IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05847/2010

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23rd April 2015	**On 19th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR VIJAYAKUMAR KESAVAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Rothwell (Counsel)
For the Respondent: Mr D Clarke (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Coutts, promulgated on 29th January 2015, following a hearing at Hatton Cross on 16th January 2015. In the determination, the judge dismissed the appeal of the Appellant, who subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Sri Lanka, who was born on 20th October 1981. He appears to have entered the UK illegally on 9th March 2010 using a false passport and on 17th March 2010 made an application for asylum, humanitarian protection, and human rights violations. The Respondent refused the application by way of letter on 7th April 2010 and issued removal directions on the same date.

The Appellant's Claim

3. The Appellant's claim is based upon fear that if returned to Sri Lanka he would face persecution due to his involvement with the LTTE and is previously ill-treated by the authorities. In July 2005, the Appellant was transporting a parcel for the LTTE when he, and another man who was driving the vehicle, was stopped by Sri Lankan authorities. When the vehicle was searched the parcel was discovered and it was found to contain bullets. The authorities arrested the driver of the vehicle but they only took the Appellant's details saying that they would be in contact with him later (see paragraph 21). In October 2005, the Sri Lankan Army came to the Appellant's house in Colombo and arrested him saying that the driver had said that they are always transporting weapons for the LTTE. The Appellant denied the allegation. The army spoke to his employer who terminated his employment. The Appellant had no further involvement with the LTTE after this time. On 2nd October 2006, the Appellant was arrested and held at Wellawatte Police Station. He was taken to court.

4. It is proven that he was a member of the LTTE. The case against him was that the parcel contained bullets discovered when the vehicle in question was searched. He was detained for five days. He was released on payment of a bribe (see paragraph 24). Then in February 2009, the authorities came to the Appellant's house. He was taken to a dark room where he was beaten, burned with cigarettes and also hot metal rods. He was shown a photograph of someone which they said he had brought into the area in his vehicle back in 2005 which he denied. On 28th February 2010, he was released through the payment of a bribe and taken by the CID to a checkpoint and delivered to his uncle and an agent. He was told that if he was arrested again he would not be released. The Appellant's parents, wife and younger brother remain in Sri Lanka.

The Judge's Findings

5. The judge held that,

> "On the evidence before me, I am satisfied that the Appellant was detained and tortured by the Sri Lankan authorities as claimed. The medical report prepared by Professor Lingham, following an examination of the Appellant on 8th May 2010, is clinically corroborative of his account and there is no evidence to suggest that the Appellant's injuries were self-inflicted by proxy" (see paragraph 29)

6. The judge went on to say that it followed, "on the lower standard, that I accept as credible the Appellant's account of his involvement with the LTTE and his ill-treatment by the Sri Lankan authorities ..." (paragraph 30).

7. The judge then turned to the consideration of the authorities in relation to Sri Lankan asylum claims. The principal authority here was **GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319**, and the judge went through the "risk factors" (see paragraph 31). The judge noted how one of the risk factors relates to,

> "... 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 removal of hostilities within Sri Lanka." (see paragraph 31)

8. The judge then proceeded to apply the country guidance case to the Appellant and observed that,

> "... whilst I accept that the arrest of the Appellant in February 2010 was a post-conflict one, it related, however, to the alleged earlier transportation of an LTTE member prior to the resolution of the conflict. There is no evidence before me to suggest that the Appellant has had a significant role in relation to post-conflict Tamil separatism or wishes to start or renew hostilities with Sri Lanka ....". (paragraph 32)

9. The judge also observed that, "there is no evidence to suggest that the Appellant's name appears on a stop list that would be accessible at the airport or that there is an outstanding court order or arrest warrant against him". The judge was prepared to accept that, "having no original passport and that requiring an emergency travel document the Appellant will come to the notice of the Sri Lankan authorities before departing from here" but, even though he would be placed on a watch list when he returns, "the objective evidence suggests that this should not cause him any real difficulty." This was not least because the Appellant has been away from Sri Lanka for nearly five years, has not taken a stand in any post-conflict activities, and only assisted the LTTE through coercion" (paragraph 33).

