



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: AA/06874/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8<sup>th</sup> December 2014**

**Determination  
Promulgated  
On 19<sup>th</sup> December 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**P L L**

(ANONYMITY ORDER MADE)

Respondent

**Representation:**

For the Appellant: Mr P Nath, Senior Home Office Presenting Officer

For the Respondent: Mr C Lane of Counsel instructed by Pickup Scott Solicitors

**DETERMINATION AND REASONS**

**Introduction and Background**

1. The Secretary of State appeals against a determination of Judge of the First-tier Tribunal Freer promulgated on 22<sup>nd</sup> October 2014.
2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to him as the Claimant.

3. The Claimant is a Sri Lankan national born 6<sup>th</sup> March 1946 who on 8<sup>th</sup> April 2014 claimed asylum on the basis of his imputed political opinion. In the alternative, he claimed that he was entitled to humanitarian protection, and that to remove him from the United Kingdom would breach Articles 2, 3 and 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
4. The application was refused by letter dated 4<sup>th</sup> September 2014, and the Secretary of State issued a Notice of Immigration Decision dated 5<sup>th</sup> September 2014 to remove the Claimant from the United Kingdom.
5. The appeal was heard by Judge Freer (the judge) on 16<sup>th</sup> October 2014. The judge dismissed the asylum claim finding that the Claimant did not fall within the risk categories set out in GJ (Sri Lanka) CG [2013] UKUT 319 (IAC). The judge did not find that the Claimant was entitled to humanitarian protection, and did not find that there would be a breach of Articles 2 or 8 of the 1950 Convention if the Claimant was returned to Sri Lanka. The judge did however find that to remove the Claimant from this country would breach Article 3 of the 1950 Convention, and therefore allowed the appeal on that basis.
6. The Secretary of State applied for permission to appeal to the Upper Tribunal contending that the judge had made perverse or irrational findings on a matter or matters that were material to the outcome of the appeal. I set out below the grounds contained within the application for permission to appeal;
  - (a) It is respectfully submitted that the Immigration Judge has materially erred in law by allowing the Appellant's appeal on Article 3 grounds, yet dismissing it on asylum grounds. It is respectfully submitted that the reasons provided at paragraphs 79-81 of the determination for allowing the Appellant's appeal are those which would be covered by the Refugee Convention (fear from the Sri Lankan Government and State actors of persecution).
  - (b) It is noted that the Immigration Judge provides reasons for dismissing the Appellant's asylum claim at paragraphs 70-74, finding that the Appellant would not be of interest to the authorities and not fit into the risk categories outlined in GJ & Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC). However at paragraph 79-81 of the determination the Immigration Judge finds that the Appellant may face mistreatment from the Sri Lankan authorities. It is respectfully submitted that the Immigration Judge has provided contradictory findings in relation to the risk faced from the Sri Lankan authorities on return.
  - (c) In addition the Immigration Judge states at paragraph 77, "He has not established a real risk of torture or inhuman or degrading treatment contrary to Article 15(b)" yet finds that the Appellant's Article 3 rights would be breached in paragraphs 79-81. It is therefore respectfully submitted that the Immigration Judge's findings are contradictory and therefore irrational. As a result it is submitted that the Immigration Judge has materially erred in law.

7. Permission to appeal was granted by Judge of the First-tier Tribunal Chambers in the following terms;
  - (1) Permission is sought to appeal against the decision of the Judge of the First-tier Tribunal who in a decision promulgated on 22 October 2014 allowed the appeal.
  - (2) The grounds seeking permission submit that in allowing the Article 3 appeal and dismissing the asylum claim the judge gave contradictory findings in relation to the risk faced.
  - (3) The judge dismissed the asylum claim finding the Appellant did not fall within a risk category (paragraph 74) but allowed the appeal under Article 3 (paragraph 83) finding the Appellant may be at significant risk of beatings (paragraph 81).
  - (4) The grounds are arguable.
  - (5) Permission to appeal is granted.
8. Following the grant of permission the Claimant lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the First-tier Tribunal determination did not contain a material error of law.
9. It was submitted that the judge made a number of findings of fact at paragraph 60 of his determination, including that it was more likely than not that the Government of Sri Lanka (GOSL) were seeking a member of the Claimant's family and that the Claimant was at risk of violence due to intelligence gathering exercises in that regard. The judge made clear findings of fact that the Appellant would face persecution, and those findings were consistent with the findings made in respect of Article 3 of the 1950 Convention in paragraphs 79-82.
10. The asylum appeal was refused because the Claimant did not fit within the defined categories established in Gj & Others, and therefore if the asylum appeal was only disallowed because the persecution was not for a Convention reason, then there was no error of law.
11. Alternatively, if it was found that the Appellant faced persecution as a family member of a wanted man, and that this was a Convention reason, then the asylum appeal should have been granted as well as the Article 3 appeal, and if there was an error of law, it was that the asylum appeal was dismissed.
12. In relation to the contradiction between the judge's findings on Article 15(b) of the Qualification Directive 2004/83/EC, and his findings in relation to Article 3 of the 1950 Convention, if there was an error of law, it was that the appeal was not allowed under the Qualification Directive.

