



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004477

First-tier Tribunal No: PA/00662/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

4th March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SR
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer
For the Respondents: Ms E Gunn of Counsel instructed by David Benson Solicitors

Heard at Field House on 5 December 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 the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge Gibbs promulgated on 7 September 2023 allowing SR's appeal against a decision of the Secretary of State for the Home Department dated 31 May 2023

refusing a protection claim and maintaining a decision to deport. The First-tier Tribunal allowed the appeal on protection grounds.

2. Although before me the Secretary of State for the Home Department is the appellant and SR is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and SR as the Appellant.
3. I do not propose to rehearse the full background facts. For the moment it will suffice to summarise certain salient matters; I will make more detailed reference later as is relevant for the purposes of this Decision.
4. In summary, the following is to be noted:
 - (i) On 9 December 2012 the Appellant was 'encountered' in Dover; he made an application for asylum claiming to be from Sri Lanka. However, this claim was subsequently deemed to be withdrawn on 18 December 2013.
 - (ii) The Appellant was arrested in 2015. He made further submissions in respect of asylum claiming to be a national of India. This application was refused on 20 January 2016.
 - (iii) In February 2016 the Appellant agreed to comply with the ETD process (emergency travel document), but said that he was Sri Lankan.
 - (iv) In due course a claim for asylum on the premise that the Appellant was from Sri Lanka was processed and refused on 31 May 2023.
 - (v) In the meantime the Appellant had been the subject of deportation proceedings consequent upon convictions for sexual assaults in 2015 and 2020. These, and a breach of licence, are summarised at paragraph 4 of the decision of the First-tier Tribunal. A deportation decision was made on 11 December 2021.
5. The Appellant's appeal on protection grounds against the Respondent's decision of 31 May 2023 was heard on 5 September 2023. Both parties were represented.
6. The appeal was allowed on protection grounds for reasons set out in the decision of First-tier Tribunal Judge Gibbs.
7. Judge Gibbs:

(i) Considered section 72 of the Nationality, Immigration and Asylum Act 2002 and concluded that the Appellant was excluded from the protection of the Refugee Convention (paragraphs 9-12).

(ii) Considered Article 3 of the ECHR and concluded that the Appellant's removal from the UK would be in breach of Article 3 by reason of a risk of ill-treatment at the hands of the Sri Lankan authorities (paragraphs 13-18).

(iii) Found that the Appellant was not entitled to the protection of Article 3 on medical grounds (paragraphs 19-20).

(iv) Noted that the appeal was not being pursued on Article 8 Grounds (paragraph 7).

8. The Respondent applied for permission to appeal which was granted by First-tier Tribunal Judge Athwal on 22 September 2023.

'Error of law' challenge

9. The Respondent has raised two grounds of challenge; permission to appeal has been granted on both of them.

10. However, before me it was common ground that the substance of Ground 2 was immaterial to the outcome before the First-tier Tribunal.

11. Ground 2 pleads that *"the FTTJ has not applied the current case law in respect of Sri Lankan nationals of Tamil ethnicity with a claimed link to the LTTE and as such this has affected their assessment of the risk posed to the appellant on return"*. This is further particularised: *"The FTTJ has cited **GJ (post-civil war: returnees) Sri Lanka CG (Rev 1) [2013] UKUT 319 (IAC)** [18], but the leading authority in such cases is **KK and RS (Sri Lanka) v The Secretary of State for the Home Department [2022] EWCA Civ 119**, which assesses and incorporates the findings of GJ that are still relevant"* (para 2b).

12. Paragraph 18 of the decision of the First-tier Tribunal, which sets out the key findings on risk factors pertaining to the Appellant, is in these terms:

*"I therefore find that despite the appellant's behaviour in the UK his account of events in Sri Lanka are credible. He is a person who has failed to report whilst on bail and I find that it is therefore reasonably likely that he is a wanted man, despite the passage of time. I am therefore satisfied that, in accordance with **GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)** there is a real risk that the appellant's name will be on a stop list and that therefore he will be stopped at the airport and face a real risk of serious harm at the hands of the Sri Lankan government."*

13. The salient features of risk thus identified – being on a ‘stop’ list, the associated risk of being stopped at the airport, and the reasonable likelihood that those detained by the Sri Lankan authorities will be subjected to ill-treatment contrary to Article 3 – are reproduced in **KK and RS** with reference to **GJ**. The absence of any express reference to **KK and RS** in the decision of the First-tier Tribunal was therefore wholly immaterial, and does not in any event constitute an error of law.

