



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08948/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On 30 May 2019

Decision & Reasons Promulgated
On 15 July 2019

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

U R
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Jegarajah, instructed by David Benson Solicitors

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Background

2. The appellant is a citizen of Sri Lanka who was born on 15 August 1979. He arrived in the United Kingdom clandestinely on 18 October 2008 and claimed asylum. That application was refused on 14 November 2008 and his appeal was dismissed on 11 March 2009. He was subsequently refused permission to appeal. He became appeal rights exhausted on 30 June 2009.
3. On 30 May 2013, further submissions were made on the appellant's behalf and these were refused on 17 March 2014. A second set of further submissions were made on 28 May 2014 but these were again refused on 21 July 2016.
4. Most recently, further submissions were made on the appellant's behalf on 18 October 2016. On 4 July 2018, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and on human rights grounds.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal (Judge Mathews). Before Judge Mathews, the appellant relied, in essence, upon three bases for his claim. First, he claimed that he was at risk because of his activities with the LTTE in Sri Lanka prior to coming to the UK. Secondly, he relied upon his *sur place* activities in the UK having joined the British Tamil Forum ("BTF") and the Transitional Government of Tamil Eelam ("TGTE") in 2014. He claimed that he had been involved in diaspora activities, including attending a demonstration on 4 February 2018 organised by the TGTE outside the Sri Lankan High Commission in London. He claimed that those activities would put him at risk on return to Sri Lanka and that in June 2017, the Terrorist Investigation Department ("TID") had visited the home of the appellant's cousin in Sri Lanka enquiring about the appellant's activities in the UK. Thirdly, the appellant relied upon his mental health problems and that he was at risk of committing suicide if he returned to Sri Lanka.
6. Judge Mathews rejected the first basis of the appellant's claim, which had, in fact, been rejected in the earlier appeal in 2009.
7. As regards the second basis of the appellant's claim, namely his *sur place* political activity in the UK, Judge Mathews also rejected that basis of his claim. Judge Mathews rejected the appellant's account that his cousin had been visited by TID in Sri Lanka looking for the appellant. Nevertheless, Judge Mathews accepted that the appellant had attended demonstrations and whilst he was involved with the TGTE or BTF in the UK, Judge Mathews found that he did not have any "organisational or management role" - a "significant" role - which would put him at risk on return falling within one of the risk categories in GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC).
8. As regards the third basis of the appellant's claim, namely the risk of suicide due to his mental health, Judge Mathews rejected that claim on the basis that the appellant

would have treatment available in Sri Lanka and the risk, if any, to him did not reach the high threshold required for a health claim.

The Appeal to the Upper Tribunal

9. The appellant sought permission to appeal to the Upper Tribunal on a number of grounds. On 2 January 2019, the First-tier Tribunal (Judge Andrew) granted the appellant permission to appeal. In particular, the judge gave permission on the basis that the judge arguably erred in law in assessing the risk to the appellant due to his *sur place* activities in the UK.
10. The respondent did not file a rule 24 notice.

The Submissions

11. Before me Ms Jegarajah, who represented the appellant, focused her submissions on grounds 1 and 2 (dealing with the assessment of the appellant's risk based upon his *sur place* activities in the UK and the application of GJ and others and also ground 4, which challenged the judge's adverse finding in relation to the appellant's claim that his cousin's home had been visited by the TID in June 2017 looking for the appellant. She placed no reliance on the other grounds, in particular no challenge was mounted to the judge's rejection of the appellant's claim based upon his LTTE activities in Sri Lanka or upon any risk to him as a result of his mental health problems.
12. Ms Jegarajah, in her detailed submissions, contended that the judge had failed to consider the relevant evidence before him concerning the risk to an individual who had been involved in the UK with the proscribed TGTE. She relied upon the Court of Appeal's decisions in UB (Sri Lanka) v SSHD [2017] EWCA Civ 85 and KK (Sri Lanka) v SSHD [2019] EWCA Civ 172.
13. In UB (Sri Lanka), the Court of Appeal concluded that a judge had erred in law by failing to take into account evidence found in the then Home Office guidance entitled "Tamil Separatism" (August 2014) and, in particular, two letters from the British High Commission which are set out at [12]-[13] of the judgment of Irwin LJ as follows:

