



IAC-AH-DP-V1

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

Appeal Number: AA/06421/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 1 March 2016**

**Decision & Reasons  
Promulgated**

**On 16 March 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**N V (SRI LANKA)  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Miss L Dickinson, Solicitor, Fursoon Knapper Solicitors

For the Respondent: Mr S Staunton, Specialist Appeals Team

**DECISION AND REASONS**

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Sweeney sitting at Columbus House, Newport on 10 December 2015) dismissing on asylum and human rights grounds the appellant's appeal against the decision of the Secretary of State to remove him as a person subject to administrative removal under Section 10 of the

Immigration and Asylum Act 1999, his asylum/human rights claim having been refused. The First-tier Tribunal made an anonymity direction, and I consider it is appropriate that the appellant continues to be accorded anonymity for these proceedings in the Upper Tribunal.

### **The Reasons for a Grant of Permission to Appeal**

2. On 21 January 2016 First-tier Tribunal Judge McDade granted the appellant permission to appeal for the following reasons:
  2. The grounds of application for permission to appeal assert that the judge has failed to consider the multifaceted implications of **GJ and Others (Post-civil war returnees) Sri Lanka CG [2013] 00139 (IAC)** particularly in relation to the Appellant's PTSD as a direct result of torture, and whether he may be on a stop list on re-entry to Sri Lanka, and whether he would realistically be able to seek treatment for his PTSD without revealing to state provided medical services, details of human rights abuses he suffered and whether there was adequate consideration of proportionality under Article 8. These grounds are arguable and there is an arguable error of law.

### **Relevant Background**

3. The appellant is a national of Sri Lanka, whose date of birth 22 March 1965. He is of Sinhalese ethnicity. On 14 August 2007 the appellant was issued with a six month family visit visa valid until 14 February 2008. He flew from Sri Lanka to the UK on 17 October 2007, and entered the UK on the same date, using a genuinely issued Sri Lankan passport containing his visit visa. The appellant did not return to Sri Lanka before his visit visa expired, and was eventually encountered by the authorities on 1 August 2013, when he was arrested for immigration offences. At that point, the appellant claimed asylum.
4. His claim is most conveniently summarised in an asylum statement which he signed on 26 June 2015. He was married, and had two children. He had his own business in Sri Lanka for five years before he came to the UK. He had a private bus company for passenger transport, and he also operated a fish transportation business whereby he transported fish from Tamil areas to Colombo. He owned a bus and a lorry. He had six drivers working for him. He did not drive the lorry transporting fish through Tamil areas because he was scared to do so. He had Tamil drivers who did that job. He drove the bus from time to time, on various routes. He did this to help out his drivers who worked long hours.
5. His problems began around 2005. He could not remember the exact date. But it coincided with the civil war. When he was driving the bus in Colombo, it was stopped and searched by the CID. He was arrested, detained and tortured before being released. On the second occasion (in 2006) he was arrested in Colombo with two of his drivers. On that occasion he was a passenger in the bus. The drivers were Tamil. They were still missing. He thought the drivers were carrying illegal items in the

vehicles, including bombs and weapons. During his arrest and detentions, he was accused of being involved in their illegal activities. He told them he was not involved. He was asked to make a payment in order to secure his release, and he agreed to do this. He was not issued with any papers or taken to a court.

6. His last arrest was in 2007, about five days before he came to the UK. He could not remember exact dates due to memory loss. This had come about because he was badly tortured. He had not claimed asylum when he arrived in the UK because he was told by people that they did not give asylum to Sinhalese people, only Tamil people. He was scared of being sent back, so he just tried to survive here.
7. The appellant was extensively questioned about the three detentions in his substantive asylum interview. When the authorities searched his vehicles in 2005, they did not find any weapons or explosives. This was also the case on the occasion of his second arrest in April 2006 when his bus was heading towards Baddulla. They suspected that the bus was carrying weapons and explosives, but nothing was found on the bus.
8. His last arrest and detention had taken place around late September or early October 2007. He was with his bus and lorry drivers at Baddulla when the authorities appeared. Again, the authorities were suspicious of weapons and explosives that might have been transported on his vehicles. Two of his bus drivers were shot and killed, while he was taken away. He said he was spared death because he was Sinhalese and the authorities knew that he would not transport weapons (AIR Q175).
9. For the purposes of preparing a Medical Foundation Report, Dr Alison Wickert conducted three interviews with the appellant of three hours' duration on each occasion. The appellant told her that the men who detained him on the third occasion demanded 5 lakhs to let him go. When he agreed to this, they took him to Baddulla Town and told him to go home. He thought this was on or about 4 or 5 October 2007. He went home and visited his family. He was terrified that, despite being released, the TID (Terrorist Investigation Department) or police would come back later to kill him, as they had already killed his two drivers. He had previously obtained a visa to go to the UK and now decided to use it. His passport and his visa were in his house in Colombo so he went there to collect them, instead of remaining at home in Bandarawela, a town in the hills 125 miles east of Colombo, where he lived with his wife and son. His daughter was at school in Colombo and living with her aunt in Colombo.

### **The Hearing Before, and the Decision of, the First-tier Tribunal**

10. Both parties were legally represented before Judge Sweeney. Miss Dickinson, Solicitor, appeared on behalf of the appellant. In his subsequent decision the Judge set out the submissions of the representatives at paragraphs [18] to [30]. At paragraph [30], he recorded Miss Dickinson as acknowledging that there was nothing in the

appellant's bundle that identified that the appellant would be exposed to risk were he to return to Sri Lanka.

11. The Judge's findings were set out at paragraph [31] onwards. The Judge broadly accepted the appellant's account of his experiences in Sri Lanka prior to his departure in 2007. He accepted that he had operated a transportation business which he had closed down in 2006 or 2007. The fact that ownership of the bus was transferred back into his name in 2007 was not inconsistent with the claim, which the judge accepted, that he had immediately sold on the bus, so as not to prejudice his safety. He found that the fact that his vehicles were stopped and searched on a number of occasions, that his drivers were Tamil, and what he had garnered from snippets of conversations between his drivers which he had overheard (despite his limited understanding of Tamil) could have reasonably led the appellant to suspect that weapons and explosives were present on his vehicles. He rejected the criticism of the respondent that the appellant would have sacked the drivers if he suspected them of transporting weapons. The Judge observed there was a war going on at the time, and it was readily conceivable that the appellant would have been fearful of the consequences of upsetting one of the adversaries. He concluded at paragraph [70] that the appellant suffered torture at the hands of his authorities on three separate occasions in 2005, 2006 and 2007.
12. He accepted the appellant's explanation for not claiming asylum on his arrival in the UK. It was understandable that the appellant accepted the advice he received that he would be unlikely to be granted asylum. Given the risks that would arise to him if they were right, namely that he would be returned to Sri Lanka, where there was a real risk he would be arrested and subjected to torture, it was understandable that he would be keen to avoid such a risk coming to fruition.
13. Having given his reasons for accepting the appellant's account of past persecution, the Judge then turned to address the issue of future risk in paragraphs [80] to [94]:
  80. Finally, I turn to determine, given my conclusion that the appellant has previously suffered torture, whether he has a well founded fear that he will be persecuted should he return there.
  81. I take into account the country guidance case of **Re GJ and others Sri Lanka CG [2013] UK UT00319**. There is nothing in the evidence before me to suggest that the appellant falls within any of the four categories of individuals who are at real risk of persecution or serious harm on return to Sri Lanka. Such was not asserted by the appellant or Miss Dickinson on his behalf.
  82. There is no evidence that he has had a significant role in relation to post-conflict Tamil separatism. He is not a journalist or human rights activists, has not given evidence to the Lessons Learned and Reconciliation Commission and there is no evidence that his name appears on a stop list.

