



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/07446/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 15 April 2016

Decision & Reasons Promulgated  
On 26 April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

H S  
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Martin (counsel) instructed by Biruntha Solicitors  
For the Respondent: Mr D Clark, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, preserving the anonymity direction made by the First Tier Tribunal.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Howard, promulgated on 28 January 2016, which dismissed the Appellant's appeal on all grounds.

### Background

3. The Appellant was born on 13 November 1984 and is a national of Sri Lanka. On 29 April 2014 the Secretary of State refused the Appellant's application for asylum.

### The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Howard ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 26 February 2016 Judge Parkes gave permission to appeal stating inter alia

*"2. The Judge found that the Appellant had not been targeted by the Sri Lankan authorities and did not fall into any of the risk categories set out in the country guidance. Her sur place evidence was limited and conflicting. It was found that her mental health did not engage ECHR,*

*"3. The grounds argue that given the positive credibility findings made, the Judge erred in the assessment of the risks she faced having been arrested and also erred in relation to her mental health and the risks to her on return on that account.*

*"4. As most of the Appellant's case had been accepted as being reliable, including the disappearance of others including her brother and her own arrests, it is arguable that the Judge did err in relation to the dangers that she might face. All the grounds are arguable."*

### The Hearing

5. (a) Mr Martin, for the appellant, adopted the terms of the grounds of appeal. He reminded me that the Judge made a number of positive credibility findings, accepting the majority of the appellant's account, but told me that at [25] the Judge was wrong to find that the treatment the appellant suffered amounts to "harassment", and that the Judge was wrong to find that the interest the authorities have in the appellant is attributable to her brother.

(b) Mr Martin took me to the case of GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) and reminded me of the risk categories identified there, and then referred me to the case of MP (Sri Lanka) and NT (Sri Lanka) v SSHD [2014] EWCA Civ 829. He argued that the appellant falls within a risk category because she demonstrates that she has been of interest to the Sri Lankan authorities, and it is likely that she continues to be of interest to the Sri Lankan authorities; he argued that it is likely that she features on a "Stop" list.

(c) Mr Martin turned to the second ground of appeal and argued that the appellant's appeal should succeed on article 3 ECHR grounds because she is at risk of suicide. He relied on the case of Y & Z (Sri Lanka) [2009] EWCA Civ 362, and argued that the appellant has a subjectively held fear, and has previously attempted suicide. He told me that the Judge was manifestly wrong to disregard the appellant's belief. He told me that at [35] of the decision the Judge makes a material error of law when he found that Sri Lanka is "*a safe environment for the appellant, irrespective of her beliefs*".

(d) Mr Martin urged me to allow the appeal, to set the decision aside, and substitute my own decision allowing the asylum appeal and allowing the appeal on article 3 ECHR Grounds.

6. (a) Mr Clark, for the respondent, told me that the decision does not contain any errors of law, material or otherwise. He took me to GJ & others and reminded me of the risk categories identified there. He told me that it is not disputed that the appellant has been arrested in the past, but emphasised that each time she was arrested, she was released. He told me that the Judge had carried out a fact finding exercise which is beyond criticism, that the Judge had properly directed himself by reference to relevant country guidance, and then reached a decision which is well within the range of decisions available to the Judge.

(b) Mr Clark turned to the second ground of appeal, and told me that the evidence of an overwhelming subjective fear (as described in Y & Z) is absent from the appellant's case. He told me the appellant has been assessed as at moderate risk of suicide, and that more is required to engage article 3 ECHR. He asked me to dismiss the appeal.

### Analysis

7. In MP (Sri Lanka) and NT (Sri Lanka) v SSHD [2014] EWCA Civ 829, the Court of Appeal upheld the Country Guidance case of GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) and found that there was no legal error in the Upper Tier's country guidance on Sri Lanka despite the fact that it had narrowed the risk categories from those in the Eligibility Guidelines of the United Nations High Commissioner for Refugees. It was stated however that the Upper Tier had not prescribed "*that diaspora activism is the only basis on which a returning Tamil might be regarded as posing*" a future 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*".