"12. Annexed to the guidance is the text of two letters from the British High Commission in Sri Lanka. This material is authoritative and clearly intended to be read with the guidance. The first letter is dated 16 April 2014:

'Proscribed Terrorist Groups

On 1 April 2014, the government of Sri Lanka announced the designation of 16 Tamil Diaspora organisations and 424 individuals under the UN Security Council resolution 1373 on counter-terrorism. The order was issued by the Secretary of Defence. The government asserts that this action has been taken to stop attempts to revive the LTTE. The BHC [i.e. British High Commission] has asked the government of Sri Lanka to provide evidence to support this decision.

Among the organisations proscribed are the Transnational Government of Tamil Eelam (TGTE) and the UK-based Global Tamil Forum (GTF) and British Tamil Forum (BTF). When making the announcement on 1 April, Brigadier Ruwan Wanigasooriya said that individuals belonging to these organisations would face arrest under anti-terrorism laws ... [T]o date, there have been no known arrests based on membership of one of the newly proscribed groups.'

13. The later letter is dated 25 July 2014 and the relevant text reads:

'The spokesperson from the DIE stated that returnees may be questioned on arrival by immigration, CID, SIS and TID. They may be questioned about what they have been doing whilst out of Sri Lanka, including whether they have been involved with one of the Tamil Diaspora groups. He said that it was normal practice for returnees to be asked about their activities in the country they were returning from.

The spokesperson from the SIS said that people being 'deported' will always be questioned about their overseas activities, including whether they have been involved with one of the proscribed organisations. He said that members of the organisations are not banned from returning to Sri Lanka, they are allowed to return, but will be questioned on arrival and may be detained.'"

14. Irwin LJ dealt with the relevance of this material, in the context of it not having been served prior to the hearing, at [23]–[25] as follows:

- "23. If the material had been served, then the issue of TGTE membership would have been of more significance. As the matter stood, the FTT reached no conclusion on the point. The Appellant's argument is that, if it had been accepted that he was a member, then the indication from the High Commission's letters is that (1) he would be questioned, (2) he might be arrested, and (3) he might be detained. If detained, the guidance in GJ points to a risk of mistreatment.
24. In truth, consideration of the risk to the Appellant turns not merely on him showing that he was actually a member of the TGTE, but relies on his membership being detected on arrival in Sri Lanka. There is no suggestion that this Appellant is on any list of individuals of interest to the authorities in Sri Lanka. The objective findings by the FTT are clear that any activity by the Appellant in this country, even if observed or recorded, was low level and not likely to carry risks. That activity itself would not demonstrate membership of the TGTE. In addition, I bear in mind the very clear findings that the Appellant lied and exaggerated in alleging mistreatment during his last visit to Sri Lanka, and thus his credibility is low.
25. For all these reasons, I have hesitated before reaching my conclusion on this issue. However, it seems to me that I cannot quite preclude the possibility that these letters might affect the outcome, and thus that they are 'material' to the decision in that sense."