83. I have also borne in mind the Court of Appeal's decision in **MP NT Sri Lanka [2014] EWCA Civ 829** which makes clear that there may be cases which fall outside of the four categories mentioned in **Re GJ** where the evidence shows that the Sri Lankan government might regard an appellant as posing a threat to the integrity of Sri Lanka.
84. Again, no specific facts were asserted by Miss Dickinson on behalf of the appellant to show that the appellant was likely to be regarded as posing a particular threat by the Sri Lankan government.
85. The appellant contends that he would be at risk if he were to return to Sri Lanka now despite having left in 2007 as it is the "same ministers and government, only the name has changed".
86. The appellant said that he had asked his accountant two or three times if the authorities were still interested in him. His accountant had told him not to come to Sri Lanka as they would kill him.
87. I have no evidence from the appellant's accountant, whether oral or in writing, in support of the appellant's account. Further, there is no evidence as to the basis upon which his accountant has formed the view that the appellant would be at risk on return.
88. In the circumstances, I am not satisfied that there are substantial grounds for thinking that the appellant would be at real risk of arrest and subsequent persecution or serious harm if he returned to Sri Lanka on the basis that he falls within one of the four categories identified by the Upper Tribunal in **Re GJ**, or for any other reason.
89. Accordingly, I am not satisfied that any fear held by the appellant of future persecution, or future serious harm, is well founded.
90. I have borne in mind rule 339K of the Immigration Rules, though given the changed situation in Sri Lanka since the torture the appellant suffered, that the same occurred some 8 years ago, and the country guidance case of **Re GJ**, I am not satisfied that the previous torture to which the appellant has been subject demonstrates that there is a real risk of his being persecuted or suffering serious harm were he to be returned to Sri Lanka.
91. In the circumstances, for the reasons I have given above, I find that the appellant has not discharged the burden of proof to show to the low standard of proof that he faces a genuine fear of persecution for any of the reasons under the 1951 Refugee Convention. I can find no alternate grounds for finding any entitlement to a grant of humanitarian protection above. I dismiss the asylum appeal.
92. In determining this appeal under the Human Rights Act 1998, I find, for the same reasons, that the appellant has not discharged the burden of proof to show a real risk that his removal from the United Kingdom would cause a breach of his protected human rights under Articles 2 and/or 3.

93. The appellant did not contend before me that the risk of suicide was so high were he to be returned to Sri Lanka that to do so would amount to a breach of his human rights under article 2 or 3.
94. Similarly, it was not contended that to return him to Sri Lanka would, by reasons of his health, amount to a breach of articles 2 or 3.

### **The Hearing in the Upper Tribunal**

14. At the hearing before me to determine whether an error of law was made out, I asked Miss Dickinson to produce the skeleton argument upon which she had relied before the First-tier Tribunal. She did so, and I noted that her skeleton argument was mainly devoted to the issue of past persecution. On the topic of future risk, Miss Dickinson's written submissions were confined to the following short passage in paragraph 9:

Therefore as the appellant fears persecution of the Sri Lankan authorities, it should be accepted the United Kingdom's obligations and the Refugee Convention are engaged if the appellant's claim for asylum is found to be credible as there would clearly be no sufficiency of protection for the appellant if the appellant were to return to Sri Lanka and the appellant would not be able to live safely in any part of Sri Lanka making internal relocation in Sri Lanka impossible.

15. Miss Dickinson agreed that she had not submitted to the First-tier Tribunal Judge that the appellant came within any of the main risk categories identified by the Tribunal in **GJ and Others**, or that he had a well-founded fear of persecution on account of falling into the following additional risk category identified by the Tribunal in **GJ and Others** at paragraph [289]:

(v) Certain witnesses of human rights violations...

But she submitted that the judge should have engaged with the risk categories highlighted in **GJ and Others** once he had accepted the appellant's account that he had witnessed two of his drivers being murdered by the authorities. On the topic of the appellant seeking treatment for his PTSD in Sri Lanka, she acknowledged that there were some private clinics where he could access treatment, but she submitted that most of them would be State run.