8. At [24] the Judge accepts that the appellant has been the subject of significant abuses at the hands of the Sri Lankan authorities. At [25] the Judge finds that the appellant's brother has either been detained incommunicado by the authorities, or "*remains someone who the authorities seek*". At [26] the Judge considers country guidance case-law, but does not consider the case of MP & NT. At [25] the Judge

makes it clear that his consideration of the case relies solely on for risk categories identified in the case of GJ. The Judge has not considered whether or not the appellant's profile, borne out by an acceptance of the account given by the appellant, establishes a reasonable likelihood that the appellant requires international protection.

9. In PP (Sri Lanka) v Secretary of State for the Home Department [2014] EWCA Civ 1828 it was held that in finding that a female Tamil asylum seeker, who had been raped whilst detained the Sri Lankan authorities, would not be at risk if returned to Sri Lanka, the Upper Tribunal had erred in giving insufficient consideration to the issue of whether women in certain circumstances should be treated as falling within a particular risk category in addition to the risk categories identified in the latest country guidance case. In PP (Sri Lanka) v Secretary of State for the Home Department [2014] EWCA Civ it was held that the Upper Tribunal's decision, following GJ, that there was no evidence that Tamil women might form an additional category of risk was an error of law, because it conflicted with the UNHCR guidelines.

10. The Judge restricted his consideration of the almost undisputed account given by the appellant to consideration of the risk categories identified in the case of GJ. The cases of MP and NT and the case of PP make it clear that the case of GJ does not provide a prohibitively restricted list of risk categories, and that there are cases where other factors must be considered.

11. In reaching his conclusion at [30] that the appellant is not a refugee, the Judge has not taken account of the fact that the appellant has suffered (what the Judge finds at [24] to be) significant abuses by the Sri Lankan authorities in the past. He has not given adequate consideration to the appellant's profile as a Tamil woman who has been detained on three separate occasions, whose family are viewed as LTTE activists. I therefore find that the decision is tainted by a material error of law and must be set aside.

12. Paragraph 339 K of the Immigration rules provides

*"339K. The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will 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 reasons to consider that such persecution or serious harm will not be repeated."*

13. There is nothing wrong with the Judge's fact finding exercise. The Judge found that the appellant has been arrested 3 times, and subject to "significant abuses" during those arrests. The Judge found that the appellant's brother was involved in LTTE activity and has either been arrested or is still sought by the Sri Lankan authorities. It is argued for the respondent that the sequence of arrests has no relevance (or significance) because the appellant was released through normal channels each time. That is not entirely correct. It is the appellant's evidence, accepted by the Judge, that the appellant was released because she could rely on the influence of the Red Cross,

for whom she worked. If the appellant returns she can no longer rely on the intervention of the Red Cross, because she is no longer one of their employees.

14. The undisputed evidence indicates that the appellant has suffered previous harm when summarily detained by the Sri Lankan authorities. Paragraph 339K of the Immigration Rules tells me that I must therefore find that she has a well-founded fear of future harm unless there are good reasons which show it will not be repeated. There is no evidence before me that the situation in Sri Lanka has changed in any material respect since 2013 when the appellant was summarily detained & significantly abused.

15. If the Sri Lankan authorities had in some way acknowledged that the appellant was not a political opponent and had been detained in error then it would have been possible to conclude, this was a "chance incident" and a case of "wrong time, wrong place". However there is no evidence of this: she was not released on the will of the authorities because she was of no interest to them. She was released because of the significant influence of the Red Cross.

16. If the appellant were returned to Sri Lanka it would appear that for exactly the same reasons that she might be identified and detained again, along with potential additional interest in her generated by the fact that he has been in the UK for the last 3 years. As GJ identifies, the focus of the Sri Lankan government is currently on preventing diaspora Tamil separatist destabilising the Sri Lankan states (see (3) of the headnote). I appreciate however that the Tribunal also found that the Sri Lankan authorities had sophisticated intelligence to identify those who were intent on reviving Tamil separatism and the appellant has made no realistic case that she is involved in any such activities. It is hard to tell if the appellant is on a "watch list". GJ tells me that she would only be on a watch list if an arrest warrant had been issued (see paragraph 16). The country guidance (at (9) of the headnote) suggests that generally the appellant would only be detained if on such a watch list if surveillance suggested she is involved with Tamil activism.