13. The Tribunal issued directions that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal determination should be set aside.

### **The Upper Tribunal Hearing**

14. I firstly heard submissions from Mr Nath on behalf of the Secretary of State, who relied upon the grounds contained within the application for permission to appeal. Mr Nath pointed out that there was a clear conflict between the findings made by the judge in respect of Article 15(b) of the Qualification Directive, in which he had found no real risk of torture or inhuman or degrading treatment, and his findings in relation to Article 3 when the judge found a real risk that the Claimant would be subjected to torture or to inhuman or degrading treatment or punishment.
15. Mr Lane relied upon his rule 24 response and pointed out that there had been no challenge made by the Secretary of State to the findings of fact made by the judge, nor the findings made in relation to the Claimant's credibility.
16. Mr Lane pointed out that the judge had dismissed the asylum claim because the Claimant did not fit within the risk categories set out in GJ & Others, and he indicated that this was accepted.
17. Mr Lane went on to submit that the judge had erred in that he should have considered other risk factors relating to asylum not covered either by GJ & Others, or in the Court of Appeal decision MP & Another [2014] EWCA Civ 829 in which Underhill LJ had stated at paragraph 50 that there may untypically be cases where the evidence shows particular grounds for concluding that the GOSL might regard an individual as posing a current threat to the integrity of Sri Lanka as a single State even in the absence of evidence that he or she has been involved in diaspora activism.
18. Mr Lane submitted that the finding in relation to Article 3 was not incompatible with a dismissal of the asylum appeal, but accepted that it was more difficult to reconcile the findings made by the judge in relation to Article 15(b) of the Qualification Directive, and Article 3 of the 1950 Convention.
19. However Mr Lane submitted that the judge had made clear findings of fact which had not been challenged and had accepted the Claimant's daughter's evidence as corroborating in part the Appellant's account. Mr Lane submitted that in view of those findings, the judge had in fact erred, and should have allowed the appeal on humanitarian protection grounds.
20. Having heard oral submissions I indicated that I would reserve my decision. I indicated that as I found there had been no challenge to the findings of fact and the credibility findings, if I decided there was an error of law I would re-make the decision without a further hearing as in my

view no further evidence or submissions were required. Neither representative disagreed.

## **My Conclusions and Reasons**

21. I do not find that the judge erred in concluding that the Claimant was not entitled to asylum. The judge considered both GJ and MP and concluded on the facts as found, that the Claimant did not fit within any of the risk categories.

22. There has been no challenge to the findings made by the judge that the appeal cannot succeed with reference to Articles 2 and 8 of the 1950 Convention.

23. There is a conflict when the findings of the judge in relation to Article 15(b) of the Qualification Directive are compared with the findings in relation to Article 3 of the 1950 Convention. Article 15 is set out below;

Serious harm consists of:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

24. Article 3 of the 1950 Convention is set out below;

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

25. The judge at paragraph 77 stated that the Claimant "has not established a real risk of torture or inhuman or degrading treatment contrary to Article 15(b)". There was also no general level of violence that would engage Article 15(c). The Article 15(c) findings have not been challenged. In relation to Article 3 the judge found that the Claimant had suffered recent beatings, which had been corroborated by the evidence of his daughter who the judge found credible.

26. I therefore conclude that the judge has made contradictory conclusions which cannot be reconciled and which amounts to an error of law.

27. I therefore set aside the decision of the First-tier Tribunal. In re-making the decision I preserve the unchallenged findings of fact which are set out in paragraph 60 of the First-tier Tribunal determination and which I set out below;

