



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003747

First-tier Tribunal No: PA/51300/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9 August 2023

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S Y
(AMONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr J Metzger, instructed by Raj Law Solicitors

Heard at Field House on 28 July 2023

Although is an appeal by the Secretary of State, I shall refer to the parties as they were in the First-tier Tribunal.

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 and/or any member of his family, likely to lead members of the public to identify the appellant and/or any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka born in 1982. His appeal against deportation was allowed on asylum and human rights grounds by First-tier Tribunal Judge S J Clarke ('the judge') on 29 May 2022.
2. The Secretary of State appealed on the grounds the judge erred in law in failing to begin the substantive deliberation on appeal by considering the section 72 certificate. Secondly, the judge failed to apply Devaseelan. The judge failed to take the previous decisions as a starting point and to demonstrate that any departure from the previous findings was justified on the evidence. Thirdly, the judge failed to meaningfully engage with KK and RS (sur place activities: risk) Sri Lanka [2021] UKUT 00130 (IAC). Prior involvement with the LTTE and an ongoing interest in Tamil separatism was insufficient to establish risk and a more extensive analysis of the appellant's circumstances was required. The appellant had failed to establish he had or is perceived to have undertaken a significant role in Tamil separatism.
3. Permission was granted by Upper Tribunal Judge Stephen Smith on the following grounds:
 1. It is arguable that the judge failed to give sufficient reasons for concluding, at paragraph 13, that the appellant would be perceived as having a "significant role in Tamil separatism". Even bearing in mind the deference with which this appellate tribunal should approach first instance judges' findings of fact, it is arguable that the judge has failed sufficiently to explain why merely attending a selection of events in the United Kingdom would give rise to that conclusion, in light of the guidance given by KK and RS (Sur place activities: risk) Sri Lanka CG [2021] UKUT 130 (IAC).
 2. It is also arguable that the judge failed to begin substantive deliberation of the appeal by considering the section 72 certificate, but, for the reasons given by the First-tier Tribunal when refusing the application for permission to appeal, it is not clear that that arguable error was material. However, I grant permission on all grounds."

Summary of the judge's findings

4. It is not in dispute that the appellant has 12 convictions for 25 theft offences. The appellant was sentenced to 12 months' imprisonment in October 2012. A deportation order was signed in June 2013 and the appellant's appeal was dismissed by the First-tier Tribunal in September 2015 and by the Upper Tribunal in 2016. The appellant has a history of repeated offending up until his last conviction in April 2018. The appellant has not offended since then. The judge heard evidence from the appellant, his wife and a social worker. The appellant has three children.
5. The judge made the following findings of fact:
 - a. The appellant suffered ill-treatment from the armed forces and the LTTE because he was a young Tamil
 - b. He was trained and indoctrinated into the LTTE and sent to the front line
 - c. He was detained in Colombo and released upon payment of a bribe
 - d. He came to the UK in July 1999
 - e. The appellant's father was involved with training LTTE seafarers
 - f. The appellant was detained at the airport on return to Sri Lanka in 2007
 - g. After his release the police came to his home, questioned him and beat him up
 - h. The appellant left Sri Lanka using an agent

- i. The police came looking for him after he left
- j. The appellant attended heroes day in the UK
- k. He fled his country twice and still holds anti-government pro-Tamil views
- l. He did not have a passport and would be questioned on return
- m. He would conceal his political beliefs to avoid persecution
- n. The appellant represents as a genuinely reformed man who now takes on responsibilities to his family
- o. The risk of re-offending has dropped significantly because of his child's (Y) leukaemia
- p. Y is in remission with an excellent prognosis but still suffers physically and psychologically. The appellant is his main carer
- q. The appellant is a changed man with a larger family to provide for and has left his criminal past behind him
- r. The appellant's wife is a refugee and could not visit the appellant in Sri Lanka.

6. At [13] the judge stated:

"I conclude the Appellant faces a real risk he will come to the adverse attention of the Sri Lankan authorities and suffer ill-treatment on the basis that he would be perceived as having a "significant role in Tamil separatism" particularly in light of his history of involvement in the LTTE and previous ill-treatment by the authorities in 2007 and his family history in the LTTE and his political opinions and attendance at Tamil political events in the UK."