14. Inevitably then, the focus of the challenge before me was in respect of Ground 1.

15. In summary Ground 1 is that “*the FTTJ’s acceptance that the appellant was involved with the LTTE and would be at risk on return has been inadequately reasoned*” (Grounds at paragraph 1(d)). The Ground is articulated in this way:

“a) It is respectfully submitted that the FTTJ has not considered the appellant’s alleged involvement with the LTTE and fear of the authorities resulting from this with any scrutiny whatsoever and has seemingly accepted this as fact without undertaking an assessment of the evidence, owing to undue reliance on ‘consistency’ [14].

b) The appellant may have stated that he was a Sri Lankan national upon entry to the UK in 2012 but he had not given evidence as to any involvement with the LTTE, as it was noted he had absconded before his substantive interview took place and had only raised the fact he is a Tamil for his reason, as noted in the reasons for refusal letter (RFRL) for his asylum application made when claiming to be an Indian national (see Home Office bundle page 6). This means that the appellant’s claimed involvement with the LTTE has only been claimed since responding to the current deportation order against him in 2016.

c) The appellant has not explained why he chose to abscond in 2012 and it is submitted that were his claim to fear the Sri Lankan authorities because of his alleged LTTE involvement true, then he would have continued to pursue this claim and not then make a claim as an Indian national in 2015. The claim that he was advised to do this by others in detention lacks credibility due to the fact Sri Lankans were being granted refugee status on account of LTTE involvement, as evidenced by GJ itself and therefore the FTTJ’s finding has been inadequately reasoned in this respect [16].”

16. It seems to me that subparagraphs (b) and (c) do not in themselves raise any specific pleading of error of law. Indeed, on one reading they might be thought to amount to no more than re-putting the Respondent’s case. If

they have any function in the instant challenge it is perhaps only to illustrate that there were issues in the case that the First-tier Tribunal needed to address, with reasons, in the process of reaching relevant findings on the Appellant's claimed involvement with the LTTE and difficulties with the authorities in Sri Lanka. As such, pursuant to subparagraph (a) this is essentially a 'reasons' challenge; pleaded in aid is the notion that the Judge failed to take into account that the Appellant did not mention LTTE involvement until facing the prospect of deportation in 2016 (subparagraph (b)), and/or did not factor in the circumstances in which the Appellant's initial claim made in 2012 had been deemed to have been withdrawn.

17. I find that in significant part there is nothing of any merit by way of error of law in respect of much of the Respondent's Ground 1.
18. The First-tier Tribunal clearly engaged with the circumstances of the Appellant claiming to be a national of India when he made further representations in respect of protection in 2015: see paragraph 16. The Judge concluded that the Appellant had offered explanations for his conduct that were credible.
19. It may also be seen that the Judge engaged with the Appellant's supposed 'absconding' leading to his initial claim being deemed withdrawn. The Judge noted that there was no dispute the Appellant had changed addresses without informing the Respondent, and despite some apparent reservation as to the plausibility of the Appellant's belief that the Home Office would nonetheless contact him concerning an interview, noting in particular that he had twice been required to show his ARC card and then been allowed "*to continue on his way*" (and therefore, implicitly, not to have been considered to be 'at large' without permission or authority), concluded "*I do not therefore find that the appellant's absconding, such as it was, casts significant doubt on his credibility*".
20. It is not pleaded that the analysis and findings of the First-tier Tribunal at either or both of paragraph 16 and 17 were perverse or irrational.
21. As such much of Ground 1, including all of subparagraph (c), may be seen as no more than an attempt to reargue points on which the Judge gave reasons for her conclusions.
22. In all such circumstances it seems to me that the only matter of any specific merit in Ground 1 is in respect of the approach to the Appellant's claim to have been involved with the LTTE and to fear the authorities.
23. The Judge's reasons for accepting the Appellant's claim in this regard are apparent at paragraphs 14 and 15:

“14. ... I also find that the appellant has provided a consistent account of events in Sri Lanka, to the respondent, in his substantive interview, to the two psychiatrists that he has seen and in his oral evidence before me...”