15. Ms Jegarajah placed reliance upon this and submitted that Judge Mathews had failed to engage with this material, which might have led him to find that the appellant was at risk.
16. In addition, in relation to KK (Sri Lanka), Ms Jegarajah submitted that, on reading that judgment, and looking at the risk to returning Tamils who have been involved with the TGTE in the UK, there was no requirement that they should have played a “significant” role or have a “significant” profile.
17. Ms Jegarajah placed reliance upon the Appellant’s attendance at the demonstration on 4 February 2018 and the material relied upon before Judge Mathews that demonstrated the significance of this event where the defence attaché, Brigadier Fernando, had come out of the High Commission building and made threats towards the protesters, specifically making a throat-slitting gesture. The demonstration received wide coverage and video coverage of it was readily available on the internet. Ms Jegarajah submitted that the judge had failed to consider this material and also what was said in GJ and others at [336] concerning the Sri Lankan authorities’ monitoring of the Tamil diaspora including, she submitted, this event.
18. Finally, as regards the judge’s adverse credibility finding in relation to the Sri Lankan authorities’ interest in the appellant, she submitted that the judge had simply been mistaken in para 36 when he counted against the appellant that his cousin had not mentioned to him that the TID had contacted him looking for the appellant. Ms Jegarajah submitted that that was not the appellant’s evidence, which was that his cousin had told him that the TID had come looking for him.
19. In response, Mr Howells submitted that the current *CPIN* did not include the two High Commission letters relied upon by the Court of Appeal in UB (Sri Lanka). He submitted that, in any event, the remittal by the Court of Appeal in UB (Sri Lanka) was a hesitant one. In relation to KK (Sri Lanka), Mr Howells submitted that in that case the individual had not only been involved with a proscribed organisation in the UK but had participated in a serious conspiracy to smuggle Tamils into the United Kingdom. That distinguished it from the appellant’s *sur place* activities in the UK.
20. Mr Howells submitted that the judge had found that the appellant was not a formal member of the TGTE or BTF and, on the basis of those findings, he was entitled to find that, applying GJ and others, the appellant did not fall within a risk category. He referred me to the relevant *CPIN* “Sri Lanka: Tamil Separatism” (June 2017) at Section 12.2 dealing with the treatment of returnees and paras 6.2.1 – 6.2.2 on de-proscription of Tamil groups and para 6.3 on proscribed organisations.
21. In relation to ground 4, and the judge’s finding in para 36 in relation to the claimed visit to the home of the appellant’s cousin, Mr Howells accepted that the judge had been mistaken. The appellant had said in cross-examination that his cousin had spoken to him about the TID contacting his cousin. The judge had, therefore, been in error in counting against the appellant’s credibility on this issue that his cousin had not told him about the visit.

Discussion

22. The risk categories acknowledged in GJ and others are well-known. The risk category within which the appellant's circumstances *prima facie* would merit consideration would be whether he was a person who is, or is perceived to be, a threat because they are or are perceived to have a significant role in relation to post-conflict Tamil separatism.
23. Subsequent to GJ and others, cases such as UB (Sri Lanka) have brought to the fore a claim made by those involved (whether through membership or attendance at meetings and demonstrations) with proscribed organisations such as the TGTE in the UK. Mr Howells referred me to the relevant passages in Sections 6.2 and 6.3 concerned with de-proscription of Tamil groups and proscribed organisations. Paragraph 6.2.2 identifies that, in relation to de-proscribed Tamil groups, the government of Sri Lanka no longer considers membership or affiliation with them to amount to terrorism or a terrorist activity. It was not suggested before me that the TGTE has been de-proscribed. It remains a proscribed terrorist organisation.
24. The judge was specifically referred to the material emanating from the British High Commission in the *CPIN* document for August 2014. The judge made no reference to it in his decision. Its relevance was identified by Irwin LJ at [23]–[25] of his judgment which I have set out above. The fact that the letters are no longer contained in the current *CPIN* document does not remove them from the realm of available evidence which was relied upon by the appellant before Judge Mathews. Linked with other material dealing with the Sri Lankan authorities' monitoring of diaspora activity, this material potentially put the appellant at risk. Its relevance was that if he were returned to Sri Lanka, he would likely be asked questions about whether he had participated in political activities in the diaspora. Applying the well-known principles in HJ (Iran) & another v SSHD [2010] UKSC 31 and RT (Zimbabwe) v SSHD [2012] UKSC 38 the appellant could not be expected to lie and, since the TGTE is a proscribed terrorist organisation in Sri Lanka, the evidence suggests that he might face detention and serious harm as a consequence (see GJ and others at [168]).
25. I acknowledge that the appellant's case was weakened by the judge's finding that he did not accept that the appellant was a *member* of the TGTE or BTF. But the judge did, at least, accept his involvement in certain political diaspora activities, not least the highly charged events outside the Sri Lankan High Commission in 2018. At para 38, whilst recognising that the appellant had attended demonstrations, the judge was not persuaded that he was a "formal member of either the TGTE or BTF". There was a basis for linking him to diaspora activities which *might* interest the Sri Lankan authorities.
26. As I am persuaded that the judge erred in assessing the risk to the appellant based upon his *sur place* activities in the UK, there is merit in the decision being remade including all factual matters relevant to that. It is accepted that the judge erred in para 36 of his decision, and then made adverse credibility findings, having mistakenly understood the evidence not to include the appellant's evidence that his

