



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004636

First-tier Tribunal Nos: PA/54746/2022
LP/00600/2023

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 27 June 2024**

Before

**UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE SYMES**

Between

**SP
(ANONYMITY ORDER MADE)**

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms U Miszkiel, Counsel, instructed by MTC Solicitors
For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

Heard at Field House on 8 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

1. This is an appeal by a citizen of Sri Lanka against the decision of the First-tier Tribunal dismissing his appeal against the decision of the Secretary of State dated 14 October 2022 refusing him international protection.
2. I regret the delay in promulgating this decision which is entirely my fault. It is based closely on a draft I received from the typists on 13 December 2024.
3. The decision is challenged on three grounds. First it is said that the decision followed procedural unfairness because:

“The Judge erred in departing from and failing to consider a concession made by the Respondent’s representative at the hearing.”
4. The second ground alleges that the judge did not apply properly the guidance in **KK and RS (sur-place activities: risk) Sri Lanka CG [2021] UKUT 0130**.
5. Third, it is said that the judge erred in her application of the **HJ (Iran)** principle. This is clearly a reference to the decision of the Supreme Court in **HJ (Iran) v SSHD [2010] UKSC 31** which decided, inter alia, that a person is entitled to protection if they would only avoid persecution by reason of suppressing their beliefs.
6. It was Ms Miskiel’s case that if the appellant succeeded on ground 1 then the appeal had to be redetermined but if he succeeded on grounds 2 or 3, perhaps particularly ground 2, the appeal should be allowed on the findings that the judge has made.
7. The appellant was represented in the First-tier Tribunal by Ms K Renfrew of Counsel. Ms Renfrew provided a statement about what had happened in the First-tier Tribunal. Regrettably, this was not served until very late. Mr Parvar had anticipated the kind of thing that might have been said made further enquiries that enabled him to respond appropriately to Counsel’s statement very quickly. Had Mr Parvar not been so diligent it may have been necessary to have adjourned the proceedings and we are grateful to him for taking such a mature and constructive approach.
8. The most important part of the statement is at paragraph 6 where Counsel says:

“From what I can recall of the hearing and from reviewing my notes, at the close of the Respondent’s submissions, the presenting officer had indicated that the Respondent was in difficulty because involvement in the TGTE was, under the country guidance in KK and RS, sufficient to place the appellant at risk. I recall being surprised by this submission as there had been no concession to this effect in the respondent’s case documents. The Judge intervened and asked the Respondent’s representative to clarify his position on this issue, to which he replied that he did not have instructions to concede this point and that the Tribunal was invited to dismiss the appeal.”
9. The summary of Counsel’s notes of the Secretary of State’s submissions is interesting. It states:

“- Lately submitted TGTE ID.
- Belated involvement with the TGTE.
- TGTE involvement is enough under KK and RS (Respondent is in difficulty).

Judge:
Question – why are we in court today if that is the respondent’s position?

Response:

R has no instructions to concede the appeal and we invite the tribunal to dismiss.”

10. Counsel’s notes for her own submissions then indicate it was a starting point that if it was the respondent’s position that the appeal should be allowed with reference to **KK and RS** then she conceded that the appellant is a refugee. Counsel’s notes emphasises that it was not put to the appellant in the decision, review or cross-examination that his political views were not genuinely held. Counsel then outlined her summary of the evidence particularly drawing attention to TGTE membership cards. Much else was said.
11. It is against this background that the appeal was brought.
12. We consider with some care the First-tier Tribunal’s Decision and Reasons.
13. The judge outlined the appellant’s immigration history. He was born in 1969. He arrived in the United Kingdom in 2007 and claimed asylum unsuccessfully. There was a decision of Immigration Judge Neyman dated 4 July 2007 dismissing his appeal against an earlier decision and then a decision of Immigration Judge Baldwin dated 4 May 2011, again dismissing his appeal against the refusal of protection. It was his case that he had been subjected to forcible recruitment into the LTTE and instead had escaped. Judge Neyman’s decision shows that on the morning of the planned hearing in June 2007 the appellant told his Counsel that he had given a completely untrue account. Judge Neyman did not believe him and Judge Baldwin was no more impressed in the later decision. The most recent claim was based on new evidence of sur place activities supporting the government of Tamil Eelam TGTE. The problem, according to the respondent, is that the appellant had not shown he had taken a “significant role” in Tamil separatism. It is part of his case in the present appeal that he had been involved in “numerous campaigns to fight for Tamil justice and independence from state oppression and genocide since I came to the UK.”
14. He said he had joined the Transnational Government of Tamil Eelam (TGTE) a few months after arriving in the United Kingdom and had been an active supporter. He claimed to have attended Tamil diaspora activist work, that he had been a banner carrier and flag waver at various Tamil events. He was also in a working group with the political wing leader of the LTTE.
15. The judge noted, correctly, that it was the respondent’s case that the appellant was not truthful and could not show that he would face persecution and that **KK and RS** did not help him.
16. The appellant gave evidence and was very critical of one of his earlier advisors. He had the misfortune to use a solicitor who has been struck off the Solicitor’s Roll, largely as a result of dishonest practice involving immigration and asylum.
17. The judge noted that although the appellant had claimed to have been a member of the TGTE since 2010 his earliest membership card was dated November 2022. The appellant said that cards were not issued until 2015.
18. The judge recorded that she had been urged by Counsel to allow the appeal because of the appellant’s support for the TGTE. The judge recognised that being a member of the TGTE, a proscribed organisation, was a “significant risk factor”.
19. Also, it was argued that the appellant had genuine pro-separatist beliefs and could not be expected to suppress them in the event of return to Sri Lanka.

