



IAC-AH-KRL-V1

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

Appeal Number: AA/07980/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 29 January 2016**

**Decision & Reasons Promulgated  
On 17 February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**J S  
(ANONYMITY DIRECTION MADE)**

**Appellant**

**and**

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

**Respondent**

**Representation:**

For the Appellant: Ms G Peterson, Counsel, instructed by A & P Solicitors

For the Respondent: Mr P Nath, Specialist Appeals Team

**DECISION AND REASONS**

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Durance sitting in Manchester on 9 October 2015) dismissing his appeal against the decision of the Secretary of State to refuse to recognise him as a refugee as otherwise requiring international or human rights protection. The First-tier Tribunal made an anonymity direction, and I consider that the claimant should continue to be accorded anonymity for these proceedings in the Upper Tribunal.

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

2. On 18 November 2015 Designated First-tier Tribunal Judge Zucker granted the appellant permission to appeal for the following reasons:

“It was open to the judge to have regard to the attitude the Authorities might have had towards the appellant. That he did not assert the Authorities had any interest in him after his release did not necessarily mean that it was not open to the judge, having regard to the totality of the evidence, to find the grant of a bus licence in the circumstances of the case to be a pointer in making credibility findings. However if, as is submitted, the judge materially mis-recorded what the appellant said about his involvement with the LTTE after 2009 and wrongly characterised the appellant as having told lies then the whole of the decision may need to be revisited. In those circumstances permission is granted on all grounds.”

## **Relevant Background**

3. On 2 June 2014 the appellant attended a substantive asylum interview. He said he had been forced to join the LTTE in December 2006. He had no involvement with the LTTE prior to this date (Q&A 22). He confirmed that he had been forcibly recruited: he had begged them not to send him to fight the army. He was assigned a non-combatant role, helping to bury the dead and also to provide food to the fighting areas. During “the last battle” he was arrested on 28 January 2009 and detained for nearly two months, during which time he was severely tortured. He was then handed over to the police, and the police put him in an army hospital. He then joined his family members who were in a refugee camp at Verapuram. While in detention, he told his interrogators that he had been forcibly recruited to the LTTE. He was asked whether he had helped the LTTE after his capture by the Sri Lankan Army in 2009. He answered no (Q &A 55).
4. The appellant claimed that he had been detained again in 2014. He was asked why. He answered that they suspected the LTTE were reforming in his local area, and they suspected him of helping the LTTE to reform in the area (Q&A 56).
5. The appellant said that he had been arrested on 1 March 2014 at a bus stop. He was detained at Kilinochchi Army Camp until mid-April 2014. On the day of his arrest, he was taken to the camp where he was beaten up to the point where he lost consciousness. When he awoke, he was shown photographs of three individuals, and he was asked whether he knew these “new LTTE leaders”? He told the Home Office interviewer that he recognised two of them, but he had never met them. After the end of the war, he had not seen any LTTE members, and he did not know what the two people that he recognised were, “doing now”.
6. He was asked how he had managed to leave detention in 2014. He said they had taken about ten to fifteen people to a place in the jungle, and put them in a camp and divided them into groups and sent them into the jungle to search for LTTE members in the jungle. The interviewer questioned why the authorities would tell a former LTTE member to search for members of an organisation they had previously worked for. The appellant answered that the Government was arresting every public person

and asking them to help in searching in the jungle to find LTTE members. On the first day, the search was fruitless. They did not find anybody. On the second day, they heard some shooting. They were later told that the new LTTE leaders had been shot by the army in the jungle. That night, the appellant and another person managed to escape by crawling away into the jungle past a sentry point where the soldier on duty was “in a sleeping position”.

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

7. Both parties were legally represented before Judge Durance. The appellant gave oral evidence, and adopted as part of his evidence-in-chief a witness statement in which he responded to various points made against him in the refusal letter. At pages 6 and 7 he said as follows with reference to paragraph 12 of the refusal letter:

“I did not know what and what I must tell and must not tell. Because of the bad experience I had in Sri Lanka due to my LTTE involvement I denied any LTTE connection other than 2006 membership at my interview as I feared of being sent back to Sri Lanka.

In my substantive interview I said I was forced to join the movement in December 2006. In fact, I was helping the LTTE from 1990 in many ways. I helped them in organising blood donation, helping financially, storage facility at home, collecting and supplying dry food during battle time, etc. The local people and many LTTE members know my involvement with the LTTE.

*I also helped former LTTE members during 2010 and 2014 by finding jobs, accommodation, financial help, etc. I did not disclose any of these in my interviews as I thought it was wrong for me to accept my LTTE involvement and that is why I said no involvement at all (my emphasis). I did not even disclose my first brother-in-law’s long time membership and send brother-in-law’s membership.*

I had close relationship with the LTTE as I was the president of Mallavi Area Chamber of Commerce and therefore organising and attending meetings with LTTE’s political leader Thamilchelvan, finance head Thamilenthi, Tamil Eelam Economy and Development Organisation (TEEDOR) Karikalalan.”

