



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

Appeal Number: AA/09863/2013

**THE IMMIGRATION ACTS**

**Heard at Newport  
On 6 May 2014**

**Date Sent  
On 29 May 2014**

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**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**AJ  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr M McGarvey of McGarvey Immigration and Asylum Practitioners Ltd

For the Respondent: Mr K Hibbs, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. The appellant is a citizen of Sri Lanka who was born on 18 August 1961. He arrived in the United Kingdom in 2002. On 10 September 2008, he claimed asylum. On 15 October 2013, the Secretary of State refused the appellant's application for asylum and on that date made a decision to remove him by way of directions to Sri Lanka.
3. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 4 December 2013, Judge A Cresswell dismissed the appellant's appeal on asylum, humanitarian protection and human rights grounds. The Judge found that, taking the appellant's account "at its highest" that the appellant had failed to establish that he would be at risk of persecution or serious harm if returned to Sri Lanka.
4. The appellant sought permission to appeal to the Upper Tribunal. On 31 December 2013, the First-tier Tribunal (Judge Cruthers) granted the appellant permission to appeal. Thus, the appeal came before me.
5. The sole ground of appeal relied upon both in the grounds of appeal and by Mr McGarvey at the hearing was that the Judge had been wrong to dismiss the appellant's appeal simply on the basis that the appellant did not fall within any of the risk categories set out in the country guidance case of GJ and Others (Post-Civil War: Returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) at [356(7)].
6. Mr McGarvey relied upon the grant of permission by the Court of Appeal in MP (Sri Lanka) and NT (Sri Lanka) (dated 13 November 2013) where the order of the Court of Appeal states that:

"Pending the final determination of this appeal or until further order, individuals who fall outside the said risk categories should not for that reason alone have their claims for asylum rejected, whether by the Respondent or on appeal to the First-tier Tribunal or the Upper Tribunal."

Mr McGarvey submitted that the Judge had fallen into error because that was precisely what he had done.

7. On behalf of the respondent, Mr Hibbs submitted (relying upon the respondent's Rule 24 Notice dated 16 January 2014) that Judge Cresswell had not dismissed the appellant's appeal solely on the basis that the appellant did not fall within the risk categories set out in GJ and Others. He submitted that at para 25 of his determination, Judge Cresswell had considered whether the appellant was at risk outside of those categories. Mr Hibbs submitted that there was no evidence before the Judge that a person with the appellant's profile would be at risk on return to Sri Lanka.

## **Discussion**

8. In his determination, Judge Cresswell approached the issue of risk to the appellant on return to Sri Lanka on the basis that his account was to be accepted: as Judge Cresswell put it at para 21(i), he took the appellant's account "at its highest".

9. At para 21(i) Judge Cresswell stated:

“At worst, the appellant described ill treatment by the Sri Lankan army based solely upon the fact that he was a Tamil. He does not suggest any opposition or political involvement on his part in either Sri Lanka or the UK or that he would be suspected of any such involvement on return.”

10. At para 21(v), Judge Cresswell set out the factual basis for assessing any risk to the appellant as follows:

“He is, however, a Tamil as has been accepted by the Respondent. He does have injuries consistent with assaults upon him. The objective information would support a hostile attitude by the Sri Lankan army to Tamils at the time described. The Appellant was not cross-examined at the hearing as to the veracity of his account. I have decided, therefore, that I should properly treat the Appellant as someone of Tamil ethnicity who was the subject of violent assaults by the Sri Lankan army at various times solely because he was a Tamil and because other Tamils were involved in an armed opposition to the Sri Lankan government.”

11. At para 21(vi), Judge Cresswell added that:

“The Appellant told me that he has not taken part in any anti-Sri Lankan regime demonstrations in the UK.”

12. Having set out the headnote of GJ and Others in full at para 24 of his determination, Judge Cresswell reached the following findings at para 25.

“I have considered the matters put forward by the Appellant in support of his claim for asylum in the light of the country guidance and conclude that the Appellant’s account, even at its highest, does not lead to a real risk of mistreatment such as to require international protection of any kind. He is unlikely to be of any interest to the Sri Lankan authorities. There was no other evidence brought to my attention which could lead to a different conclusion. Accordingly, I do not find that he has established a well-founded fear of persecution for any Convention reason or at all. I do not find that he has shown that he is eligible for Refugee Protection (Asylum).”

13. For present purposes, the salient risk categories set out in GJ and Others are summarised at para (7) of the headnote (and set out at [356(7)] of the determination) in GJ and Others as follows:

“7. The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, are:

- (a) Individuals who are, or 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.
- (b) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government.

- (c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.
- (d) A person whose name appears on a computerised “stop” list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a “stop” list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.”

14. It is clear that the appellant’s personal circumstances (as accepted by the Judge at paras 21(i), (v) and (vi) of his determination) do not bring the appellant within one of the risk categories set out in GJ and Others. Indeed, Mr McGarvey did not suggest otherwise in his submissions. He maintained, however, that in failing to follow the order of the Court of Appeal in MP and NT, decided shortly before the hearing before Judge Cresswell, the Judge had erred in law.
15. For the purposes of this appeal, I will assume that a failure to apply the order of the Court of Appeal in MP and NT would amount to an error of law by the First-tier Tribunal or the Upper Tribunal. I put it in that way because it is not, in my judgement, entirely free from doubt that the order has the effect of requiring (as a matter of law) the First-tier Tribunal or Upper Tribunal to disregard a binding country guidance case such as GJ and Others unless, and until, the Court of Appeal overrules it. For example in SG (Iraq) v SSHD [2012] EWCA Civ 940 the Court of Appeal concluded that a grant of permission to that court did not affect binding nature of CG case.
16. However, it is clear that Judge Cresswell did not fall into the error Mr McGarvey seeks to attribute to him in para 25 of his determination. There, he first determined that the appellant on the facts which he accepted, could not succeed in bringing himself within a risk category within GJ and Others. However, he went on to consider whether, nevertheless, there was any evidence which, as he put it, “could lead to a different conclusion”, namely that the appellant was at “real risk of mistreatment such as to require international protection of any kind”. He concluded there was “no other evidence”.
17. Mr McGarvey accepted that there appeared to be no background evidence before Judge Cresswell. That may well be because the appellant was, at that time, not legally represented. Nevertheless, the Judge could only determine the appeal on the basis of the evidence relied on by the

parties. No evidence was drawn to my attention which would establish that the appellant would be at risk on return today, as someone who had no LTTE connections or any political involvement in Sri Lanka or the UK, but was of Tamil ethnicity and who had been detained and ill treated by the Sri Lankan army (but not since 1999) solely because Tamils were involved in an armed conflict with the Sri Lankan government. There was not, as Judge Cresswell pointed out at para 25 of his determination, any evidence before him that the appellant, in these circumstances, would be at real risk of persecution or serious ill treatment on return to Sri Lanka.

18. For these reasons, I reject Mr McGarvey's submission that the Judge erred in law by dismissing the appellant's appeal simply on the basis that he did not fall within the risk categories set out in GJ and Others at para 356(7) of that determination. Judge Cresswell was alive to the issue of whether any objective evidence placed the appellant at risk outside the risk of the categories in GJ and Others. In the absence of any evidence that the appellant was at risk, the appellant's appeal inevitably failed.

#### Decision

19. For these reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal on all grounds did not involve the making of an error of law. Its decision stands.
20. The appellant's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb  
Judge of the Upper Tribunal

Date: