



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004549
First-tier Tribunal No:
PA/53643/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 05 December 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SRH
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr R Solomon of Counsel instructed by MDL Solicitors
For the Respondent: Ms T Rixom, Senior Home Office Presenting Officer

Heard remotely at Field House on 30 November 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified) 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 the appellant (and/or other person). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. By the decision of the First-tier Tribunal (Judge Chowdhury) issued on 10.10.23, the appellant, a citizen of Sri Lanka, has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Ali) promulgated 3.8.23 dismissing his appeal against the respondent's decision of 25.8.22 refusing his further submissions of 1.12.21 in support of a claim for

international protection first made in 2016 and in respect of which earlier appeals were dismissed by the First-tier Tribunal in 2017 and again in 2021, with permission for onward appeal to the Upper Tribunal refused.

2. Following the helpful submissions of both legal representatives, I reserved my decision to be provided in writing, which I now do.
3. The written grounds are poorly drafted and difficult to follow. They are preceded by an unnecessary and lengthy treatise on the law. However, they appear to argue that the First-tier Tribunal (i) failed to accord adequate weight to the new evidence, failed to consider the objective country circumstances, and failed to provide adequate reasons; and (ii) failed to apply the correct standard of proof and assess the risk on return against the Country Guidance of KK and RS (Sur place activities: risk) Sri Lanka CG [2021] UKUT 00130 (IAC). However, Mr Solomon's oral submissions to me were much clearer. He concentrated on the application of the Country Guidance to the circumstances of the appellant's 2008 detention and the 'inherent probability' that he may fall in the first category of those on a 'watch list' and liable to detention.
4. In granting permission, Judge Chowdhury considered it arguable that the First-tier Tribunal Judge made an inconsistent finding in not accepting that the appellant would not be at risk of detention and Police questioning when it was accepted that he had been arrested in Sri Lanka and would therefore already be on a stop or watch list.
5. The Upper Tribunal has received the respondent's Rule 24 response, dated 24.10.23, which argues that the First-tier Tribunal directed itself appropriately with reference in particular to KK and RS. The respondent submits that even if the appellant is on a 'watch list,' arising from the 2008 detention, the error cannot be material as under the Country Guidance there was no 'real risk' at the date of the appeal hearing. On that Country Guidance, such a person with no *sur place* activity would not be liable for detention at the airport on arrival, only subsequent monitoring. It was submitted that on those facts placed the appellant in one of the identified risk categories.
6. The First-tier Tribunal accepted that, as previously found by earlier Tribunals, the appellant had been detained and mistreated in 2008, but rejected the claim to have been detained in 2015, suggesting that despite opportunities for further detention, he was not regarded as worthy of further adverse interest.
7. In his submissions, Mr Solomon proceeded on the basis of the First-tier Tribunal findings of the appellant having been detained and mistreated in 2008 but not in 2015. He suggested that on those findings, whilst the appellant may not be on a 'stop list,' the 'inherent probability' was that he was on a 'watch list.' The Tribunal was taken to various passages from the CPIN, KK and RS, and the Court of Appeal's decision in RS (Sri Lanka) [2019] EWCA Civ 1796. From those passages, the following is clear. (i) It is not in dispute that conditions and treatment in detention by the Sri Lankan authorities is likely to breach article 3 ECHR; (ii), Stop and watch lists are still in use, as was the case at the time of the earlier Country Guidance of GJ & Others; (iii) The Sri Lankan authorities maintain a permanent electronic database and there is no good reason why a person would be removed from the database once on it; (iv) on being returned on a TTD the appellant will be questioned on arrival at BIA, whether or not on any list; (v) The database is accessible at BIA and if he is on either a stop or watch list, he will be subject of further questioning; (vi) Even if not on a 'stop list' those on a 'watch list' fall into two sub-categories, the first of which are those deemed to be of sufficiently strong adverse interest to warrant detention after return home, and the second to merit only monitoring; (vii) such monitoring will not place a person at risk on

return; (viii) for those in the first sub-category of the 'watch list' whether they have or are perceived to have undertaken a 'significant role' in Tamil separatism remains the appropriate touchstone; (ix) such an assessment will always be fact-specific. The CPIN explains at 7.3.1 that watch lists include those considered of interest, those suspected of separatist or criminal activities.

