



(IMMIGRATION AND ASYLUM CHAMBER)

UPPER TRIBUNAL  
APPEAL NUMBER: PA/12614/2018

THE IMMIGRATION ACTS

Heard at: Field House  
On: 4 March 2019

Decision and Reasons Promulgated  
On: 14 March 2019

Before

Deputy Upper Tribunal Judge Mailer

Between

KARIYAWASAM [W]

ANONYMITY DIRECTION NOT MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms D Revill, counsel, instructed by MTC & Co Solicitors

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Sri Lanka, born on 24 November 1985. He appeals with permission against the decision of the First-tier Tribunal Judge, promulgated on 31 December 2018, dismissing his appeal against the respondent's decision refusing his application for international protection.
2. She found that the appellant was detained and tortured by the Sri Lankan authorities in 2009; that he was released after payment of a bribe; that he thereafter left Sri Lanka and that he genuinely believed that the authorities remain interested in him.

3. The appellant's own evidence was that he does not and never has supported the LTTE and he has not undertaken any diaspora activity in the UK. The Judge noted that the events which occurred were some nine years ago. Although noting that the appellant has heard that the authorities have visited his parents' home from time to time, she found that this has not caused them to have to move house, and otherwise there is no evidence that the appellant is wanted or that there is an arrest warrant for him [32].
4. She found at [35], that in assessing his risk on return to Sri Lanka, the fact that his detention occurred in 2009 and not more recently is significant in accordance with ME (Sri Lanka) v SSHD [2018] EWCA Civ 1486.
5. In granting the appellant permission to appeal, First-tier Tribunal Judge Foudy stated that having found that the appellant had been detained in 2009, it is arguable that the Judge misapplied the country guidance authority in GJ and others (Post Civil War Returnees) Sri Lanka CG [2013] UKUT 00319. The other grounds also revealed errors of law.
6. On behalf of the appellant, Ms Revill, who did not represent the appellant before the First-tier Tribunal, adopted the grounds seeking permission to appeal. She submitted that in GJ, the Upper Tribunal found that if a person is detained by the Sri Lankan security services, there remains a real risk of ill treatment or harm requiring international protection.
7. In adopting the first ground, she noted that the Tribunal referred to the decision in ME (Sri Lanka), supra. There the Court of Appeal was concerned with an appellant who had been detained in 2014 which indicated that recent detention is compelling evidence of ongoing risk. However, she submitted that it does not establish the converse proposition, namely, that earlier detention will not give rise to ongoing risk. That constitutes an erroneous position taken by the First-tier Tribunal Judge.
8. She submitted that the Tribunal in GJ at [146] and [13] of Appendix J, also considered evidence that those who had previously been released on payment of a bribe would be recorded as escapees and absconder action would be commenced. The Judge however, did not consider whether the appellant would fall within risk category (d) of GJ as someone who would feature on an intelligence "stop" or "watch" list due to the nature of his escape from detention. The failure to consider this risk category is a material error.
9. Nor did the Judge have regard to the evidence relating to the in-country situation post dating GJ. Ms Revill referred to the Freedom From Torture report dated 2017 in the appellant's bundle at 122-128 which provided evidence of ongoing detention of those with imputed and low-level involvement with the LTTE after 2015. This runs contrary to the Judge's finding at [36] that there has been a significant change in the focus of the Sri Lankan authorities.
10. Ms Revill also contended that the Judge applied too high a standard of proof by placing undue weight on various factors in the assessment of risk on return, including the lack of an arrest warrant.

11. In GJ, the Tribunal heard evidence that detention in Sri Lanka is routinely conducted in the absence of an arrest warrant [49]. Although the appellant did not suggest that he had been previously subjected to formal court proceedings, given the nature of his detention and escape, the Judge wrongly placed weight on the absence of an arrest warrant in the assessment of risk on return.
12. In particular, she failed to give reasons why the passage of time is significant, which was necessary in the light of the finding in GJ that the authorities maintain a computerised intelligence led 'watch' list. There was no evidence to support the conclusion that the passage of time would lead to the removal of the appellant from those computerised records. Accordingly, a higher evidential burden was placed on the appellant.
13. Ms Revill adopted ground 3 and submitted that the psychiatric report referred to an increased risk of suicide upon return. In the light of her acceptance that the appellant had a subjective fear, the Judge should have considered the risk of harm as a consequence of the deterioration of his mental health as a separate Article 3 claim.
14. With regard to ground 4, she contended that the Judge did not properly consider relevant factors when determining the impact of forced removal on the appellant's mental health including the availability of treatment and the willingness of the appellant to engage in any available treatment in Sri Lanka.
15. In concluding at [37] that the appellant would be able to access his current treatment in Sri Lanka as a default position, the Judge did not have regard to the 'objective evidence'. In GJ, the Tribunal expressly considered evidence indicating a lack of effective treatment for mental health conditions in Sri Lanka at [454]. There are only 25 working psychiatrists in the whole of Sri Lanka. Money spent on mental health only really goes to the large mental health institutions in capital cities, which are inaccessible and do not provide appropriate care for mentally ill people.
16. Nor did the Judge consider how his fear of returning to Sri Lanka may impact upon his ability to engage with treatment.
17. Ms Cunha on behalf of the respondent submitted that the Judge has considered the risk factors in GJ at [32] and [36]. The appellant had not been supporting the LTTE. Nor was there any diaspora activity which was significant having regard to her reference at [34] to the Country Policy and Information Note relating to Sri Lanka. She submitted that the Judge has "done enough". She has considered GJ appropriately.
18. With regard to ME (Sri Lanka) supra, Ms Cunha accepted that whilst it is correct that that decision was based on different facts, namely someone who was a member of the LTTE, the appellant has never worked for the LTTE but had an association with another person who was involved with them. Nor was he ever detained since 2009.
19. Ms Cunha noted that although accepting that the appellant heard that the authorities have visited his parents' home from time to time, the Judge did not

