts are under his control. He could delete them. If he has been acting in bad faith, he may be expected to do so, whenever that is in his interest.
23. The appellant entered the UK on his Sri Lankan passport. He claims since to have lost it, and it may well have expired. However, there is nothing to suggest that he could not obtain an up-to-date passport. He has not shown that his case should be considered on the basis of an enforced return. Refusal to return voluntarily, where that course is available, does not qualify for protection: see *Macdonald’s Immigration Law and Practice*, 9th ed., ¶12.24 and 12.28, and cases there cited.
24. The expert report says as a generality at the opening of paragraph 34:

“Irrespective of whether the appellant returns under escort or independently, he will be questioned at the airport in his capacity of a failed asylum seeker.”
25. That is imprecise. Going into further detail later in the paragraph, the following is found:

“UK returnees escorted or presented by the airline are immediately identifiable as returnees to the DIE [Department of Immigration and Emigration]. Unescorted returnees travelling on emergency passports issued by the Sri Lankan High Commissioner in London will be questioned by DIE to ascertain if they are returnees. However, unescorted returnees travelling on their original passports will in all probability not even be questioned by DIE unless they bring themselves to the immigration officers’ attention in some other way e.g. presenting a document containing forged or unauthorised endorsements.”

26. There is nothing in the report to show that the appellant could not obtain his own passport and return unnoticed, as far as mode of travel is concerned.
27. Mr Mackay suggested that even if the appellant applied routinely to the Sri Lankan authorities for an up-to-date passport, a file was likely to be opened and enquiries made, particularly as he would be seen to have spent a long time in the UK without a lawful basis. That would be a matter of inference rather than direct evidence of such a practice.
28. Mr Mackay argued that the appellant's activities were such that he was already likely to have been entered on the authorities' list of persons of interest; and that the authorities had available to them manifests with the names of persons returning routinely, and would be likely to scrutinise these also.
29. The country guidance and the evidence, including the expert report, shows that the authorities' approach is based on sophisticated intelligence. It was accepted that there is no specific evidence of how they monitor the internet or that anyone has been put at risk only because of monitoring. Mr Govan submitted that the expert report surmised without evidence about monitoring. However, the nature of intelligence and surveillance is such that organisations hide their methods. The inferences drawn by the expert are reasonable. As he says at paragraph 17:

"It is not clear how effective or efficient Sri Lankan intelligence is in relation to the diaspora, but the received wisdom considers that it has improved. If the Sri Lankan authorities have identified the appellant, this will provide an additional reason as to why his name will be on the electronic database and therefore on one of the lists."
30. Towards the end of submissions, by agreement, the appellant's name was entered into the Google search engine by the presenting officer. The UT confirmed the outcome. Although the appellant's name is not obviously an uncommon one, it is the first result. That takes the search not immediately to his website but to the well-known site LinkedIn. One further click leads to his website.
31. The appellant's activities may well have been undertaken cynically, given past findings about his case. At best, they may have had mixed motives. The only difference this makes goes to the extent to which he might be deemed likely to hide his traces. The ability to delete would be a matter for an expert in information technology. There was no evidence of that nature, and it was for the appellant to make his case. However, the appellant's activities are not all within private accounts such as Facebook, and I take it as reasonably likely that some internet trail, such as an archived website, would remain.
32. The respondent's decision is based on the appellant's activities being so insignificant and obscure as to avoid attention; but the ease with which they can be found on the internet under his name answers that point.
33. There is a possibility that based on either (a) general surveillance of the internet or (b) scrutiny of appellant's name when he applies for a passport or appears on a passenger list, his anti-government publications may come to the attention of the

authorities. Only a routine enquiry through a search engine would be required, not methods unique to the security services. The appellant might be able to return routinely and unnoticed; but there is a strong enough possibility of identification to place him at risk.

34. The decision of the FtT has been set aside. The appeal, as originally brought to the FtT, is allowed.
35. No anonymity direction has been requested or made.

A handwritten signature in black ink, reading "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

1 October 2018
Upper Tribunal Judge Macleman