15. I also find that [counsel for the Appellant] submitted documentary evidence regarding key LTTE characters referred to by the appellant in his account which corroborates his evidence. These were not challenged by [the Respondent’s Presenting Officer].”

24. The Judge gave consideration to the way in which the Respondent’s case had been put on this issue, but did so by reference to matters highlighted by counsel for the Appellant: see paragraph 14 again –

“Indeed, as [counsel] highlighted in her submissions the substance of his claim had not been subject to dispute, rather, it is his claim to Indian citizenship that undermines his credibility in the eyes of the respondent as is his behaviour in the UK in accordance with the s.8(2) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004”

25. An understanding of the Judge’s comment requires consideration of the Respondent’s RFRL of 31 May 2023 at paragraph 65 et seq.. Paragraph 65 is in these terms:

“Benefit of the doubt

65. Your claim that you were involved with the LTTE and were caught supplying medicines to the LTTE by the Sri Lankan authorities has been considered, and on the basis of all of the evidence, has been considered as uncertain. In considering whether to accept this aspect of your claim, consideration has been given to paragraph 339L of the Immigration Rules and section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.”

26. At paragraph 68 the specific factors of the Appellant’s *“actions in hiding your nationality and absconding”* are identified as instances of a failure to make a genuine effort to substantiate the claim with reference to paragraph 339L (I) of the Immigration Rules, as cited at paragraph 67. It is also said that elements of the Appellant’s account have been found to be inconsistent: I return to this aspect of the case below. Pursuant to these matters the decision-maker determined that the Appellant’s general credibility had not been established (paragraph 69); in consequence the Appellant was not to be afforded the benefit of the doubt regarding unsubstantiated aspects of his claim (paragraph 70); and further in consequence it was not accepted that the Appellant had been involved

with the LTTE and had been caught supplying medicines to the LTTE by the Sri Lankan authorities (paragraph 71).

27. In context then, it may be seen that the observation of the Judge at paragraph 14 was to the effect that the Respondent's case was that the Appellant's credibility in respect of his involvement with the LTTE and consequent difficulties with the authorities in Sri Lanka turned on his 'section 8' conduct. The Judge specifically appears to have accepted counsel's characterisation of such conduct as being related to the Appellant's "*claim to Indian citizenship*" (paragraph 14). Given that the Judge concluded that the Appellant's claim in 2015 to be of a different nationality had been adequately explained, and that the circumstances of the 'absconding' did not cast significant doubt on his credibility, the Judge in substance concluded that the Appellant had answered the Respondent's case against him - at least so far as the Judge perceived the case to be.
28. As I have indicated above, in my judgement the Judge addressed the two issues of the false claim to Indian citizenship and the 'absconding' in a manner that is not impugnable on the grounds pleaded.
29. Ground 1 also seeks to rely on a failure of the Appellant to mention his involvement with the LTTE at his initial screening interview in December 2012.
30. I have noted above the reference at paragraph 68 of the RFRL to elements of the Appellant's account found to have been inconsistent. It is clear from paragraph 68 that the decision maker determined this undermined the Appellant's general credibility pursuant to paragraph 339L of the Immigration Rules. It is apparent at paragraphs 57-59 of the RFRL that a key component of the elements of inconsistency was that the Appellant "*made no mention [of his] arrest and detention*" in his screening interview. However, the RFRL does not raise any issue of a failure to mention involvement with the LTTE in his screening interview.
31. Further to this, the screening interview included in the Respondent's bundle before the First-tier Tribunal at Annex B (dated on its face as 2 September 2020, but in the index as 18 March 2021) includes as the reason for coming to the UK "*I supplied LTT. I am scared for my life*", and the basis of claim includes "*I supplied medical equipment to LTT*".
32. Accordingly, in so far as the RFRL refers to a screening interview, it appears to be the screening interview conducted in the context of the instant claim rather than any screening interview in respect of the initial claim in 2012 or the claim as an Indian national in 2015. Neither of those earlier screening interviews was filed by the Respondent before the First-tier Tribunal. In the instant screening interview there is not a failure to

mention involvement with the LTTE: the complaint in the RFRL is the failure to mention arrest and detention in such interview.