16. On behalf of the Secretary of State, Mr Staunton adopted the Rule 24 response that had had been settled by a colleague. The Judge had directed himself appropriately. This included giving consideration to the case law of **GJ and Others** at paragraphs [81] and [82] of his decision. It was perfectly open to him to find that the appellant would no longer be the subject of scrutiny on return, and in particular that he did not fall into any of the four risk factors identified in the headline guidance. It was not true that the appellant would have to divulge the entirety of his claim in order to receive treatment for PTSD in Sri Lanka. But even if he did, there was

no reason to suppose that the doctors who treated him would report his account to the authorities.

## **Discussion**

17. The grounds of appeal to the Upper Tribunal were settled by Counsel from Chambers in Exeter, and not by Miss Dickinson who appeared on behalf of the appellant before the First-tier Tribunal. This explains why there is a lack of correlation between the case which was advanced by Miss Dickinson to the First-tier Tribunal Judge and the asserted errors of law in the Judge's decision.
18. Ground 1 is that the Judge erred in law in not considering adequately whether the appellant would be at real risk of persecution on return as a witness of a human rights violation, namely the murder of two of his drivers in 2007.
19. It is convenient at this stage to refer to the country guidance case of **GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319**. This country guidance replaces all existing country guidance on Sri Lanka, and it includes the following headline guidance:
  - (2) The focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009. The LTTE in Sri Lanka itself is a spent force and there have been no terrorist incidents since the end of the civil war.
  - (3) The government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state .... Its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka.
  - (4) If a person is detained by the Sri Lankan Security Services there remains a real risk of ill-treatment or harm requiring international protection.
  - (5) Internal relocation is not an option within Sri Lanka for a person at real risk from the Sri Lankan authorities, since the government now controls the whole of Sri Lanka and Tamils are required to return to a named address after passing through the airport.
  - (6) There are no detention facilities at the airport. Only those whose names appear on a 'stop' list will be detained from the airport. Any risk for those in whom the Sri Lankan authorities are or become interested exists not at the airport, but after arrival in their home area, where their arrival will be verified by the CID or police within a few days.
  - (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 ....
  - (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 ....
  - (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.
- (8) The Sri Lankan authorities' approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war. In post-conflict Sri Lanka, an individual's past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan government.
- (9) The authorities maintain a computerised intelligence-led 'watch' list. A person whose name appears on a 'watch' list is not reasonably likely to be detained at the airport but will be monitored by the security services after his or her return. If that monitoring does not indicate that such a person is a Tamil activist working to destabilise the unitary Sri Lankan state or revive the internal armed conflict, the individual in question is not, in general, reasonably likely to be detained by the security forces. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual.
20. According to the Judge's Record of Proceedings, which was not challenged as inaccurate, Miss Dickinson not only did not advance a case under paragraph 289(v) of **GJ and Others**, but she effectively conceded that there was no *objective* evidence, as distinct from the *subjective* evidence discussed by the Judge at paragraphs [86] to [87], which indicated that the appellant would be at risk on return now on account of his past history in Sri Lanka.
21. In any event, the apprehended risk raised in ground 1 does not stand up to scrutiny. The appellant is not publicly identified as a witness to a murder carried out by the Sri Lankan authorities in 2007, and he has no plans to make such disclosure in any public forum.



