



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: PA/01170/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 13 December 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

FFHR (Sri Lanka)
(anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jagadesham, Counsel instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

Heard at Phoenix House (Bradford) on 29 November 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify her or any member of her family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant is a national of Sri Lanka born in 1984. She has been granted restricted leave in the United Kingdom because the Secretary of State accepts

that she would face a real risk of torture, inhuman and degrading treatment should she be returned to Sri Lanka. The Respondent has however refused to grant the Appellant protection under the Refugee Convention, because she believes that the Appellant should be excluded under Article 1F(a) thereof:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

...

2. That is ultimately the issue in this appeal, but it is not, immediately, the issue before me.

Case History

3. The Appellant arrived in the UK and claimed asylum on the 30th July 2018. She was twice interviewed, and asked to complete a 'preliminary information questionnaire'. Her solicitors supplied the Home Office with a detailed statement and chronology of events. Salient among these was that between 2006 and 2009 she was a member of the LTTE. On the 29th June 2018 a warrant was issued for her arrest in Sri Lanka, following investigations by the authorities there. This was what had prompted her to seek international protection. The Appellant's lawyer in Sri Lanka has sent a copy of this warrant to the UK, and it is accepted by the Respondent to be genuine.
4. The claim was refused on the 25th January 2019. At this stage the Respondent's position was that the Appellant's evidence was not credible, and that she did not face a real risk of harm in Sri Lanka. That letter was subsequently withdrawn and replaced by one dated the 17th July 2019, wherein the Respondent accepted the account, but asserted that there were serious reasons for considering that the Appellant was guilty of acts contrary to the purposes and principles of the United Nations. The claim was accordingly excluded with reference to Article 1F(c). The Appellant appealed and by the time the matter came before the First-tier Tribunal, the Respondent had changed his position again. A review by the Presenting Officer resulted in a refusal letter dated the 19th November 2019 in which protection was refused on the amended grounds that there are serious reasons for considering that the Appellant has committed a crime against humanity: Article 1F(a). At a subsequent case management review hearing before Judge Lodato the Respondent was asked to clarify what evidence, if any, was challenged. This led to a fourth refusal letter, dated the 8th July 2020, in which the Respondent accepts the Appellant's evidence. It was on the basis of this position that the appeal proceeded. The Respondent noted that the Appellant had been a willing member of the LTTE at a time when it was proscribed as a terrorist organisation by the UK, and that the intelligence wing, of which she was part, played a particular role in the commission of crimes. Although she had tried to resign from the organisation in May 2008 she had remained part of the group when that resignation was refused. Her failure to disassociate from the group, when she was living in Colombo and could have done so, indicated that she was

not acting under duress. The Respondent identified three actions in particular as engaging Article 1F(a):

- i) The Appellant's involvement in procuring and selling unregistered SIM cards to members of the LTTE, such activity directly contributing to the organisation's ability to co-ordinate attacks;
- ii) Undertaking surveillance on behalf of the intelligence wing of the LTTE;
- iii) Storing and distributing weapons, ammunition and explosives.

5. The matter came before Judge Kelly of the First-tier Tribunal on the 15th October 2020. Judge Kelly held it to be "inaccurate to suggest...that the Appellant's credibility is not in dispute". Whilst the events narrated were accepted by the Respondent, Judge Kelly did not find that concession to cover the Appellant's motivation and intentions. As to allegation (ii) the Tribunal noted the country background evidence that around 35% of the LTTE's entire budget went on its intelligence wing, which denoted the overall importance of its work. The Appellant had admitted gathering information for them, for instance on the movements of various government officials and ministers over a three year period. It rejected as "wholly implausible" her evidence that the information she had provided was simply to update her commanders on what was going on in the capital: it found it to be obvious to any reasonably intelligent person that the purpose of the information was to plan assassinations. Such politicians were non-combatants and their systematic murder fell within the definition of a crime against humanity under Article 7 of the Rome Statute. As to allegation (iii), the Tribunal noted that by her own evidence the caches she was asked to store included, on her understanding, suicide vests. When she had been asked at interview how she felt about this she had "evaded the question" and then gave an answer which did not express any regret about suicide attacks being aimed at politicians. This led the Tribunal to conclude that the Appellant had made a substantial contribution to such attacks.
6. It should be noted that in respect of allegation (i), the selling of SIM cards, Judge Kelly found the submission that these could have been used in the commission of terrorist attacks to be unsubstantiated speculation. That finding was not appealed by the Respondent, is undisturbed and is so preserved.
7. The Appellant appealed the findings on allegations (ii) and (iii) to the Upper Tribunal where the matter came before UTJ Lane. The Appellant complained that she had not known her motivations to be a matter in issue; had she done so she would have given evidence. She further contended that the First-tier Tribunal had failed to have regard to all of the material evidence, including an expert report which had concluded that she had been operating at a "very low level". It had instead relied on a series of inferences to conclude that the *mens rea* element of the charges against the Appellant was made out. In his judgment dated the 3rd August 2023 Judge Lane found no merit in the grounds and dismissed the appeal. He subsequently refused to grant permission to the Court of Appeal.
8. Permission to appeal to the Court of Appeal was granted, upon renewed application, by Lord Justice Nugee on the 27th March 2023. It was listed before the Court (Lord Justice Moylan, Lord Justice Stuart-Smith and Lord Justice Lewis) on the 25th October 2023 but that hearing was vacated on the 24th October, when

the parties reached a settlement. The terms of the consent order sealed by the Court were:

“The parties are agreed that the Upper Tribunal erred in law in failing to give sufficient reasons concerning whether it was appropriate to make adverse findings on personal credibility in all the circumstances of this case and as to the principles to be applied, such that its determination should be set aside and FR’s appeal should be reconsidered.” (para 5).

9. The Court did not address the Appellant’s remaining grounds, since it was expedient and in line with the overriding objective that the matter be remitted to the Upper Tribunal. That is how the matter has come before me.

The Remittal

10. I am grateful to Mr Jagadeshm for providing me with all of the relevant materials in electronic form prior to the hearing, including a position statement on the terms of the remittal from the Court of Appeal. He accepts that the Court did not expressly find Judge Kelly to have erred: the statement of reasons refers only to error on the part of Judge Lane. That said, he asks me to note that, in granting permission to appeal, Nugee LJ expressly highlighted Ground 1, regarding procedural fairness, as did the final order sealed by the full Court. He submits that the error by the Upper Tribunal would have immaterial if Judge Kelly’s decision had been sound in law.
11. In the event that I am not prepared to read the remittal as an invitation to set the decision of Judge Kelly aside, Mr Jagadeshm relies on the skeleton argument he advanced before Judge Lane.
12. Mr Diwnycz relied on the Secretary of State’s arguments as they were advanced before Judge Lane. He submitted that the degree to which the Appellant’s evidence was agreed was limited to her actions not her beliefs, and for that reason Judge Kelly had been entitled to find as he did.
13. I have considered the terms of the consent order remitting this matter to the Upper Tribunal. Although it does not expressly address the judgment of the First-tier Tribunal, I agree that it is very difficult to see that the Court of Appeal would have remitted this matter if they thought there to be ultimately nothing in the ground. I need not say any more about that, however, since I am myself satisfied that the error alleged is made out.
14. All of the evidence against the Appellant came from the Appellant herself. There was no challenge to any of it. She explained why she had joined the Tigers, and the extent of her role. She was asked, and answered, questions about what she thought the information she gave was going to be used for. She went into her First-tier Tribunal hearing thinking that all of that was accepted. At the beginning of that hearing there was an exchange between Mr Jagadeshm, Judge Kelly and the Presenting Officer in which, the transcript shows, it was again agreed that nothing the Appellant had to say had been challenged. Notably the Tribunal did not put Mr Jagadeshm on notice that it disagreed with his assessment. The first Mr Jagadeshm knew about that was when he read in the written decision that it was “inaccurate to suggest...that the Appellant’s credibility is not in dispute”.

15. Similarly the first that the Appellant knew about the challenge to her credibility was when she received a decision in which the Tribunal found that she had known or intended that her actions would make a substantial contribution to war crimes. At its paragraph 29, for instance, the Tribunal considers the Appellant's evidence that she had not agreed with the targeting of innocent civilians. It apparently rejects that evidence on the basis that the Appellant must have known the intelligence she provided on officials' movements in Colombo was for the purpose of planning attacks: "I find it likely that she did not consider that these politicians came within her definition of 'innocent civilians'". This was directly contrary to her evidence, and was not moreover a point that had been taken in the refusal letter. The Appellant had no notice that her denials of knowledge or foresight were to be rejected. She should have been given an opportunity to address those matters.
16. Before me the parties agreed that ground 1 having been made out, it was not necessary to deal with the remaining grounds. The issue of fairness strikes at the heart of the decision in respect of allegation (ii) and (iii) and in those circumstances the appropriate outcome is for this matter to be remitted to the First-tier Tribunal to be heard by a judge other than Judge Kelly.
17. I make the following directions:
- i) The First-tier Tribunal's finding on allegation (i) (*the procurement and sale of SIM cards*) is unchallenged and it is therefore preserved;
 - ii) The appeal is to proceed on the basis that the Appellant's evidence about her actions in the years 2006-2009 is accepted as true;
 - iii) The Respondent is to file and serve, no later than the 26th January 2024, a position statement setting out:
 - a) The evidential basis for allegations (ii) and (iii);
 - b) What, if any challenge, is made to the Appellant's evidence.
 - iv) The Appellant is to file and serve a reply no later than the 16th February 2024
 - v) The appeal is to be listed before a Judge other than Judge Kelly not before the 23rd February 2024.

Decisions

18. The appeal is allowed to the extent identified above.
19. The decision in the appeal is to be re-made following a *de novo* hearing in the First-tier Tribunal before a judge other than Judge Kelly.
20. There is an order for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber

29th November 2023