33. When Ms Ahmed reached this point in her submissions I enquired whether perhaps Ground 1 introduced a new point with regard to the Appellant having "*not given evidence as to any involvement with the LTTE*" on entry to the UK in 2012. Ms Ahmed accepted that it was not raised in the RFRL. In such circumstances this aspect of the challenge must fail. It cannot be the case that the First-tier Tribunal erred because it did not address a point not raised.
34. However, this still leaves the pleading in the RFRL of inconsistency of account with particular reference to the Appellant's failure to mention in the screening interview of the instant claim his arrest and detention.
35. In this context it is adequately clear that characterisation by the Appellant's counsel before the First-tier Tribunal (at least so far as the Judge recorded it) of the issue on credibility as arising solely by reason of the Appellant's earlier claim to Indian citizenship, and that otherwise "*the substance of his claim has not been subject to dispute*", was inaccurate. It was incomplete in that the Respondent had also raised the issues of absconding and inconsistency in the narrative account (in that arrest and detention had not been mentioned in the screening interview). It was an error of the Judge to accept such characterisation. Although the Judge in any event went on to consider the absconding issue in addition to the issue of India nationality, the Judge did not identify and did not address the issue of discrepancy. Indeed, the apparent acceptance of Counsel's characterisation of the reason for rejecting the Appellant's claim indicates that the Judge did not recognise the nature of the Respondent's case as set out in the RFRL.
36. In this context, in my judgement the Judge's reference to consistency of account at paragraph 14 cannot save the Decision if such reference is made without identifying and addressing the issue of inconsistency raised by the Respondent.
37. I note that Ms Gunn observed that the issue as articulated in paragraph 35 above - which reflects the refinement of the Respondent's challenge pursuant to discussion during Ms Ahmed's submissions - does not emerge in such terms in the Grounds of challenge. I accept that observation insofar as it relates to detail. I do not accept, however, that the Grounds in substance do not encompass the eventual refinement. It is adequately clear that the Grounds are a 'reasons' challenge to the First-tier Tribunal's scrutiny of the credibility of the Appellant's account.
38. The failure to recognise and address the substance of the Respondent's case - pursuant to the mischaracterisation of the Respondent's position as

being limited to 'section 8 conduct' whereas in reality it included an assertion of inconsistency in narrative account - is such that the decision is deficient in its reasoning. I find that there has been a material error of law that requires the decision of the First-tier Tribunal to be set aside.

Re-making the decision in the appeal

39. In order to remake the decision in the appeal it will be necessary for there to be a new hearing. The appropriate forum is the First-tier Tribunal.
40. The Respondent's Grounds invite, in the event of an error of law being found, preservation of the First-tier Tribunal's findings relating to section 72 and Article 3 medical grounds. I do not consider it appropriate to completely exclude further consideration of such matters; however given the clear and well-reasoned findings of the First-tier Tribunal on both issues, in my judgement such matters should not be revisited unless there is the filing of further pertinent evidence that was not reasonably available at the time of the hearing on 5 September 2023.
41. Otherwise I do not propose to make any specific directions: standard directions will likely suffice, but I leave this as a matter for the First-tier Tribunal's ongoing case management.

Notice of Decision

42. The decision of the First-tier Tribunal contained a material error of law and is set aside.
43. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Gibbs.
44. In remaking the decision the First-tier Tribunal is to approach the issues of the application of section 72 of the Nationality, Immigration and Asylum 2002, and the Appellant's Article 3 medical case to have been determined and settled by the findings of Judge Gibbs, and not to be re-litigated, unless the Appellant files further relevant evidence that was not reasonably available to him before 5 September 2023.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

26 February 2024