



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

Appeal Number: AA/04992/2015

**THE IMMIGRATION ACTS**

**Heard at Birmingham ET  
On 5 February 2016**

**Decision & Reasons Promulgated  
On 10 February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE KAMARA**

**Between**

**SK**  
(ANONYMITY DIRECTION MADE)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr P Lewis, counsel instructed by Birnberg Peirce & Partners

For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against a decision of FTTJ Graham, promulgated on 30 July 2015, in which she dismissed the appellant's appeal against a decision to refuse to grant him asylum.

**Background**

2. The appellant left Sri Lanka in early 2013 and arrived in the United Kingdom, via India and Malaysia, with the assistance of an agent. The

basis of the appellant's asylum claim is that he is a Sri Lankan Tamil who was forced to work for the LTTE from 2004 and who was shot during the war in the course of his duties for the movement. After the war, the appellant was identified as an LTTE member and detained, interrogated and tortured. After 23 months detention, the appellant was released with reporting restrictions. Approximately 18 months after his release, the appellant was further detained when he went to report. He was accused of knowing where weapons were kept, detained for 88 days and mistreated. The appellant was released after his uncle paid a substantial bribe. He was informed by CID officers that it would be recorded that he escaped. The appellant immediately left Sri Lanka.

3. The Secretary of State rejected the appellant's claimed arrests owing to what were said to be inconsistencies between his accounts. Furthermore, it was not accepted that a forced conscript to the LTTE would be of any interest to the Sri Lankan authorities. The appellant's claim that he had taken part in a television programme was not accepted to result in any additional adverse interest in him. The respondent was of the view that the scarring on the appellant's body was not as a result of being tortured.
4. During the course of the hearing before the FTTJ, the appellant gave evidence regarding his attendance at a number of demonstrations in the United Kingdom as well as his membership of the British Tamil Forum. Article 8 was not argued on the appellant's behalf. The FTTJ accepted the appellant's claim as credible including that he would not have been regarded as an ordinary LTTE soldier. She dismissed the appeal on the basis that the appellant did not fall within the categories of persons at risk of persecution as identified in MP (Sri Lanka) [2014] EWCA Civ 829 and the Country Guidance case of GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC).

#### Error of law

5. Permission to appeal to the Upper Tribunal was sought on the basis that it was arguable that the FTTJ failed to properly consider the risk to the appellant on return in line with GJ in that she failed to give any or adequate reasons as to why she reached those conclusions given the evidence before her of the appellant's work with the LTTE's military intelligence unit; that he was detained after the end of the civil war; that he had spoken on a Tamil TV programme; attended diaspora events and was a member of the British Tamils Forum, a proscribed organisation.
6. Secondly, it was argued that the FTTJ had failed to properly consider the appellant's claim for humanitarian protection.
7. Thirdly, there was said to be a failure to properly consider Article 3 in relation to the appellant's mental health with regard to the findings of GJ as to mental health services available in Sri Lanka.
8. FTTJ PJG White granted permission on the basis that the first and third

grounds disclosed an arguable error of law. Permission was not expressly refused in relation to the second ground.

9. The Secretary of State's response of 8 September 2015 robustly defended the FTTJ's decision, stating that she "*provided a plethora of reasons why the appellant is not at risk.*" The grounds were said to be unmeritorious and to merely disagree with the adverse outcome of the appeal.