10. Accordingly, given the conclusions reached above, the judge held that "the Appellant has not discharged the burden of proof to establish that he has a well-founded fear of persecution and is entitled to grant of such" (paragraph 35).

11. The same conclusions were reached with respect to the claim for humanitarian protection (paragraph 37).

12. With respect to Article 8 and the Human Rights Convention, the judge held that the Appellant had no family life in the UK, his wife, younger brother and parents remained in Sri Lanka and that the Appellant could not succeed under paragraph 276ADE (see paragraphs 39 to 41).

13. The appeal was dismissed.

Grounds of Application

14. The grounds of application state that the judge made an arguable error of law by failing to take into account the provisions of paragraph 339K of the Immigration Rules, which state that,

> "… the fact that a person has already been subject to persecution or serious harm or direct threats of such persecution or such harm would be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good grounds to consider that such persecution or serious harm will not be repeated."

15. The grounds state that since the judge had found the Appellant to be credible in respect of serious ill-treatment and torture the conclusions reached were unsustainable.

16. On 23rd February 2015, permission to appeal was granted.

17. On 9th March 2015, a Rule 24 response was entered.

Submissions

18. At the hearing before me on 23rd April 2015, Ms Rothwell, appearing on behalf of the Appellant, submitted that the judge had erred in law in a number of respects. First, in applying **GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319**, the judge had erred in holding that the Appellant did not fall under the risk category which refers to "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 …". The Appellant, she submitted, was "perceived to be" such an individual. The reason for this was that he had been apprehended with a "black tiger" in 2005, and this man was a suicide bomber, and he was found also to carry a parcel which contained bullets. The Appellant was only released on the payment of a bribe. He had to sign on until 2007. The Appellant was consistent in his statements in this regard during his interview (see question 31, question 37, question 46, and question 86).

19. Second, the Appellant claimed asylum ten days after arrival in the UK.

20. Third, the Appellant's arrest in February 2010 was, as the judge himself found, "a post-conflict one", although it related, "to the alleged earlier transportation of an LTTE member prior to the resolution of the conflict" (paragraph 32). Even so, the evidence which the judge accepted was that the Appellant was "detained and tortured by the Sri Lankan authorities as claimed" and that this was corroborated by the medical report prepared by Professor Lingham (see paragraph 29). In these circumstances, it did not make sense to say that the Appellant was free from any risk in post-conflict Sri Lanka.

21. Finally, there was, an even more important reason why the conclusions reached by the judge were unsustainable. These were to do with the

recent judgment of the appeal in "**MP (Sri Lanka) and NT (Sri Lanka) [2014] EWCA Civ 829**". Here Lord Justice Underhill emphasised the fact that it is not the case that,

> "... Diaspora activism is the only basis on which a returning Tamil might be regarded as posing such a threat and thus of being at risk on return. .... There may, though untypically, be other cases ... where the evidence shows particular grounds for concluding that the government might regard the applicant 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" (paragraph 50)

22. Furthermore, this was consistent, with what was said at paragraph 290 of **GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319**, which was that,

> "... previous (real or perceived) links that go beyond prior residency within an area controlled by the LTTE continue to expose individuals to treatment which may give rise to a need for international refugee protection, depending on the specifics of the individual case"

23. Ms Rothwell submitted that on the facts of this particular case, it was evident, given what had happened to the Appellant, that such a risk appertained to his condition.

24. Finally, the UNHCR Guidelines issued on 21st December 2012 reflect the post-conflict changes in Sri Lanka. In **GJ** it was accepted that the UNHCR Guidelines description of a person with "more elaborate links with the LTTE" led to a real risk on return (see paragraph 396 of **GJ**), and this was the situation here.