8. In his subsequent decision, Judge Durance summarised his findings at paragraph [35], before going on to explain how he had reached such findings. He found that the appellant was a low ranking supporter of the LTTE between 2006 and 2009, and in 2009 he was briefly detained and ill-treated. The expert report from Dr Martin was supportive of that ill-treatment. Upon his release from detention, the appellant was able to set up a private enterprise called JPSK Travel. This was a bus service operating between Jaffna and Kilinochchi. The appellant was not arrested or detained in 2014. The account provided by the appellant in respect of his post-2009 activities was discrepant and incredible, and accordingly the appellant was not at risk on return. At paragraph [36], the judge reiterated that he found on the lower standard of proof that the appellant was not credible in respect of his account of events in 2014. His account was internally discrepant, inconsistent and incredible.

Moreover his account of extant risk was contradicted by the documents he had produced in support.

9. The judge expanded on this finding at considerable length and in considerable detail in paragraphs [37] to [52]. At paragraph [37], he observed that the appellant confirmed to the Presenting Officer in cross-examination that he had lied on various occasions during the asylum interview. At paragraph [42], the judge held that the reasons advanced by the appellant as to why false information was given to the respondent at the asylum interview lacked coherence. It was clear from the interview that the appellant indicated he was engaged in LTTE activities. As such it was entirely unclear why he would answer questions selectively at the interview. The answers that he gave at questions 22, 55 and 64 were clear and unequivocal. The further evidence now produced directly contradicted these answers, and the appellant confirmed that he did in fact lie at the interview.
10. The judge held at paragraph [45]:
 

“I find that in the most recent evidence given by the appellant to the effect that he participated in LTTE activities from 1990-2006 and then 2010-2014 is an alteration to his evidence in order to attempt to bolster his role, status and standing within the LTTE ... In that respect I find that the appellant lacks credibility.”
11. The judge went on in paragraph [46] to say that this conclusion was supported by the lack of credibility “elsewhere in his evidence”.
12. At paragraph [51], the judge addressed a submission from Ms Walker for the appellant that his evidence was consistent with a BBC report that she had appended to her skeleton argument. The judge said this might have been a more persuasive argument if the appellant had not given such discrepant accounts.
13. At paragraph [52] the judge said that the only scar which the appellant attributed to the events of 2014 was scar eight. The expert indicated there were other possibilities for the cause of such scarring, and, in the light of the adverse credibility findings that he had reached, he found that the other possibilities were the cause of scar eight. In so doing, he placed reliance on **KV (scarring - medical evidence) Sri Lanka [2014] UKUT 230 (IAC)**, the head note of which he had earlier set out in full at paragraph [11] of his decision.

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

14. At the hearing before me to determine whether an error of law was made out, Ms Peterson developed the grounds of appeal which had been settled by Ms Amanda Walker of Counsel.
15. With reference to ground 5, she produced a copy of a Home Office guidance document on Tamil separatism dated 28 August 2014. Annexed to this guidance is a letter dated 16 April 2014 from the British High Commission in Colombo. They reported that on 11 April 2014 the Sri Lankan Military announced that they had shot and killed three men who were trying to revive the LTTE. The brigadier identified

the three men by reference to their actual names, as well as their alleged LTTE names. There had been differing reports as to whether the killings happened in Padaviya, just outside the island's northern province, or in Nedunkerni, in the northern Vavuniya district. An intense manhunt for these suspects had taken place since the alleged shooting of a police officer on 13 March 2014. A security operation in the north and east had seen a significant increase in those detained in question. Numerous house to house searches had been carried out and 60 plus arrests had been effected under the Prevention of Terrorism Act 1979. The arrests included those of family members or suspected family members of the wanted individuals. Following the killings of the three men, the Government of Sri Lanka was seeking assistance from Interpol in locating two men suspected of financing and reorganising the LTTE. The two men, who were named, were thought to be currently living in Norway and France.

16. On behalf of the Secretary of State, Mr Nath submitted the decision of the First-tier Tribunal was sound, and that the error of law challenge was in reality no more than an expression of disagreement with findings that were reasonably open to the judge.