20. The judge reviewed the evidence about the appellant's sur place activity. The judge was not impressed. She could not identify the appellant in several of the photographs. She did identify him in a photograph relating to a Thai Pongal Day in Raynes Lane on 15 January 2023, but the judge was not told the meaning of Thai Pongal, which her own research led her to believe was a "multi-day Hindu harvest festival celebrated by Tamils in India and Sri Lanka."
21. The judge noted that the photographs did not "vouch the extent of the attendances at demonstrations and events". The judge was aware of a letter of support from a Mr Surendram, which described the appellant as an:

"active participant in TGTE activities since 2021" but it was the appellant's case he had only met Mr Surendram in 2021 and the judge did not accept it was an accurate indication of his involvement. The judge did not believe the evidence of sur place activities "except to the extent that these claims are supported by the photographic evidence and by Mr Surendram's inspecific statements about attendance at Sunday meetings and voluntary work in the main community."
22. The judge then looked carefully at the photographs and was not impressed. They were supported by captions that were helpful to the appellant, but there was no evidence that the captions, giving details for example about the date, were right.
23. At paragraph 71 the judge found that the appellant:

"is seen posing with a flag with the Tamil Eelam emblem in one of the photographs, marked as having been taken in 2015 and with a placard in the photograph marked as having been taken in 2017, the placard stating "*prosecute was crimes in Sri Lanka*". Even if it is accepted that the photographs were taken on the dates and at the events marked on the photographs and even if the appellant attended the 2015 event referred to in paragraph 64(b) above and even if the 2017 and 2023 were events were organised by the TGTE, as the commentary on the photographs states I find that the photographic evidence does not establish to the lower standard of proof applying in asylum claims that the appellant will be perceived to be a threat to the integrity of Sri Lanka as a single state because he will be perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/ or a renewal of hostilities within Sri Lanka, having regard to how '*significant role*' is to be understood and assessed as explained in KK and RS."
24. The judge did not accept that the appellant was sufficiently involved to be a problem.
25. The judge then said at paragraph 72 that there were:

"no substantial grounds for thinking that the Sri Lankan authorities had any reason to photograph the appellant at any of the events that the photographs filed have shown him attending".
26. The judge did not accept there was any reason to think the appellant is of interest to the current government of Sri Lanka.
27. The judge noted the appellant's claim not to have a valid passport and so he would have to attend the Sri Lankan High Commission to be issued with a travel document. The judge accepted that this brought with it a risk of being asked about his involvement with anything in the United Kingdom, perhaps particularly sur place activities, but did not accept that there would be admissions of a

“significant role” because there was none. The judge noted that the appellant had not claimed to have signed petitions or conducted fundraising in the diaspora or to have spoken at events. His activity was limited to intermittent attendance at Tamil supporting events.

