IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00572/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
Oral determination given following hearing	**On 17 February 2016**
On 13 January 2016	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

A M L
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms F Allen, Counsel instructed by S Satha & Co
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who was born in 1974, is a national of Sri Lanka. He entered this country in August 1997 and applied for asylum. Although his application was refused by the respondent his appeal against that decision was successful in consequence of which he was granted ILR in 1998. It was at that time accepted that he was entitled to refugee status.

2. Prior to the grant of refugee status a warrant for the appellant's arrest had been issued by a German court and the appellant was thereafter extradited to Germany and in 2000 he was sentenced to a term of

imprisonment of three years and six months suspended to probation for an attack on a Tamil in Germany. The appellant was then deported from Germany to the UK later in 2000 and subsequently on 16 January 2004 he was sentenced to four years' imprisonment for possessing a prohibited weapon and possessing ammunition without a certificate. Thereafter on 27 April 2005 the appellant was issued with notice of liability to deportation and he was then on 18 September 2005 released from prison on licence.

3. In the letter of 27 April just referred to the respondent gave notice to the appellant under Section 72 of the Nationality, Immigration and Asylum Act 2002 that the appellant would not be able to claim the benefit of the Refugee Convention by reason of the respondent's decision that he was a danger to the community of the United Kingdom by reason of his conviction. Reference will be made to this aspect of the letter below. Subsequently on 17 January 2011 the respondent wrote to the appellant giving her reasons for ceasing his refugee status. These are set out in some detail in the letter of 17 January 2011. Subsequently on 4 May 2011 the respondent issued a notice of liability to deportation and on 29 November 2011 a decision to make a deportation order and refusing a claim for asylum were served on the appellant. The appellant appealed against that decision on 30 January 2012 and on 20 March 2012 the appellant's appeal was allowed to the extent that it was held that the respondent's decision had not been in accordance with the law.

4. On 31 May 2013 the respondent issued a further notice of liability for deportation to which the appellant responded on 24 June 2013. A week later on 1 July 2013 the respondent served a further notice of liability for deportation to which the appellant responded on 16 July 2013. Two weeks later on 30 July 2013 the appellant's asylum claim was refused and then on 27 August 2013 a decision to deport was made and a deportation order signed by the respondent. The appellant appealed against this decision and yet again on 11 March 2014 his appeal was allowed to the limited extent that the decision was held to be not in accordance with the law. The respondent withdrew that decision to deport and the deportation order which had subsequently been made. Thereafter on 13 March 2014 a further decision to deport letter was served on the appellant setting out the respondent's reasons and the appellant appealed against this decision on 1 April 2014.

5. This appeal was heard before First-tier Tribunal Judge Beach sitting at Taylor House on 17 December 2014 and in a Decision and Reasons promulgated on 20 January 2015 the judge dismissed his appeal. The appellant now appeals with leave against that decision. There are essentially two grounds within this appeal. The first ground is that the judge failed to consider whether the decision "to invoke the cessation clause" was made out and that he erred further in proceeding to determine the asylum and Article 3 appeal afresh. It is argued within the grounds that as the initial decision to deport the appellant was set aside as not being in accordance with the law "it followed that all the decisions

which were served with the immigration decision fell away" (paragraph 6 of the grounds) which included "the decision to cease refugee status". The effect of this was that there was "no valid decision ceasing refugee status served upon the applicant" (at paragraph 8 of the grounds).

6. In any event and in the alternative it was submitted within the grounds that even if the decision to cease refugee status had been properly served nonetheless this issue "should have been considered and decided on by the FtTJ in this appeal, this being the first opportunity for this decision to be considered and tested" and it is argued that the appellant "has been denied the opportunity of putting the SSHD to proof that cessation of refugee status is made out in the instant case" (still at paragraph 8). It is said that this was a material error because the effect was that the appellant was required to "reprove his claim [to] have a well-founded fear of persecution" whereas the burden of proof was on the respondent to establish that circumstances had changed. As it is put at paragraph 11 of the grounds, the judge "failed to determine whether the SSHD had established that there had been a fundamental and durable change in circumstances in Sri Lanka such that he was no longer entitled to protection but rather reconsidered the applicant's asylum claim afresh [which] approach amounts to an error of law".

7. The second ground is that in any event the judge failed to have regard to the appellant's evidence in relation to his current circumstances. At paragraph 12 it is stated that "in the applicant's statement, he refers, inter alia, to his attendance at demonstrations in the UK against the killing and tortures of Tamils by the Sri Lankan government", but "the FtTJ made no reference to this evidence" and "failed either to take it into account or make a finding of fact in relation to the evidence when assessing whether the applicant is at risk of persecution today". It is further submitted at paragraph 13 that the judge "had an obligation to have regard to the Adjudicator's determination as a starting point, to consider any further evidence submitted by or on behalf the applicant and then to assess risk on return with reference to the current situation".