### **Discussion**

17. Ground 1 is that the judge erred in finding that the appellant's ability to obtain a permit to run a bus service after his release from an IDP Camp in October 2009 was relevant to the question of whether his asylum claim was credible. Although Judge Zucker granted permission to appeal on all grounds raised, he clearly indicated in his reasons for granting permission that he did not see any merit in this particular ground, and I am of the same view. The fact that the appellant was able to operate a bus service in and around Jaffna following his release was more consistent with the appellant not being of ongoing adverse interest to the Authorities than the contrary proposition. It was open to the judge to find that the appellant's ability to operate such a bus service was indicative of him having a low risk profile in 2014 such as to make it less likely that he would be singled out by the Authorities as a potential suspect in a conspiracy to reform the LTTE. Clearly the judge would have been wrong to have treated the appellant's ability to run a bus service between 2010 and 2014 as being determinative of his risk profile. But this was not what the judge did. It was simply one matter which he took into account alongside a number of other matters.
18. Ground 2 is that the judge erred in recording that the appellant was seeking to suggest he had remained involved with the LTTE from 2009 to 2014, as opposed to simply providing assistance to former LTTE members. While the appellant had withheld details relating to the full extent of his LTTE involvement prior to 2006, he was not seeking to suggest he had any involvement with the LTTE after the end of the civil conflict in 2009.
19. Ms Walker sought to support ground 2 by selective quotation from the appellant's witness statement and from a passage in the appellant's cross-examination. I say "selectively" advisedly. Ms Walker ignored the fundamental discrepancy between

the position which the appellant took in his substantive asylum interview and the position which he took in the passage from the witness statement which I have quoted above.

20. It is clear from the quoted passage that the appellant was taking the position that he had hitherto suppressed the truth about his involvement with the LTTE *before* 2006 and *after* 2009. There is thus no merit whatsoever in the suggestion that the judge mis-recorded what the appellant said about his involvement with the LTTE after 2009, and wrongly characterised the appellant as having told lies. On his own case, the appellant lied in his asylum interview about his involvement with the LTTE *before* 2006, and his involvement with the LTTE *after* 2009.
21. I accept that later in his witness statement the appellant sought to qualify his earlier "admission" of suppressing the truth as to his activities after 2009 by saying that he did not have any involvement with the LTTE after 2009 as the movement no longer existed. In the passage from his cross-examination which is quoted by Ms Walker the appellant drew the same distinction.
22. But this does not change the fact that at pages 6 and 7 of his witness statement the appellant characterised his non-disclosure of, among other things, helping and providing funding to former LTTE members between 2010 and 2014 as *falsely denying* an LTTE involvement and connection after 2009.
23. The ostensible purpose of this crucial passage in the appellant's witness statement was to bolster his role, status and standing with the LTTE so as to lend credence to the claim that he was singled out in 2014 as a likely co-conspirator in a conspiracy to reform the LTTE. The "disclosure" of the appellant's involvement with the LTTE *before* 2006, and association with former LTTE members *after* 2009 is clearly relevant to his risk profile in 2014, and the appellant would not have brought it up in his witness statement if he and/or his legal representatives did not think it was relevant to his risk profile.
24. The clear thrust of the asylum interview was that the appellant had nothing to do with the LTTE after 2009, including associating with and providing support to other former members of the LTTE.
25. So it was open to the judge to characterise the appellant as having told lies about his involvement with the LTTE, both before 2006 and after 2009, particularly when the appellant himself in his witness statement claimed to have suppressed "the truth" when answering questions in the asylum interview. The judge was not bound to accept the appellant's alternative case, which was that he had not in fact suppressed the truth in respect of his activities after 2009.
26. At paragraph [43] the judge addressed another excuse offered by the appellant as to why he had allegedly suppressed the truth in his asylum interview, which was that he had not received adequate legal advice by the time he attended the interview. The judge said this did not stand up to scrutiny because when the appellant was

examined by Dr Martin on 21 September 2015, he was still maintaining that he had joined the LTTE in 2006.

27. Ground 3 is that it was unreasonable for the judge to find that the appellant was maintaining his lie about his involvement with the LTTE prior to 2006 during the course of his assessment by Dr Martin on 21 September 2015.
28. I accept that the judge's observation is not a strong adverse credibility point, as Dr Martin states at the outset of his report that the history which he gives in the report is restricted to those aspects that he considers relevant to the physical findings. However, the appellant's legal representatives had instructed Dr Martin to examine the appellant with a view to preparing a scarring report. These representatives had been on the record since at least the middle of May 2015, the appellant having been represented by a different set of representatives at the time of the asylum interview. So there had been plenty of time for the appellant's new representatives to take instructions from their client, and to give him appropriate advice, before they gave instructions to Dr Martin. Nonetheless, neither they nor the appellant sought to correct the record as to when the appellant had allegedly begun assisting the LTTE. So it was reasonable for the judge to reject the excuse of inadequate advice by reference to the fact that the record had not been corrected by the time of the appellant's examination by Dr Martin.
29. Ground 4 is that the judge materially erred in finding in paragraphs [47] to [49] that the appellant's account of the 2014 detention and escape was simply incredible. This ground was not specifically pursued by Ms Peterson, and was also not singled out by Judge Zucker as having prima facie merit.
30. Ground 4 is developed at considerable length in the grounds of appeal, and in essence it is argued that the judge has not given adequate reasons for rejecting the appellant's account of his detention and his escape from detention.
31. Insofar as ground 4 is directed at the adequacy of the judge's reasons for disbelieving the appellant's account of his arrest and detention in 2014, there is an inherent flaw in the premise, which is that the judge's reasons are confined to paragraphs [47] to [49]. The judge's reasons for rejecting the appellant's account of being arrested and detained in 2014 range much more widely.
32. Paragraphs [47] to [49] are in fact solely focused on a discrete aspect of the appellant's account, which is his alleged escape from detention. The judge has given adequate reasons for finding that this account is inconsistent, incoherent and lacking in credibility.
33. Ground 5 is that the judge materially erred by failing to give adequate consideration to the objective evidence, in particular the letter from the British High Commission dated 16 April 2014 annexed to the respondent's guidance on Tamil separatism.