60. I therefore make the following findings of fact:

- (i) The Appellant himself is unreliable in his evidence, which means some of it may be untrue in whole or in part but this is not determinative of those matters.
- (ii) His daughter IL does not know his whole life story but where she corroborates aspects of it they should be taken as reasonably likely to be true, since her credibility was accepted by the Respondent when she claimed asylum granted in 2012 and she has been coherent and plausible when she appeared before me.
- (iii) The authorities from at least 2011 have not suspected the Appellant himself of being an LTTE activist because they gave him a passport. They had suspicions earlier, during the civil war, which is not in dispute.
- (iv) There are consistent accounts from more than one source that the Appellant's wife and another daughter are living together in hiding in Sri Lanka and they move often to avoid detection.
- (v) Therefore it may reasonably be the case (although this was not put to me in terms) the wife and daughter are afraid to apply for passports in their own names to leave Sri Lanka and are internally displaced persons; were they outside the country they could qualify as refugees in their own right.
- (vi) It has been explained why the man and not the women left Sri Lanka. However this does not sit well with the fact that one of the Appellant's other daughters escaped independently, as we know. That casts some doubt but is not a determinative point.
- (vii) These accounts also make it more likely than not that there is a further family member or members actively sought, even recently, by GOSL on suspicion of continued LTTE activities. The country guidance shows that such investigations are intelligence led activities; the gathering of intelligence may include questioning family members to discover the whereabouts of a missing relative of interest and in Sri Lanka, even today, that may provoke acts of violence to obtain a forced confession.
- (viii) The Appellant is not one of those family members who is actively sought under a warrant or summons because there is none and the Appellant has not even bothered to enquire; but he may be sought by the GOSL in the hope that he may have location information for the person or persons in his family who is or are actually of real interest, based on intelligence, to the GOSL.
- (ix) I bear in mind that trauma is one possible reason for memory loss, although memory loss without more is not cogent proof of trauma and the proof of memory loss before me is not of high expert level. It is however supported by the Appellant's daughter IL, whose testimony I have found reliable.
- (x) There is no rational reason to suppose that the GOSL are yet aware of the Appellant's failing memory, since it became noticeable only after his departure. His memory does not yet remove him from a

list of potential informants. Therefore it does not remove the risk that he claims exists on return. Its effect on his ability to respond to questions may be taken to be a sign of failing to cooperate with GOSL, which perception could give rise to harm.

(xi) The UK is the centre of Tamil activism in the diaspora (paragraph 303 of the Upper Tribunal decision). The Appellant's passport on return would show he had been in the UK, for what that may be worth. I have to balance that point against his lack of activity in the diaspora and the sophisticated knowledge of GOSL that not all in the diaspora are activists. The approach of the GOSL is not wholly rational, it may be argued, but it is intelligence led.

(xii) It is recorded in the COI report at 2.2.2 that the report of the Bar Human Rights Committee of England and Wales (March 2014) shows that family connections continue to be of interest as one focus of intelligence gathering, which fact is consistent with the accounts I have heard in this appeal.

(xiii) In the same report section at 2.2.4 it is shown that even in 2014 the GOSL are crushing actual attempts to revive the LTTE.

28. Further findings were made by the judge in paragraphs 62, 68, 69, 80 and 81. In summary the judge noted that the Claimant's daughter was believed by the UK authorities and she was granted asylum, and she had given evidence consistent with this.
29. The account of the daughter was corroborative of some significant points made by the Claimant, as pointed out by the judge in paragraph 68. This included the fact that the Claimant's wife and another daughter were moving around Sri Lanka to avoid detection by the GOSL, which the judge found to be consistent with continuing persecution of the family. The judge noted that the Secretary of State in the refusal letter had accepted that the Claimant had been of adverse interest to the GOSL in the 1990s.
30. The judge went on in paragraph 69 to find that there had been past persecution of the family, and for a period in the 1990s this included the Claimant, and that a beating of the Claimant had taken place fairly recently.
31. In paragraph 80 the judge found that at least one family member of the Claimant was of genuine recent interest to the GOSL, and if the Claimant returned to Sri Lanka he would have to share the lifestyle of his wife and daughter, which would mean moving from one temporary address to another to avoid the authorities, and in paragraph 81 the judge found a significant risk of beatings if the Claimant returned to Sri Lanka.
32. The judge did not accept the Claimant as a reliable witness, but found some of his evidence was corroborated by background evidence, and to a certain extent corroborated by the oral evidence given by his daughter who had been granted asylum in the United Kingdom.

33. As previously stated, I found no realistic challenge had been made to the credibility findings and findings of fact made by the judge. Therefore, based upon those findings, I conclude that the judge was entitled to find that the Claimant was not at risk of persecution because he did not fit within the risk categories set out in GJ, but was entitled to conclude that the Claimant would be at risk of torture or inhuman or degrading treatment or punishment, and therefore the Claimant was entitled to be granted humanitarian protection pursuant to Article 15(b) of the Qualification Directive, and the appeal should also be allowed under Article 3 of the 1950 Convention.

### **Decision**

The determination of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The appeal of the Secretary of State is dismissed.

The Claimant's appeal is dismissed on asylum grounds.

The Claimant's appeal is allowed on humanitarian protection grounds.

The Claimant's appeal is allowed pursuant to Article 3 of the 1950 Convention.

The Claimant's appeal is dismissed with reference to Articles 2 and 8 of the 1950 Convention.

### **Anonymity**

The First-tier Tribunal made an anonymity direction. That order is continued pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No report of these proceedings shall directly or indirectly identify the Claimant or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 12<sup>th</sup> December 2014

Deputy Upper Tribunal Judge M A Hall

### **TO THE RESPONDENT** **FEE AWARD**

No fee has been paid or is payable and therefore there is no fee award.



Signed

Date: 12<sup>th</sup> December 2014

Deputy Upper Tribunal Judge M A Hall