factor this in to her assessment regarding the risk on return. She submitted however that even though this may be an error, the issue is whether or not it is material. She submitted that the appellant would not fall into a relevant category having regard in particular to the respondent's CPIN of June 2017 relating to Sri Lanka.

20. With regard to the grounds relating to Articles 3 and 8, the psychiatric report did not state how the appellant would self harm or how it relates to risk on return. The Judge was entitled to conclude that the psychiatrist had failed to take into account that familial support would be available to the appellant. Medical facilities are available in Sri Lanka, as noted by the respondent.
21. With regard to the risk of suicide, 'the Judge can only go with the evidence presented'. The report did not state that there was a likelihood of self harm. The appellant himself did not seek assistance until 2017 although he registered with a GP in 2015 [19-20].
22. The Judge has engaged with the medical evidence as a whole from [16] onwards. Her conclusion that the evidence did not make out that the appellant would take his own life having regard to familial ties of support is sustainable. Nor was there a likelihood of very significant obstacles or difficulties on return which would hinder his re-integration.
23. In reply Ms Revill referred to [7(d)] in GJ. It appears to be accepted that the appellant was sought actively by the authorities. This suggests that there might well be an arrest warrant and in particular that absconder action can be taken against him. If he is detained by the Sri Lankan security services, there remains a real risk of ill-treatment or harm requiring international protection as noted by the Judge at [4].
24. She referred to [17] in ME. The real question is whether the Sri Lankan authorities would have questions to ask the appellant. There is therefore a risk of questioning taking place.
25. Finally, she again submitted that the Judge did not properly assess the ability of the appellant to access his current treatment in Sri Lanka. He might not even want to access it. He might not have a sense of trust. The Judge has not engaged with that issue. None of this was taken into account.

### **Assessment**

26. In GJ, the Upper Tribunal held that if a person is detained by the Sri Lankan security services there remains a real risk of ill treatment or harm requiring international protection. That guidance remains in force.
27. The Judge sought to rely on the fact that the appellant's detention occurred in 2009, and was not more recent. In seeking to rely on the decision in ME, which held that whilst a recent detention is compelling evidence of ongoing risk, I accept the

proposition that it does not follow that earlier detention may not be relevant to the assessment of ongoing risk.

28. In that respect, it was incumbent upon the Judge to consider whether the appellant, having previously been released on the payment of a bribe, would be recorded as an escapee or an absconder resulting in absconder action being commenced against him – paragraph [146] and paragraph [13] of Appendix J, of GJ.
29. Nor was there any consideration given as to whether the appellant would appear on a “stop” or “watch” list following his escape from detention. There was evidence which post dated GJ produced by Freedom From Torture dated 2017 regarding ongoing detention of those with imputed and low level involvement with the LTTE after 2015. The question therefore was whether there has been a significant change in the focus of the authorities as referred to by the Judge at [36].
30. Moreover, she did not consider that there remains a computerised, intelligence led watch list. There was no evidence that the mere passage of time would lead to the removal of a person in the position of the appellant from these computerised records.
31. The absence of an arrest warrant would not therefore in itself reduce the risk of harm on return.
32. I have also had regard to the submissions relating to the appellant's mental health. In particular, the Judge did not consider, whether in the light of his subjective fear of returning to Sri Lanka, he would be able to engage with treatment on arrival. That was highlighted in the report of Dr Abuaya who stated that the appellant in these circumstances is unlikely to feel a sense of safety and thus his ability to trust any therapist or other healthcare professional there would be compromised.
33. Having regard to the circumstances as a whole, I find that the decision of the First-tier Tribunal involved the making of an error on a point of law.
34. I accordingly set aside the decision.
35. The parties agreed that in that event the appeal should be remitted to the First-tier Tribunal for a fresh decision to be made. The parties agreed that the Judge's findings at [29] are to be preserved.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside.

The appeal is remitted to the First-tier Tribunal (Hatton Cross) for a fresh decision to be made by another Judge.

The Judge's findings at [29] of the decision are preserved.

Anonymity direction not made.

Signed

Date 11 March 2019

Deputy Upper Tribunal Judge Mailer