7. The judge considered whether the appellant should be excluded from protection under the Refugee Convention at [15] and [16]. She concluded the appellant should be granted asylum because he was a changed man and his return to Sri Lanka would breach the Refugee Convention and Article 3. At [17] and [18] the judge briefly considered Article 8 in light of her earlier findings noting the new facts not before the tribunal in 2016. She considered the evidence of the appellant, his wife and the social worker and concluded the appellant's deportation would give rise to unduly harsh consequences to Y.

Respondent's submissions

8. Mr Tufan relied on the grounds and submitted the judge's findings on the section 72 certificate were irrational and unreasoned. The appellant was a repeat offender. There was insufficient evidence to show that he was a reformed character and the judge failed to give adequate reasons for why she came to this conclusion. Although the judge referred to the 2014 OASys report, which stated the appellant was at medium risk of re-offending, her conclusion that the appellant was a changed man because he now had a larger family was insufficient to show the appellant was no longer a danger to the community.

9. Secondly, the judge made a tangential reference to previous hearings. However, the judge failed to address the detailed findings. The appellant had not made an asylum claim in his previous deportation appeal and the only conclusion that could reasonably be drawn was that it could not succeed. There was no adequate consideration of this decision as a starting point.

10. Lastly, the judge had failed to engage with KK and RS in any meaningful way. The judge failed to demonstrate why the appellant's role was significant and a threat to the government of Sri Lanka. The appellant had returned to Sri Lanka

without attracting adverse attention and there was insufficient evidence he had a significant role in Tamil separatism. The judge gave the appellant credit for evidence he had not provided.

Appellant's submissions

11. Mr Metzger relied on his skeleton argument dated 21 July 2023 and the authorities referred to therein. He submitted the Upper Tribunal should exercise judicial restraint when examining the reasons given by the First-tier Tribunal and should not assume too readily that the judge had misdirected herself just because not every step in her reasoning was fully set out in the decision. It was apparent when reading the decision as a whole why the judge had reached her decision. He submitted the Devaseelan guidelines establish the starting point and they do not require a judge to consider all issues that previously arose and to decide their relevance to the appeal before them.
12. Mr Metzger submitted the judge's consideration was adequate and appropriate. She was well aware the appellant was a repeat offender and her conclusion that the appellant had rebutted the presumption under section 72 was based on detailed factual findings at [16] and [18] which supported the judge's conclusion that the appellant was not a danger to the community. The respondent had not challenged these findings in the grounds of appeal to the Upper Tribunal and permission was not granted on that basis. In any event, the judge's findings were open to her on the evidence before her and she gave adequate reasons for her conclusions. The respondent had failed to show that had the judge addressed section 72 at the start of her findings and conclusions the outcome could have been different.
13. It is apparent the judge addressed Devaseelan from her references to the previous decisions at [6], [11] and [17]. There was no challenge to the judge's credibility findings and the appellant's evidence of ill-treatment in 2007 was not challenged in cross-examination. The appellant's evidence was consistent with the ceasefire at that time. The judge considered the change in circumstances since the previous decisions and made findings which were reasonably open to her. There was no error of law.
14. Mr Metzger submitted the grounds mischaracterised the judge's conclusions in challenging her application of country guidance. A proper reading of the decision demonstrated that the judge's conclusion in relation to this at [13] was based upon the Appellant's:
 - (i) history of involvement in the LTTE;
 - (ii) previous ill-treatment by the authorities in 2007;
 - (iii) family history in the LTTE; and
 - (iv) political opinions and attendance at Tamil political events in the UK.
15. These findings of fact were not challenged in the grounds and the judge's conclusion was consistent with the country guidance in KK and RS. The appellant's sur place activity was only one of four relevant risk factors and was not determinative of the appeal. The judge's reasons adequately demonstrate why the appellant was a real risk of being perceived as having a significant role in Tamil separatism.

16. In any event, the judge found the appellant succeeded on asylum grounds under the HJ (Iran) principles. The appellant would be questioned on return and would conceal his genuine political beliefs to avoid persecution. The respondent did not challenge these findings or conclusions in the grounds or in oral submissions. The appeal succeeded under headnote 17 of KK and RS. There was no material error of law.