### The hearing

10. Mr Lewis argued that the FTTJ found the appellant credible on all issues. Those issues included his first and second periods of detention; that the appellant was accused of having knowledge of the existence of arms; that no weapons were found as a result of the appellant's attempt to assist the authorities and that he was, consequently, returned to detention and subject to further torture. The FTTJ accepted that the Sri Lankan authorities did not believe that the appellant did not know where weapons were hidden. The appellant refused to assist the authorities any further. Following his release from prison by bribery, the authorities sought the appellant at his family home. The FTTJ accepted all this as well as the fact that the appellant's release would be recorded as an escape.
11. Mr Lewis stressed that the appellant had applied for asylum on his arrival in the United Kingdom and that he had continued his pro-Tamil activities in this country. Again, this had all been accepted by the FTTJ. Mr Lewis argued that the reasons provided by the FTTJ at [48] for concluding that the appellant would not be at risk were inadequate. Furthermore, the FTTJ failed to properly apply GJ to the appellant's case. He made no submissions in relation to the second and third grounds of the permission application.
12. Mr Diwyncz made very brief submissions. He relied on the Rule 24 response. He argued that the decision and reasons was a detailed document as to what happened during the hearing. He referred me to [48] of the decision in its entirety and asked me to note that the FTTJ had mentioned the case of MP. In short, the FTTJ was not satisfied that the appellant had a significant role in post conflict Tamil separatism. Mr Diwyncz agreed with Mr Lewis that it was not possible for evidence to be available as to whose names were on a secret stop list, however he asked me to accept the FTTJ's conclusion that the appellant's name would not be on it.
13. In reply, Mr Lewis emphasised that the Sri Lankan authorities believed that the appellant was withholding information and as a result, the appellant is clearly in a category of risk. Furthermore, the appellant had partaken in significant activities in the United Kingdom including participating in a television programme and attending demonstrations. The FTTJ had been wrong to conclude that facial recognition equipment was not available, given what was said in GJ on this topic. It remained the case that the appellant was suspected of involvement in the LTTE and continuing to

support the movement via his activities in the United Kingdom. The first appellant in GJ succeeded on a lesser profile than that of the appellant. He argued that the FTTJ materially erred in discounting the appellant's activities.

#### Decision on Error of Law

14. I concluded that the FTTJ materially erred in law in finding that the appellant was not at continued risk in Sri Lanka for the specific reasons given at [48] of the decision and reasons, which include an absence of evidence of an arrest warrant; or that he was on a stop list and that face recognition technology is not used by the Sri Lankan authorities.
15. The evidence before me, including in GJ, is that an arrest warrant would not be provided to the person sought or their family. It follows that if the appellant had been able to produce an arrest warrant, it was unlikely to be a reliable document. The absence of a document does not amount to an adequate reason for concluding that the appellant is not at risk.
16. The same point made above can be made about the stop list. The FTTJ said there *"was no evidence to show that he is on a "stop" list."* This reasoning is inadequate because the list is unpublished and it is not reasonably likely that an asylum applicant would have access to such a document.
17. The FTTJ accepted at [45] that the appellant *"would not have been regarded as an ordinary LTTE member"* and that he could *"accept that the appellant's affiliation with military intelligence could explain why he was detained a second time."* The appellant's second period of detention occurred between November 2012 and January 2013, significantly after the end of the civil war. During that detention, the appellant was asked about the whereabouts of LTTE weapons. The said accepted facts go some way to indicating that the appellant would be someone of continued adverse interest.
18. The appellant continued his pro-Tamil activities in the United Kingdom. The FTTJ did not accept that the appellant's appearance on a television programme and attendance at a number of demonstrations would *"not have brought the appellant to the adverse attention of the authorities in Sri Lanka who do not have facial recognition equipment."* The FTTJ referred to no evidence in relation to his finding that the Sri Lankan authorities did not have the said equipment, whereas in GJ at [336] there was an explicit finding that former Tamil areas and the diaspora are *"heavily penetrated by security forces"*, photographs were taken of public demonstrations and the authorities *"may be using face recognition technology."* There was reference to the Sri Lankan authorities sponsoring a face recognition technology project at the University of Colombo.