34. It is not clear that the judge was in possession of the guidance referred to in ground 5, as there was no copy in my file, and there was also no copy in Mr Nath's file. Moreover, there is no reference to this guidance in the judge's decision.
35. There is reference at paragraph [51] to a BBC report that Ms Walker had appended to her skeleton argument, and the British High Commission letter indicates that the BBC has carried a report of the matters canvassed in the letter. Assuming that the BBC report conveys the same information as that contained in the British High Commission letter, I am not persuaded that the judge erred in not treating the report as lending credence to the appellant's account of either his detention or his escape from detention. As I explored with Ms Peterson in oral argument, the report is inconsistent with the appellant's account in two material respects. Firstly, the appellant claims to have been detained on 1 March 2014, whereas the intense manhunt for three alleged LTTE leaders only began after the alleged shooting of a police officer on 13 March 2014. Secondly, it is not suggested that those who were arrested under the Prevention of Terrorism Act 1979 were sent out into the jungle to search for the three suspects.
36. Grounds 6 and 7 both relate to the judge's findings on the scarring report insofar as the scarring report was relied on by the appellant as providing supporting evidence for his alleged ill-treatment and detention in 2014 as against his accepted ill-treatment and detention in 2009. Ms Peterson did not seek to argue either of the two grounds, rightly recognising that the scarring report was of very limited evidential value with respect to the alleged detention in 2014. At page 8 of his report, Dr Martin said as follows:
- "Determining the age of the scars by just visual inspection is not a precise science and often it is just possible to say that the injuries are mature or immature, enough to give a very approximate range of time when the injuries could have been caused. The scars are matured and this is consistent with injuries that occurred more than a year ago."
37. In short, Dr Martin did not profess to be able to distinguish chronologically between the scars attributed by the appellant to the 2009 detention as against the scarring attributed to him to detention in 2014. So the judge did not err in not attributing significant probative value to the scarring report as supporting the appellant's account of being detained in 2014.
38. Ground 8 relates to a procedural matter which is discussed by the judge at paragraphs [67] and [68] of his decision. Ms Walker relied upon photographs at page [73] of the appellant's bundle as support for the fact the appellant was photographed with the head of the LTTE political wing at a wedding (no date given). Ms Walker was asked whether there was any material before the Tribunal which indicated that the person in question was in fact the head of the LTTE political wing. She indicated that she did not have any such information but that such information was in the public domain. She suggested she might send the information to the Tribunal after the conclusion of the hearing. The judge indicated to Ms Walker this was not



satisfactory as it deprived Mr Richardson, who was appearing on behalf of the Secretary of State, of the opportunity to make representations on the point.

39. The judge said the burden of proof rested on the appellant, and he had not discharged the burden of proving that he was standing next to a high ranking member of the LTTE in the photograph. But if he was wrong about this, the photograph simply showed the appellant attending a wedding where there was a notable guest. He held that this was not sufficient evidence of itself to place the appellant within the risk categories of **GJ and Others**.
40. It is argued in ground 8 that it was unreasonable of the judge not to allow the appellant to submit further objective evidence after the hearing to confirm the physical appearance of the asserted LTTE leader.
41. There is no merit in this submission. It was a reasonable exercise of case management powers, and it was in accordance with the overriding objective, for the judge to refuse to admit further objective evidence on this issue after the hearing.
42. Furthermore, the judge dealt with the matter in the alternative. The judge reasonably concluded that, even if it was true that the appellant had been privately photographed at a wedding standing next to a LTTE leader, this did not in itself increase his individual risk profile. The photograph relied upon was a private wedding photograph, not a photograph that had been carried in the local or national press.

### **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 his 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