8. Paragraph [21] of the headnote provides a non-exhaustive list of indicative factors to be considered in that assessment. Mr Solomon pointed out that those fact-specific factors include any relevant history in Sri Lanka, the type of activities undertaken, and any relevant familial connections. It was submitted that the decision of the First-tier Tribunal failed to undertake any such assessment, failed to take into account relevant factors, and failed to provide any adequate reasoning for the conclusion at [40] of the decision that the appellant will not be on either a 'stop list' or a 'watch list'. In particular, it was submitted that arising from the circumstances of the 2008 detention, it is inherently probable that the appellant will be on the 'watch list' and fall within the first sub-category, leading to his detention after arrival. The context of his detention in 2008 was following a bomb attack in which his girlfriend was thought to be the suicide bomber. Her phone was recovered with photos of her and the appellant on it. For that reason, he was suspected of involvement in the attack and arrested the following day. He was seriously mistreated and tortured during six months of detention, only escaping by payment of a bribe.
9. Mr Solomon pointed to the factual background of RS (Sri Lanka), which in some respects was not dissimilar to the appellant's case, with the appellant in that case detained in 2009, tortured, and escaped by payment of a bribe. Furthermore, GJ was cited by the Court of Appeal to the effect that bribery is very common in detention centres and that escapes by payment of a bribe would normally be recorded as escaped from detention in the Police database and subject to absconder action. Of course, to be weighed against that was the finding that the appellant was found not to have been detained since 2008, despite opportunities for him to be detained.
10. Of significance is [25] of RS (Sri Lanka) where Lord Justice Floyd considered that the First-tier Tribunal Judge in that case had "completely overlooked the inherent probabilities of the case." On the facts of having been detained and tortured, then escaping from custody with the help of a visiting contractor paid for his services, it was inherently likely than an arrest warrant had been issued and that appellant was on a 'stop list.' Whilst the appellant in the present case may not have been on a 'stop list' as he was not detained in 2015, there needed to be a careful assessment whether the 'inherent probabilities' were that he remained on a 'watch list' and whether, applying the lower standard of proof, he fell within the first sub-category and, therefore, liable to detention because of the adverse interest arising from his history.
11. Ms Rixom submitted that on the facts, even if the appellant was or might be on a 'watch list' he would not be in the first sub-category. My difficulty with that assertion is not whether the appellant was or was not in the first sub-category, but whether the decision discloses a sufficiently careful assessment of the relevant factors that might place him in that sub-category and therefore at risk on return. I have carefully read the findings between [40] and [44] of the decision but cannot discern that the judge undertook the necessary assessment consistent with the relevant factors described in the Country Guidance. Whilst the judge has referenced the relevant authorities, the statements rejecting the assertion that the appellant will be of adverse interest are insufficiently reasoned. For example, at [44] the judge stated that the evidence relied on "does not enable me to depart from" (the previous Tribunal decisions). At [40] the judge stated that

“there is no evidence before me to suggest that the appellant is on either of these (lists).” There may well be no positive evidence that he is on either list but of concern is that there is no indication that the judge has considered the inherent probabilities arising from the historical context of the previous detention in 2008 against the factors cited in the Country Guidance. In summary, I am not satisfied that there been an adequate and balanced assessment as to whether the appellant might be on a ‘watch list’, even if never detained in 2015.

12. In all the circumstances, I am persuaded that there is a material error in the decision of the First-tier Tribunal sufficient to require it to be set aside and remade. Given the factual matrix, it is not appropriate to attempt to preserve any findings, but the decision should be remade de novo. I have considered whether it is appropriate to retain this matter in the Upper Tribunal but this is a case which meets the criteria for remittal to the First-tier Tribunal, consistent with 7.2 of the Practice Statement, “the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”

Notice of Decision

The appellant’s appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal to be remade de novo.

I make no order for costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 November 2023