cousin had told him that the TID were looking for him. Although the judge gave a number of reasons why he did not accept that the appellant was a member of the TGTE in the UK, especially at paras 30–35, the judge’s rejection of supporting documentation concerning the appellant’s involvement with the TGTE in the UK was, at least in part, linked to his adverse credibility finding in relation to whether his cousin’s home had been visited by the TID in Sri Lanka. So, at para 37 the judge said this:

“I find that these documents have no evidential value, and furthermore that they have been prepared and submitted simply to bolster a claim, I find that they are false in their contents and assertions hence the appellant not having had any such interest in him by the TID mentioned to him by his cousin, and hence the appellant, who must know of their truth or otherwise, distancing himself from documents that could only have been sought if he provided details of who should be approached. The documents I find to be destructive of any last vestige of credibility that the appellant may have had after the previous decision dismissing his previous asylum claim, and finding in unambiguous terms that he lacks in credibility.”

27. In my judgment, it would be unsafe to disentangle the judge’s reasoning in para 37 such that his accepted error in para 36 can be said to have had no material impact upon the remainder of his adverse credibility findings in relation to the appellant’s *sur place* activities in the UK.
28. Consequently, I accept in substance Ms Jegarajah’s submissions on grounds 1, 2 and 4.
29. I set aside Judge Mathews’ decision such that the appellant’s claim based upon his *sur place* activities must be remade. That will require an assessment of the evidence and findings concerning the appellant’s role in the UK including whether he is a member of the TGTE and/or BTF; his involvement with those organisations, if any; and his attendance at meetings and/or demonstrations in the UK against the Sri Lankan authorities. Some of these matters may no longer be in dispute. In addition, the appellant’s credible and his claim that his cousin’s home has been visited by the TID must be assessed along with the evidence concerning what, if any, interest the Sri Lankan authorities would have in the appellant (including their knowledge of him and his activities) on return to Sri Lanka.
30. In this regard, the material to which I was referred in UB (Sri Lanka) will need to be assessed and its present import. Further, the “significant” involvement criterion in GJ and others was said in the context of LTTE activities in Sri Lanka and not in relation to membership or involvement with a proscribed organisation in the UK. Whilst Mr Howells is correct that KK (Sri Lanka) involved an individual who was not merely a member of the TGTE but also had been involved in a conspiracy to smuggle Tamils into the UK, there is no suggestion in the Court of Appeal’s judgment that a claim based upon this turned upon an assessment of whether it amounted to “significant” involvement. The categories of risk in GJ and others are not closed (see MP (Sri Lanka) and another v SSHD [2014] EWCA Civ 829 at [50]). It will be a matter for assessment on remittal to what extent, if any, the appellant’s UK

involvement with the TGTE creates for him a real risk of serious ill-treatment by analogy to the risk category in GJ and others.

Decision

31. For these reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law and is set aside.
32. Given the nature and extent of fact-finding required, and applying para 7.2 of the Senior President's Practice Statement, it is appropriate, in my view, that the matter should be remitted to the First-tier Tribunal.
33. The issue for the First-tier Tribunal will be the appellant's claim based upon his *sur place* activities. The findings, which led to the dismissal of his claim, based upon his claimed past activities with the LTTE stand.
34. Likewise, the appellant's claim based upon a risk of suicide also stands dismissed.
35. The appeal is remitted to the First-tier Tribunal on the above basis to be heard by a judge other than Judge Mathews.

Signed



A Grubb
Judge of the Upper Tribunal

Dated 10 July 2019