17. The appellant has credibly set out that she has only a historic low-level involvement with the LTTE prior to 2009. The country of origin materials reviewed in GJ find that such a person does not have a real risk of serious harm in Sri Lanka today. However, this appellant was persecuted, as she was detained and abused for her imputed political opinions on three occasions, and only escaped because of the influence of her employers. This leads me to conclude that she must have been perceived as someone who has a significant role in relation to post-conflict Tamil separatism by the authorities (risk factor 7(a) in GJ). The appellant's flight from Sri Lanka soon after detention; spending time in London (a known diaspora centre); and the lingering interest the authorities have in her brother are factors which are more likely to enforce rather than diminish the political opinion imputed to the appellant. I find that the appellant is at real risk of being detained for reason of her imputed political opinions on return to Sri Lanka as a result.

18. GJ tells me that if a person is detained by the Sri Lankan security services that they remain at real risk of ill-treatment and harm, and that internal relocation is not an option for a person at real risk (see paragraphs (4) and (5) of the headnote).

19. I find, applying the lower civil level of proof applicable in asylum cases, that the appellant therefore has a well-founded fear of persecution in accordance with 7(a) of the country guidance set out in GJ. Her appeal is allowed in accordance with the UK's obligations under Article 3 ECHR on the same grounds.

20. The appellant argues that article 3 is also engaged because her mental health is so fragile that there is a risk that return will result in her own suicide.

21. In AA (Iraq) [2012] EWCA Civ 23 the Court of Appeal acknowledged a distinction between "domestic" cases, where the risk is of suicide in this country on being told of the decision or of suicide in transit, and "foreign" cases, where the risk relates to the situation after arrival in the receiving country. The Court of Appeal said "*Any Immigration Judge is entitled to take the view that the risk of suicide in the UK upon learning of a final decision to remove her would be adequately managed in this country by the relevant authorities: see J, ante, paragraph 57. ... Moreover, the Immigration Judge would be entitled to assume that the Home Secretary would take appropriate measures to guard against any suicide attempt during the relatively brief transit to Belgium, including the provision of appropriately qualified escorts: see J, paragraphs 61 and 62.*"

22. In Y and Z (Sri Lanka) v SSHD (2009) EWCA Civ 362 the Court of Appeal said that even where there was no objective risk on return, there came a point at which the undisturbed finding that an appellant had been tortured and raped in captivity had to be conscientiously related to credible and uncontradicted expert evidence that the likely effect of the psychological trauma, if return was enforced, was suicide.

23. The evidence indicates that the appellant's mood is so low that there is a moderate risk that she will attempt to take her own life if she abandons hope of remaining in the UK. The case of AA (Iraq) tells me that the risk created by the appellant's suicidal ideation is outweighed by the protections offered by the respondent. I have sympathy for the appellant, and I am concerned for her welfare, but I am reassured that the respondent has both the resources and the will to protect the appellant from her instinct to compromise her own life. In this respect, the respondent honours her duty to protect the appellant's article 3 rights.

24. But, as I have found the appellant has established a well-founded fear of persecution, by analogy I find that her claim engages article 3 of the Human Rights Convention because she would face a real risk of inhuman or degrading treatment if she were returned to her country of origin.

25. The Judge's decision to dismiss the appeal is based on a material error of law and must be set aside. I substitute my own decision allowing the appeal on asylum and article 3 ECHR grounds.

**Decision**

26. The determination of First Tier Tribunal Judge Grimmett promulgated on 31 December 2015 contains a material error of law. I set the decision aside. I substitute the following decision.

27. The appeal is allowed on asylum grounds.

28. The appeal is allowed on article 3 ECHR grounds.

Signed

Date 18 April 2016

Deputy Upper Tribunal Judge Doyle