28. At paragraph 72 the judge found there were “no substantial grounds” for thinking that the Sri Lanka authorities had photographed the appellant but even if he had been photographed his familial connections would not have emerged. The judge found there were again “no substantial grounds” for thinking that the appellant had been captured on more than one occasion. Although he would have to go to the Sri Lanka authorities the judge did not accept there would be any finding of a significant role by the Sri Lanka authorities.
29. The judge went on to say that the appellant had not made “any unequivocal statement of belief in Tamil separatism” in his witness statement. The judge then embarked upon a forensic examination of the contents of the witness statement. This is a troubling approach because in matters of international protection where the “real risk” standard is relevant and has to be applied and where findings of fact must be made “in the round” a highly structured approach is not necessarily right. However, at page 17 of his statement the appellant said:

“I have taken part in numerous campaigns to fight for Tamil justice and independence from state oppression and genocide since I came to the UK. During the final stages of the war, in particular, I campaigned daily to save my family and the lives of other Tamils in my homeland.”
30. He then went on to explain at paragraph 18 his involvement in the TGTE and said:

“The TGTE believes that the only solution for the Tamil people is the establishment of a separate Tamil state. I joined the TGTE as I support its aims which is to address the unresolved political issues of Eelam Tamils.”
31. We have reflected on this and we cannot agree with the judge. It is wrong to say the appellant had not made any unequivocal statement to believe in Tamil separatism. Further, as was pointed out, he was not cross-examined on the basis that he did not believe in Tamil separatism.
32. The judge, in her Decision and Reasons, then gave reasons for finding that the appellant had exaggerated his role. At paragraph 79, the judge appears to “row away” from her findings that there was no unequivocal statement and says:

“Even if the appellant genuinely holds separatist beliefs he has not shown what he would wish to do on return in relation to the expression of these genuinely held separatist beliefs.”
33. The judge then went on to describe the appellant’s assertion that he would “continue to campaign for Edam Tamil’s rights and justice until I die” as vague because he does not spell out what he intended to do. Neither, according to the judge, did he spell out that he intended to do that in Sri Lanka. The judge also commented that he had not shown campaigning in the United Kingdom, rather attending Remembrance Day and community events.
34. With respect to the judge, we find that she has seriously undervalued the evidence. As indicated above, she is just wrong to say that the appellant was equivocal in his support. Whether or not the appellant is sincere, he has said perfectly plainly where his sympathies lie. Further, one of the “community events” included the appellant being associated with photographs of a former leader of the LTTE. The celebration may have had a more benign title but it was

plainly, from the pictures, a pro-Tamil separatist organisation demonstration and the appellant was there.

35. We find the judge's finding that the appellant could not be expected to carry on in Sri Lanka just not open to her.
36. The appellant succeeds on the grounds suggesting that the judge has not made proper findings about the risk on return because there was no basis for doubting that the appellant would want to be involved in Tamil separatist activities. This could only have been arrived at by a wholesale adverse credibility finding and although there were proper reasons to criticise the appellant's integrity he was not challenged by the Home Office on that point and it was not for the judge to do it.
37. Neither, on reflection, can we accept the judge's confidence in the appellant not being in trouble in the event of return. It is likely that he will have been photographed. That is what the Sri Lankan authorities do and he made sure he was photographed. It is possible that his motives were, if not exactly insincere, illuminated by a desire to build a case, but that does not mean he has not succeeded.
38. It is plain to us that the appellant would at least face a real risk of being identified for his activities in the United Kingdom and that is enough. The Sri Lankan authorities who detain people investigate them for separatism do not apply high standards of prisoner welfare. He is in a category of people who are likely to be questioned and he is in a category of people who are likely to be ill-treated in questioning (there may not be much difference between the two categories).
39. It follows that we find for the appellant on all points.
40. First, we accept that there was an unfair hearing because the appellant's Counsel was wrongfooted by the judge apparently ignoring something, which if not strictly a concession, looked like the concession from the Home Office and the Counsel should have been put on notice. We find this is material. We cannot say if it had made a difference, but that is enough to make it material. We cannot say that it could not.
41. We also find that, on the judge's own findings, he is in the category of people who are sufficiently involved to be at risk. He is a flag waver and a banner carrier who is going to be photographed. That is enough. It does not matter that there are people who could do a great deal more. We also find that there was no basis for concluding he would be insincere. Rather the evidence that was not challenged pointed to his having a genuine belief in Tamil separatism, and which he would want to continue.
42. It follows therefore that we find the First-tier Tribunal erred, but erred in a way that means we allow the appeal outright.

Notice of Decision

The First-tier Tribunal erred. We set aside its decision and we allow the appellant's appeal on asylum grounds.

Jonathan Perkins

Judge of the Upper Tribunal

Appeal Number: UI-2023-004636

Immigration and Asylum Chamber

27 June 2024