8. On behalf of the appellant before this Tribunal, in the course of her succinct but well-argued submissions Ms Allen relied upon the grounds. Essentially her case with regard to the first ground was that if the cessation decision had been sent at the same time as the notice of intention to deport, which it was, effectively it formed part of the same decision so that this aspect of the decision should be treated as having been set aside by the decision of the earlier judge that the decision was not in accordance with the law. If that decision was still live then this judge's approach was incorrect because he should have considered whether there had been a fundamental change in the appellant's position and even if the refugee status had been ceased there was still Article 3 to consider and the burden was on the respondent rather than the appellant and she had to prove the lack of risk under Article 3.

9. So far as the second ground was concerned in terms of consideration of Article 3 the judge had failed to consider the appellant's current circumstances in terms of his attendances at demonstrations and so on and how that impacted on the current risk.

10. On behalf of the respondent Mr Bramble in his equally concise and persuasive submissions relied on the Rule 24 response which had been made. It was the respondent's case that the respondent had been entitled to give notice under Section 72 of the 2002 Act that the provisions of Article 33(2) of the Refugee Convention whereby the benefit of the Refugee Convention may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country applied. It was the respondent's position that by virtue of his criminal activities which extended beyond those matters of which he had been convicted he was a danger to the community and thus was not entitled to the benefit of the Refugee Convention.

11. In any event the judge considered carefully whether or not the appellant would be at risk in any event and while it was accepted that had there been no change of circumstances the appellant would still be entitled to protection under Article 3 of the ECHR the judge having considered this aspect of the case carefully concluded that he would not be at risk on return and therefore was not entitled to the protection provided under Article 3 either and with regard to the risk on return the respondent and the Tribunal had to look forward which was what the judge clearly did. It was clear from paragraph 92 of her decision that the judge had taken as a starting point the Adjudicator's decision in 1998 when the appellant's appeal against the refusal of asylum had been allowed but she then considered the up-to-date law including in particular the recent country guidance decision in *GJ and others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319.

12. So far as ground 2 was concerned, which was that the judge had failed to take account of the appellant's sur place activities, although at paragraph 12 of the grounds there is reference to the appellant's witness statement where he had said that he had attended demonstrations, in the witness statement prepared for the hearing, which amounts to some five pages and 22 paragraphs, the only reference to his attending demonstrations is one sentence at the end of paragraph 14 where it is said that "I have taken part in peaceful protests by Tamils in London against the torture and killing of Tamils by the Sri Lankan government".

13. The submissions made on his behalf are set out at paragraphs 47 to 53 of the judge's decision and it seems clear that no submission was made with regard to any risk which would be faced by the appellant by reason of his sur place activities. The judge at paragraph 96 had had regard to the UNHCR guidelines and then at paragraphs 97 to 99 dealt with the Freedom from Torture report dated September 2012. The evidence was concisely brought together at paragraph 100 where it was said that "the appellant has not put forward any new evidence regarding his asylum claim other

than updated background evidence and UNHCR guidelines all of which I have taken into account when assessing the appellant's claim".

14. At paragraph 92 the judge had taken as his starting point the decision of the Adjudicator who had allowed his appeal. Although there is no reference to the brief comment referred to above made by the appellant at paragraph 14 of his witness statement it was hard to see how this could be material, and it was not backed up by any evidence.

15. In reply Ms Allen without repeating the first submission she had made reminded the Tribunal of what it had been. If the issue of refugee status was a live issue at the time of the appeal before the judge then the first consideration should have been as to whether or not the cessation decision was correct. By starting with Section 72, which was all to do with a person's conviction, she had adopted the wrong approach. This was relevant to the submission made on behalf of the appellant as to whether or not the refugee status should be treated as having been ceased.

16. In terms of the cessation of refugee status there had to be a change in the circumstances such that it was now safe for the appellant to be returned. His refugee status could not be revoked and a cessation of refugee status could only be justified on the basis of there having been a fundamental change in the situation in the country. So far as the second ground is concerned it was not correct that nothing new had been raised as was stated by the judge at paragraph 100 of her determination.

Discussion

17. In my judgment the respondent was entitled to place reliance on what is set out within Article 33(2) of the Refugee Convention, which provides as follows:

> "*Article 33*
>
> **PROHIBITION OF EXPULSION OR RETURN ('REFOULEMENT')**
>
> 1. No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

18. Section 72 of the Nationality, Immigration and Asylum Act 2002 provides as follows:

> "*Removal*

72. Serious criminal

(1) This Section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).

