



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

Appeal Number: AA/09978/2014

THE IMMIGRATION ACTS

**Heard at Field House, London
On 3 July 2015**

**Determination Promulgated
On 31 July 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

NN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P Solanki, Counsel, instructed by Waran and Co.

For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make the order because the appellant's wife is a recognised refugee who might be at risk just by her or the appellant being identified.

2. The appellant appeals against the decision of the First-tier Tribunal (Judge Parkes) dismissing the appellant's appeal against a decision taken on 18 December to refuse the appellants asylum and human rights claims and to remove the appellant from the UK.

Introduction

3. The appellant is a citizen of Sri Lanka who left that country in 1999 and arrived in the UK. He was an LTTE member from 1985 until the late 1990s. He claimed asylum in the UK but his claim was refused on 22 May 2001 and his subsequent appeal was dismissed by Mr GF Denson, an adjudicator, in a determination dated 4 March 2003. The appellant's case was that he was injured in 1995 and no longer fit to fight but then served in an administrative role until he became increasingly dissatisfied with the LTTE and came to the UK. He is now wanted by the Sri Lankan government and there is a warrant for his arrest dated 10 October 2013. The adjudicator previously found that the appellant was not on any wanted list and could relocate within Sri Lanka if he did not want to return to Jaffna.
4. The appellant remained in the UK and lodged further submissions on 18 October 2010 and 17 March 2014. He relied upon the new arrest warrant and his *sur place* activities in the UK. The respondent then made a fresh decision on 4 November 2014.
5. The respondent accepted the respondent's identity and nationality but concluded that the arrest warrant was not genuine and the appellant was not wanted in Sri Lanka. There is no armed conflict in Sri Lanka and the appellant does not have a partner or child in the UK. His claim was again refused.

The Appeal

6. The appellant appealed to the First-tier Tribunal and attended an oral hearing at Sheldon Court, Birmingham on 9 January 2015. He was represented by Mr M Murphy, Counsel. The First-tier Tribunal found that the *sur place* activities were limited and did not suggest that the appellant would be regarded as a threat to the unitary state of Sri Lanka. The appellant had produced a document which the judge regarded as a letter rather than an arrest warrant, indicating that if the appellant did not take up the invitation to attend a police station then the police would be compelled to resort to legal action. It was 15 months since the letter was issued and no action had been taken by police. There was no arrest warrant. The appellant had failed to show that the letter was reliable and the judge attached no weight to the letter. The judge did not accept that the appellant was wanted by the authorities in Sri Lanka or that he was of any interest to them.
7. The judge noted that the appellant was married to a Sri Lankan national who entered the UK in 2010, had made an asylum claim and had lodged an appeal against the refusal of her asylum claim. They had married in 2011 and had no children. The appellant was in employment but could not succeed under paragraph 276ADE of the Immigration Rules. Neither the

appellant nor his wife had settled status in the UK and could not succeed under Appendix FM. There was nothing unusual about their circumstances. The appellant's family life was only a recent development with someone who could lawfully accompany him to Sri Lanka. The medical evidence came nowhere near engaging Article 3. Removal was proportionate.

The Appeal to the Upper Tribunal

8. The appellant sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law. The appellant's wife had claimed asylum and could not accompany him to Sri Lanka. The appellant was a former LTTE member and had engaged in credible diaspora activities. Lack of involvement in LTTE activities would not preclude adverse attention from the Sri Lankan authorities. The judge had also irrationally conflated two distinct issues – support for the LTTE and support for the Tamil people in Sri Lanka by the diaspora more generally. The judge had failed to make clear findings in respect of the police letter.
9. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on 23 February 2015. That was on the basis that it was arguable that the judge had not fully and reliably analysed the appellant's position on return bearing in mind that the appellant had been found to be credible in respect of his diaspora activities. The remaining grounds were less persuasive but permission to appeal was granted on all grounds.
10. Thus, the appeal came before me

Discussion

11. Ms Solanki submitted that there was an obvious material error in that the wife could not accompany the appellant back to Sri Lanka. The judge had failed to have regard to the evidence of diaspora activities. The judge had failed to clearly set out to what extent he accepted the diaspora activities. The judge appeared to be suggesting that the appellant should produce evidence of the photographs taken by the security forces during the war and unfairly criticised the appellant for not producing evidence that he had been photographed at demonstrations in the UK. The judge failed to assess the likelihood of the appellant being photographed and the subsequent risk to him. The judge incorrectly regarded LTTE activities and diaspora activities as the same thing, leading to confusion and errors. There was evidence of contact with former LTTE members.
12. Ms Solanki went on to submit that the lack of reference to *sur place* activities was not good reason to reject the 2013 document. The document suggested that the appellant's anti-government activities were known and that could include *sur place* activities. The question under the country guidance was how the authorities would perceive him and this was not addressed by the judge. There was no real assessment of whether the authorities would know about the diaspora activities. The appeal should be remitted to the First-tier for a fresh hearing.

13. Mr Kandola submitted that if the appellant's wife had been recognised as a refugee as at the date of the First-tier hearing then the requirements of Appendix FM would have been met but she was not a refugee at that time. She was granted refugee status on 10 March 2015. The judge was not required to pre-empt the wife's appeal. Mr Kandola conceded that if I found that there was a material error in relation to Article 8 then the decision should be remade and the appeal allowed under Appendix FM.
14. In relation to the asylum claim, the judge properly considered the documents in the round and there was no misdirection on the law. It was permissible to find the police letter unreliable because it was issued so long after the appellant had left Sri Lanka. The judge properly considered the sur place activities.
15. I find that the appellant's wife has been a refugee since she left Sri Lanka. The judge failed to have regard to Article 33 of the 1951 Refugee Convention which prohibits expulsion or return of a refugee, section 78 of the Nationality, Immigration and Asylum Act 2002 which prohibits removal whilst an appeal under section 82(1) is pending and paragraph 329 of the Immigration Rules which states that until an asylum application has been determined or a certificate issued then no action will be taken to require the departure of the asylum seeker or his dependents from the UK. The judge erred in law when he stated at paragraph 33 of the decision that family life was only a recent development with someone who can lawfully accompany him to Sri Lanka. The appellant's wife could not safely go to Sri Lanka and it would have been unlawful to require her to do so. The judge's decision in relation to Article 8 is fundamentally flawed.
16. Thus, the First-tier Tribunal's decision to dismiss the appellant's appeal under Article 8 private and family life involved the making of an error of law and its decision cannot stand. I indicated to the parties that the appeal would be allowed to that extent and that I would remake the decision and allow the appeal under paragraph EX.1.(b) of Appendix FM. That is on the basis that the appellant has a genuine and subsisting relationship with a partner who is in the UK with refugee leave and there are insurmountable obstacles to family life with that partner continuing outside the UK. Ms Solanki took instructions and confirmed that the appellant no longer wished to pursue his appeal under the Refugee Convention or Articles 2 and 3 of the 1950 Convention.

Decision

17. Consequently, I set aside the decision of the First-tier Tribunal. I remake the decision as follows;
 - (i) I dismiss the appeal of the appellant under the Refugee Convention.
 - (ii) I dismiss the appeal of the appellant under Articles 2 and 3 of the 1950 Convention.
 - (iii) I allow the appeal under Appendix FM of the Immigration Rules.

Signed **David Archer**

Date 29 July 2015

Judge Archer
Deputy Judge of the Upper Tribunal