Conclusions and reasons

Ground 1

17. Ground 1 is totally misconceived. In her decision letter of 14 February 2021, the respondent concluded that the appellant's index offences and offending history was serious enough to exclude him from humanitarian protection under the Immigration Rules. There was no section 72 certificate in this case.
18. In addition, section 72 could not apply to this appellant because he was not sentenced to a term of imprisonment of 2 years. Section 72 was amended to apply to sentences of imprisonment of 12 months by the Nationality and Borders Act ('NABA') 2022. This amendment only applies in relation to a person convicted on or after the date on which section 38 of NABA 2022 came into force.
19. This point was not taken at the hearing before me. It would appear that the judge was under the misapprehension there was a rebuttable statutory presumption. In the event that my conclusions above are incorrect, I find there was no material error of law in the judge's decision for the following reasons.
20. Section 72 of the 2002 Act clearly states that the tribunal must begin substantive deliberation on the appeal by considering the certificate. The judge in this case did not consider the certificate first in her findings and conclusions. She set out her factual findings and concluded at [13] that the appellant would suffer ill-treatment on return because of his perceived role in Tamil separatism. However, the structure of the judge's decision did not give rise to a material error of law because the judge ultimately concluded the appellant had rebutted the presumption prior to her finding that the appellant's return to Sri Lanka would breach the Refugee Convention.
21. The judge was well aware that the appellant was a repeat offender and she considered the nature and pattern of his offending. The judge's conclusion that the appellant should not be excluded from protection was open to her on the evidence before her and she gave adequate reasons for her conclusions.

Ground 2

22. It is apparent on reading the decision as a whole that the judge properly applied the Devaseelan guidelines notwithstanding she makes no specific reference to the authority. She refers to the two previous tribunal decisions in the first paragraph of her findings and conclusions and she acknowledges the change in circumstances since then. The judge found the appellant to be a credible witness and she accepted his explanation for not raising asylum in his previous appeal against deportation in 2015.

Ground 3

23. I am not persuaded the judge has failed to engage with country guidance. There was no challenge to the judge's factual findings set out at [5] above. On a proper application of KK and RS the appellant would be perceived as having a significant role in Tamil separatism because of his involvement with the LTTE and past persecution; his father's role in the LTTE and the appellant's sur place activity.
24. The term 'significant role' does not require the appellant to show that he held a formal position in an organisation or that his activities have been 'high profile' or 'prominent'. The judge carried out a fact-specific assessment and relied on factors consistent with the approach in KK and RS, namely an indicator-based approach, taking into account the following non-exhaustive factors, none of which will in general be determinative:
- i. the nature of any diaspora organisation on behalf of which an individual has been active. That an organisation has been proscribed under the 2012 UN Regulations will be relatively significant in terms of the level of adverse interest reasonably likely to be attributed to an individual associated with it;
 - ii. the type of activities undertaken;
 - iii. the extent of any activities;
 - iv. the duration of any activities;
 - v. any relevant history in Sri Lanka;
 - vi. any relevant familial connections.

Materiality

25. Further and alternatively, there was no material error of law in the decision to allow the appeal on asylum grounds for the following reasons. The appellant was not excluded from relying on the Refugee Convention because section 72 did not apply and there was no section 72 certificate in this case. In any event, the judge's conclusion that the appellant did not constitute a danger to the public was open to her on the evidence before her.
26. The grounds in the application for permission to appeal made to the First-tier Tribunal submit that the judge failed to consider the appellant's convictions for dishonesty which undermine his credibility. This point was not relied on in the renewed grounds or in oral submissions. There was no 'inherent challenge' to credibility or whether the appellant's political beliefs were genuinely held in the grounds of appeal and permission was not granted on that basis.
27. It is apparent from KK and RS that the HJ (Iran) principles apply. There was no challenge to the judge's finding at [14]:
- "The Appellant does not have a valid passport and he will be questioned at the Sri Lankan High Commission in connection with obtaining a travel document for his return and at such an interview he would conceal his political beliefs in order to avoid persecutory treatment. Similarly, if he managed to leave the airport and return to his home area, he would continue to hide his beliefs in order to avoid suffering persecution and falls within the principles of **HJ (Iran)** following **KK**."
28. Accordingly, I find there was no material error of law in the decision of 29 May 2022 and I dismiss the appeal.

Notice of Decision

The Secretary of State's appeal is dismissed

J Frances

Judge of the Upper Tribunal
Immigration and Asylum Chamber
31 July 2023