19. In conclusion the FTTJ's reasons were inadequate and failed to explain why the appellant did not fall with the category of risk at 356(7)(a) of GJ.
20. I considered that I could proceed immediately to remake the decision, preserving the previous judge's credibility findings in their entirety. Both representatives were in agreement with this course of action. The appeal proceeded by way of further brief submissions only.
21. Mr Diwnycz wished to make only one point; that is, that there was no evidence to show that the Sri Lankan authorities possess and use face recognition technology. He accepted that they may be investing in it but argued that at the time of GJ they did not have it.
22. Mr Lewis argued that the Sri Lankan authorities may be using the said technology and while it could not be said that they were using it owing to a lack of transparency, it was reasonably likely they were. Finally, he relied on paragraph 339K of the Immigration Rules, in that the appellant had been detained and ill-treated in the past and there was good reason to believe he would continue to be at risk. Detention for the purpose of interrogation brought with it the risk of torture and sexual abuse, as found at paragraph [168] of GJ. He urged me to allow the appeal.
23. At the end of the hearing, I reserved my decision.

#### Consideration and findings

24. In assessing the appellant's claim, I have applied the lower standard of proof. I have also born in mind the relevant case law including the very detailed assessment of country conditions in GJ as well as the conclusions of the Court of Appeal in MP.
25. Having considered all the evidence before me, including the positive findings of fact of FTTJ Graham, I conclude that the appellant fits with a category of person at risk of persecution on return to Sri Lanka. The specific category is in headnote 7(a) of GJ, that is the appellant is an individual who is perceived to be a threat to the integrity of Sri Lanka owing to the perception of the Sri Lankan authorities that he has a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka. My reasons are as follows.
26. The appellant was detained on the second occasion long after the end of the civil war. Put simply, he was accused of knowing where the arms were. The information provided by the appellant did not lead to the discovery of any weapons. His account, which was fully accepted by the FTTJ, was that the authorities believed that he was withholding information from them. This along with the fact that he was found by the FTTJ not to be an ordinary LTTE member and his affiliation with LTTE military intelligence causes me to conclude, that the appellant was perceived to have a significant role in the renewal of hostilities within Sri Lanka.

27. The appellant was told, when released by bribery, that he would be identified as an escapee. I note from [275] of GJ that the seriousness of any charges against an individual is not determinative of whether a bribe can be paid to obtain release. I consider it a reasonable inference that an arrest warrant would have been issued or that his name was added to a computerised list in order to identify him should he return to Sri Lanka.
28. The appellant was detained and tortured in Sri Lanka as recently as 2013. Paragraph 339K of the Rules states, to paraphrase, that the fact that a person has already been persecuted is to be regarded as a serious indication of a well-founded fear of persecution “*unless there are good reasons to consider that such persecution or serious harm will not be repeated.*” I heard no submissions on behalf of the respondent as to there being any good reasons to conclude that the appellant was no longer at risk of harm.
29. I find that the appellant’s diaspora activities would not, by themselves, result in a risk of persecution in Sri Lanka. I consider that these activities serve to heighten the risk, which already exists on account of the authorities’ perception that he has a significant role in relation to the renewal of hostilities within Sri Lanka. It is reasonably likely that the Sri Lankan authorities are able to identify participants in diaspora activities. The findings in GJ indicated that photographs are taken at events and furthermore the appellant took part in a televised event. Given that the appellant’s photograph and other details were taken by the Sri Lankan authorities when he was detained on both occasions, I consider that it is reasonably likely that he would be identified from either the television programme or via photographs taken at demonstrations. As indicated above, I consider there to be a real possibility that the appellant’s details would be contained on a stop list and therefore he would be identified on returning to Sri Lanka. From being identified, the appellant is likely to be detained for interrogation, which entails a risk of torture.
30. The appellant has demonstrated that he has a well-founded fear of persecution for a Convention reason, that he will be perceived as a political opponent of the Sri Lankan authorities.
31. An anonymity direction was made by the FTTJ. I consider it appropriate for anonymity to be continued and therefore make the following anonymity direction:

*“Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.”*

## **Conclusions**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside, except that the credibility findings are preserved.

I remake the decision by allowing the appeal (on asylum grounds).

Signed

Date: 7 February 2016

Deputy Upper Tribunal Judge Kamara

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

As I have allowed the appeal, I have considered making a fee award and have decided to make an award of the full fee if such was paid.

Signed

Date: 7 February 2016

Deputy Judge of the Upper Tribunal