25. For his part, Mr Clarke submitted that there was no error because the relevant country guidance case at the time of the decision by the judge was not based upon the UNHCR Guidelines of 2012 so that the case of **GJ** was not strictly relevant. What was relevant, and operative at the time of the decision by the Tribunal was the older case of **TK (Tamils – LP updated) Sri Lanka CG [2009] UKAIT 00049**. This was accepted in **GJ** itself, where it was said that:

> "In **TK**, decided soon after the end of the civil war in Sri Lanka, the AIT upheld the approach in **LP** but considered that, if anything, the situation for returning failed Tamil asylum seekers had improved. The onus in **TK** was current as at 26th October 2009 and is therefore now almost three and a half years old. The civil war has ended and that has of course brought change, not just in the circumstances within Sri Lanka but also in the present concerns of the Sri Lankan authorities ..." (paragraph 45)

26. On this basis, the judge in the instant appeal was correct (at paragraph 32) to conclude as he did, and it was a false approach to now look at the February 2010 events in the light of **GJ**'s assessment of the situation. This is perfectly clear from the case of **MP (Sri Lanka) and NT (Sri Lanka) [2014] EWCA Civ 829**, where it was confirmed that, "... the UT gave due consideration to the UNHCR Guidelines but was entitled to adopt the less

generous approach to risk demonstrated by its guidance …" (see paragraph 20).

27. In reply, Ms Rothwell submitted that the background evidence from August 2014 shows that Sri Lanka is still pursuing people who have elaborate links with the LTTE, and this is clear from **GJ** (see paragraph 396), and if the Appellant was deemed to be such a person, which she clearly was given that, even though he returned back to Sri Lanka in February 2010 to post-conflict Sri Lanka, he was detained and ill-treated on account of his involvement with the LTTE in 2005.

Error of Law

28. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

29. First, the judge in this case accepted that "the Appellant was detained and tortured by the Sri Lankan authorities as claimed" and that

> "the medical report prepared by Professor Lingham, following an examination of the Appellant on 8th May 2010, is clinically corroborative of his account and there is no evidence to suggest that the Appellant's injuries were self-inflicted by proxy." (paragraph 29)

30. Second, the judge also accepted that notwithstanding the fact that the civil war had now ceased, "the arrest of the Appellant in February 2010 was a post-conflict one" ... (paragraph 32).

31. Third, however, where the judge falls in error is that in so concluding above, it was a material error to suggest that "there is no evidence before me to suggest that the Appellant has had a significant role in relation to post-conflict Tamil separatism ..." (paragraph 32). This is because it is unnecessary to have had an overt role in post-conflict separatism. It is enough if one is "perceived to be, a threat to the integrity of Sri Lanka ...". The Appellant was plainly so perceived.

32. Equally, the judge Underhill LJ makes it clear that Diaspora activism is not the only basis on which a returning Tamil might be regarded as posing such a threat. In the Appellant's case, this was clearly the situation that he was confronted with.

33. Underhill LJ also makes it clear that the evidence may show particular grounds for concluding that the government might regard the applicant as posing a current threat. On the facts of this case, the Appellant was in 2005 apprehended with a black tiger and found the parcel of bullets. He was at risk. He was taken to court. He did have to sign on until 2007. He was released only on the payment of a bribe.

34. But most importantly, in 2010 he was ill-treated and that ill-treatment was an account of activities as long ago as 2005. The failure to consider these matters, in a jurisdiction where "anxious scrutiny" must be applied, and must be done on the lower standard, amounts to an error of law.

Re-Making the Decision

35. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am remitting this appeal to a judge other than Judge Coutts for a hearing at Taylor House (though not at Hatton Cross) because I set aside the decision of the original judge (see Section 12(2) of TCEA 2007), but I cannot proceed to remake the decision itself substantively. This is because both Mr Clarke and Ms Rothwell were agreed, that there was considerable evidence that apparently either was put before the judge, or was not put before the judge by Counsel below, although available, and did require consideration, and most importantly testing by way of cross-examination, which could not be done unless the matter was reconsidered before a First-tier Tribunal, such as not to deprive the Appellant before the First-tier Tribunal of a fair hearing or other opportunity to put their case before the Tribunal. Accordingly, and in these circumstances, the appeal is remitted to Taylor House Hearing Centre to be heard by a judge other than Judge Coutts. All favourable findings are to be preserved.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is to be remitted to Taylor House under Practice Statement 7.2, to be heard by a judge other than Judge Coutts.

This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 14th May 2015