



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/07380/2013

THE IMMIGRATION ACTS

Heard at Field House
On 12 March 2014

Determination Promulgated

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR T P

(Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr G Saunders a Senior Home Office Presenting Officer

For the Respondent: Ms S Jegarajah of Counsel instructed by Jein Solicitors

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Sri Lanka who was born on 5 November 1970 ("the claimant"). The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Sullivan ("the FTTJ") who allowed his appeal against the Secretary of State's decision to give directions for his removal from the UK following the refusal of leave to enter on asylum and human rights grounds.

2. The claimant first came to the UK in August 2001. Since then he has been back to Sri Lanka and returned to the UK. The Secretary of State has made a number of decisions and the claimant has made two appeals to an Adjudicator/Immigration Judge. There have been judicial review proceedings. The full history is set out between paragraphs 2 and 9 in the determination of the FTTJ.
3. The appellant claimed to fear persecution from the authorities in Sri Lanka because of his Tamil ethnicity and his past involvement with the LTTE. He fought for the LTTE between 1990 and 1993. He was injured during shelling, hospitalised and discharged from the LTTE. He did not assist the LTTE between 1993 and 1999. In 1999 he was called for compulsory training by the LTTE and in 2000 was involved in some combat action as a border guard. Later the same year he was asked to take part in similar activities but managed to put these off until the end of the year when he was sent a summons to return to serve with the LTTE which he did not answer. In 2001 the LTTE discovered his whereabouts and took him into custody because of his failure to report. He was released against a promise to return and went to the police to obtain a pass in order to leave the area. He was arrested and interrogated. He was taken in for further questioning by TELO, detained beaten and tortured over three days. He was handed back to the police who questioned and tortured him again. Subsequently, his uncle secured his release by paying a bribe and the claimant fled to the UK.
4. The claimant said that on his return to Sri Lanka in 2004 he entered the country without difficulty. He experienced no problems until 2007 when he received an anonymous demand for money. His brother was shot and killed but he managed to escape. As a result he feared both the authorities and Tamil militant related organisations. He fled Sri Lanka and returned to the UK claiming that after his departure his wife had been arrested by the EPDP and questioned as to his whereabouts. He also feared persecution from the authorities because of his LTTE /Tamil separatist related activities in this country. He suffered from severe mental ill-health.
5. The FTTJ heard the appeal on 14 October 2013. Both parties were represented, the claimant by Ms Jegarajah who appears before me. Whilst the claimant was present during most of the hearing he did not give evidence. It was said that his mental health was such that he was not able to do so. Oral evidence was given by a friend of the claimant, Mr SN and psychiatrist Dr S Dhumad.
6. The FTTJ did not draw any adverse inference from the fact that the claimant did not give evidence as there was medical evidence supporting his decision not to do so. She took as her starting point the findings of the Adjudicator/Immigration Judge in the previous appeals. This evidence, largely accepted by the FTTJ, is summarised in paragraphs 77 and 79 of the determination.

7. The FTTJ went on to consider the written evidence from the claimant's wife and the family lawyer in Sri Lanka. After assessing this she concluded that the evidence was not "indicative of the current risk to, or official interest in, the appellant".
8. The FTTJ went on to consider the evidence as to the claimant's politically related activities in this country. Whilst she found that he had not organised events, been a speaker, raised funds for the Tamil cause or made witness statements for use in proceedings against the Sri Lankan government he had from about September 2011 started to take an interest in Tamil diaspora activities in the UK and to attend demonstrations and meetings. There were publicly available photographs of him at Tamil protests and sitting at a meeting close to the leader of the British Tamil Forum.
9. The FTTJ went on to consider the evidence in the light of the country information and Tribunal Country Guidance. I will need to return to her reasoning and conclusions in more detail. She allowed the appeal on asylum and Article 3 human rights grounds but dismissed the claim for humanitarian protection.
10. The FTTJ granted the appellant anonymity. I consider it appropriate and necessary to continue her direction.
11. Unless and until a Tribunal or Court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.
12. The Secretary of State applied for and was granted permission to appeal. It is submitted that the FTTJ erred in law by failing to give adequate reasons why the claimant would be at risk in his home area, the findings in paragraphs 91 and 100 were inconsistent and there were indications that the FTTJ applied the wrong standard of proof. There is no Rule 24 response from the claimant's representatives
13. Mr Saunders submitted that the conclusion that the claimant would be monitored by the authorities in the last sentence of paragraph 91 was inconsistent with what was said elsewhere in that paragraph. The use of the words "might well" and "might" in paragraph 100 indicated that the FTTJ applied an incorrect standard of proof. I was asked to find that the determination contained errors of law, to set aside the decision and to remake it on the evidence before the FTTJ.
14. Ms Jegarajah submitted that the FTTJ took a correct and nuanced approach. I was referred to what were said to be key findings in paragraphs 80, 81, 83, 88 and 90. I queried the submission that paragraph 310 of GJ (post-Civil War: returnees) Sri Lanka CG [2013] UKUT 319 (IAC) indicated that all returnees

were questioned by the authorities when they returned to their home areas and, after examination of this paragraph Ms Jegarajah, withdrew the submission. She also accepted that the finding in paragraph 91 that the claimant would be monitored on return to his home area did not on its own give rise to the risk of persecution or serious ill-treatment. However, she submitted that the claimant had a sur place profile which would come to the attention of the authorities and give rise to risk. Paragraph 324 of GJ indicated that the Sri Lankan authorities had sophisticated intelligence gathering facilities concerning the Tamil diaspora which included monitoring of activities online, on mobile phones and in the diaspora in the four hotspots which included London. Photographs were taken of demonstrations and image recognition was used.

15. Ms Jegarajah submitted that the problem for the claimant, which the FTTJ had recognised, was his vulnerability because of his mental ill-health. When he was questioned he would not be able to do himself justice which would strengthen the suspicions in the minds of the authorities.
16. It was argued that the FTTJ applied the correct burden and standard of proof. This was set out in paragraph 17. The words; "might" and "might well" in paragraph 100 did not indicate the application of an incorrect standard of proof and the FTTJ applied the correct test in the last sentence of the same paragraph which he referred to "real risk". I was asked to find that the FTTJ had not erred in law and to uphold the determination.
17. In his reply Mr Saunders submitted that whilst the FTTJ referred to "real risk" at the end of paragraph 100 she reached this conclusion by applying an incorrect test. It was clear that the authorities considered that they were well aware of those who were a threat and the claimant was not one of them.
18. I reserved my determination.
19. In paragraph 90 the FTTJ said that if the claimant was at risk in Sri Lanka would be under the risk category listed in paragraph 356 (7) (a) of GJ. Those that fall within this category are; "Individuals who are, or who are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are 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".
20. The assessment of the situation in paragraph 91 is contained in the last eight lines in which the FTTJ said; "Given the intelligence led approach now used by the Sri Lankan authorities and the appellant's comparatively recent and limited involvement in Tamil linked activities in the United Kingdom I am not satisfied that he is regarded by the Sri Lankan government as a threat to the integrity of the Sri Lankan state or as a person having a significant role in relation to either post-conflict Tamil separatism or a renewal of hostilities in Sri Lanka. However the profile he has built for himself in the last two years is

such that there is a risk that he would be monitored on return to his home area.”

21. In paragraph 100 she said; “The profile the appellant has created for himself with Tamil groups in the United Kingdom between 2011 and 2013, the publicly available photographs of him at Tamil protests and (in one case) sitting at the meeting close to the leader of the British Tamil Forum are circumstances which might have come to the attention of the Sri Lankan authorities through their use of intelligence, informers and the monitoring of photographs. I find that the appellant would be able to leave the airport on return to Sri Lanka but that he would be monitored in his home area and at that stage might well be asked about his activities in the United Kingdom. Dr Jalal and Dr Dhumad agree that he could not manage such questioning. Given his fear of authorities, the militarisation of his home area and the difficulty which he would, by reason of his mental health, have in giving an account of himself it is my view that there is a real risk that he would be detained at that stage and a real risk that he would then be persecuted in detention.”

22. I find that the determination does not contain errors of law. The FTTJ was correct to conclude that if the appellant was at risk on return to Sri Lanka it would be under the first of the risk categories listed in paragraph 356 (7) (a) of GJ. This risk category is defined as; “Individuals who are, or who are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are 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”. I accept that in paragraph 91 the FTTJ found that the claimant did not fulfil these criteria. It is not easy to reconcile this with the conclusion in the last paragraph that “the profile he has built for himself in the last two years is such that there is a risk that he would be monitored on return to his home area”. Paragraph 356 (9) of GJ states that an individual whose name appears on a “watch” list will be monitored by the security services on return to his home area. In paragraph 90 the FTTJ found that the claimant was not on any stop or watch list in Sri Lanka. However paragraph 356 (9) of GJ does not state that only those whose names appear on a watch list are reasonably likely to be monitored on return to their home areas. The same paragraph makes it clear that how the authorities regard an individual; “will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual.”

23. The FTTJ assessed and made findings as to the claimant’s sur place activities in paragraph 100 concluding that they would be sufficient to excite sufficient interest for the authorities to wish to question the appellant when he reached his home area in which case his mental ill-health would be such that he would not be able to give a good account of himself leading to a real risk of detention and persecution. I find that on all the evidence including the country evidence and the country guidance contained in GJ this was a conclusion open to her.

24. As to the second ground of appeal, that the FTTJ applied an incorrect standard of proof, I find that the correct burden and standard was set out in paragraph 17 and that the words used in paragraph 100 do not indicate that the FTTJ departed from this self-direction. It would have been better if the words “might have” and “might” had been avoided. However, I find that the reference to the test of a “real risk” in the last sentence supports the conclusion that the correct standard of proof was applied.
25. I find that the determination does not contain errors of law and I uphold the decisions of the FTTJ to allow the appeal

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Signed
Upper Tribunal Judge Moulden

Date 17 March 2014