22. Miss Dickinson submitted that, as the result of the authorities' sophisticated intelligence, there is a real risk that the authorities in Sri Lanka hold a record on the appellant that includes a record of the fact that he witnessed the murder of the two drivers.
23. It is part of the headline guidance given by the Tribunal in **GJ and Others** that the Sri Lankan authorities' approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. But this is a finding that relates to the position as it stood at the date of assessment by the Tribunal. It is not a finding which relates back to the situation in 2007.
24. On the appellant's account, the authorities never actually found any weapons or explosives on the vehicles driven by his Tamil drivers. On the appellant's account, he was berated by his persecutors for employing Tamils as drivers, but he was not actually accused of conspiring with them to carry weapons and explosives. His explanation for not being killed alongside the two drivers, and for being subsequently released from detention (albeit on payment of a bribe), was that the authorities did not believe that he was complicit in the transportation of weapons and explosives. Given that this was how the appellant was perceived by the authorities in 2007, at the height of the civil war, there was no reason for the Judge to suppose that there was a real risk of the authorities retaining a record on the appellant which described him as being a witness to the murder of two of his drivers in 2007; still less, that there was a real risk that the appellant would be on a stop list (ground 2).
25. It is argued in ground 2 that, as the appellant left the country immediately after the event, the authorities would not have had the chance to prevent him leaving the country. This is factually incorrect. The appellant left the country some weeks later, and he did so openly. He was fearful of re-arrest and further ill-treatment, but it was not part of his case that the authorities were actually looking for him.
26. A residuary point raised in ground 1 is that the appellant would be unable to seek effective treatment for his PTSD unless he was prepared to talk to medical professionals in Sri Lanka about his experiences; and since such medical services are provided by the State, this would put the appellant at potential risk of reprisal "from other State forces".
27. As Miss Dickinson acknowledged in oral argument, there is no evidential basis for this submission. Apart from the fact that the appellant could access treatment for PTSD from a private clinic, it is fanciful to suppose that a medical professional in a State run institution in Sri Lanka would report the appellant's account of his past experiences to the Sri Lankan Police or security services. There is no objective evidence before me that doctors in Sri Lanka do not adhere to the Hippocratic Oath and to universally recognised ethical requirements in the practice of medicine, including the obligation to maintain patient confidentiality.

28. This disposes of grounds 1 and 2.
29. In Ground 3 it is argued that the Judge failed adequately to consider whether to return the appellant to Sri Lanka will be a breach of his rights under Articles 2 or 3 of the ECHR.
30. The reasoning underlying ground 3 is the same as that which underlies grounds 1 and 2. It is asserted that the Judge failed to consider whether there was a real risk the appellant would be subject to Article 3 mistreatment given his status as a witness to very serious human rights violations. Alternatively, the Judge failed to consider whether the appellant would suffer a violation of Article 3 ECHR on medical grounds as a result of being unable realistically to seek treatment for his acknowledged PTSD without revealing to State provided medical services details of the human rights abuses which he has suffered.
31. The evidence of the appellant was he had suffered from the symptoms of PTSD from the time of his arrival in the UK, but had not sought or obtained medical treatment for PTSD until after a brief period in detention in February 2015, when the symptoms of his PTSD were exacerbated. In the interim, he had coped through taking sleeping tablets that had been sent to him by friends in Sri Lanka, and after this supply dried up, he had coped without taking anything. At the time of his arrest for illegal working in 2013, he had been working illegally for two years.
32. Ground 3 falls away for the reasons that I have given in rejecting grounds 1 and 2. The appellant can realistically seek treatment for his acknowledged PTSD from either a private clinic or a State run institution in Sri Lanka. Moreover, the appellant's symptoms of PTSD are likely to be alleviated by the emotional support which the appellant will be able to access from family members in Sri Lanka on his return.
33. Ground 4 is that the Judge failed adequately to consider whether returning the appellant to Sri Lanka would constitute a disproportionate breach of the appellant's Article 8 rights. It is argued that the appellant has built up a private life in the UK at a time when he had a legitimate reason not to return to Sri Lanka until the country guidance for Sri Lanka changed in **GJ and Others**.
34. The issue of risk on return has to be assessed at the date of the hearing. It is irrelevant that the appellant might arguably have been able to prove a well-founded fear of persecution if he had claimed asylum in 2007. The appellant did not claim asylum before his visit visa expired, and he thus became an overstayer. By the time the appellant claimed asylum, the civil war had long since come to an end. Under Section 117B of the 2002 Act, the Judge was bound to treat the appellant as having built up his private life in the UK unlawfully. Alternatively, even if his status was only precarious, the judge would still have been constrained to attach little weight to the appellant's private life in the proportionality assessment.

Furthermore, Miss Dickinson did not advance an Article 8 claim at all, as she confirmed to me in the course of oral argument.

**Notice of Decision**

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

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 or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Monson