(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is -

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years.

(3) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if -

(a) he is convicted outside the United Kingdom of an offence,

(b) he is sentenced to a period of imprisonment of at least two years, and

(c) he could have been sentenced to a period of imprisonment of at least two years had his conviction been a conviction in the United Kingdom of a similar offence.

…

(6) A presumption under subSection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.

…

(9) SubSection (10) applies where -

(a) a person appeals under Section 82 … of this Act …

…

(10) The … Tribunal … hearing the appeal -

(a) must begin substantive deliberation on the appeal by considering the certificate, and

(b) if in agreement that presumptions under subSection (2), (3) … apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal insofar as it relies on the ground specified in subSection (9)(a) … [that is that the removal would be in breach of this country's obligations under the Refugee Convention]."

19. According to statute the judge was obliged to consider first whether or not the respondent's decision that because the appellant was a danger to the community he should not be entitled to enjoy the benefit of the Refugee Convention before considering the substantive appeal and this is what the judge did. It is not necessary for the purposes of this decision to analyse the basis upon which the judge considered that the presumption had not being rebutted because this is clearly set out within the decision and that aspect of it has not been challenged. Essentially the judge had regard to all the factors including in particular the convictions in Germany and the UK, the conviction in the UK being particularly serious.

20. The effect of the certification under Section 72 is that by virtue of Article 33(2) of the Refugee Convention the appellant is not entitled to the protection afforded under that Convention. He is, however, still entitled to the protection afforded by Article 3 of the ECHR which for present purposes would continue to provide him with similar protection against removal as that provided under the Refugee Convention because the respondent would still not be allowed to remove him if in consequence of his removal he would be at risk of treatment such as to breach his Article 3 rights which in this case are not in any significant way different from the protection he would have had under the Refugee Convention.

21. To that extent I accept the submission made by Ms Allen that it was incumbent on the judge to consider whether or not the situation had changed in respect of the risk the appellant faced were he to be returned now to Sri Lanka because the starting point, under normal *Devaseelan* principles, would have to be the earlier decision made in 1998 that as at that time the appellant would be at risk on return. However, that is precisely the basis upon which the judge did consider this appeal because she says in terms at paragraph 92, when considering the appellant's asylum claim that "the starting point for my consideration of this claim is the appeal determination of Special Adjudicator Swanney promulgated on 7 September 1998". Although it would have been preferable if the judge had stated in terms that she was considering the appellant's Article 3 rights nothing turns on this because the same considerations would apply and so to the extent that this was an error it was not a material one.

22. The judge noted the basis of the Adjudicator's decision and in particular the rejection of parts of the appellant's evidence but stated at paragraph 93 correctly that "the appeal was allowed on the basis of the particular circumstances in Sri Lanka and the appellant's personal circumstances as a Sri Lankan Tamil from the North of Sri Lanka with no travel documents".

23. The judge then had specific regard to the most up-to-date country guidance given in *GJ and others* and also to the Court of Appeal order in *MP and NT*, before considering the most up-to-date background evidence. In my judgment, in light of the recent country guidance given in *GJ* , the submission that a fundamental change in circumstances in Sri Lanka had not been shown is unarguable. There clearly has and this is set out in that decision. The issue which this judge had to consider was whether or not

on the basis of the evidence in this case this appellant would now be at risk on return to Sri Lanka (albeit such as to engage his Article 3 rights rather than his rights under the Refugee Convention) and accordingly the real issue in this case is whether it is arguable that the judge failed in her decision to have proper regard to this issue.

24. I should deal with one other aspect of the appeal with regard to the cessation of the appellant's refugee rights which is the argument that because an earlier immigration decision to deport the appellant had been set aside as not being in accordance with the law this somehow invalidated the appellant's decision to certify that the appellant was not entitled to the protection on which he would otherwise be entitled to rely pursuant to Article 33(2) of the Refugee Convention. I do not accept Ms Allen's submissions in this regard. This certification was only part of the decision making process and is not appealable in itself and the judge considered very carefully in this case whether or not the presumption that the appellant was a danger to the security of the country had been rebutted and as I have already noted his decision that it had not has not specifically been challenged in this appeal.

25. Accordingly I am satisfied that the judge's consideration of the issue as to whether or not the appellant would now be at risk on return has been properly considered in all respects other than the matters raised in ground 2 to which I now turn. The argument within ground 2 is essentially that because the appellant said in his statement that he had taken part in peaceful protests by Tamils in London against actions of the Sri Lankan government that was a matter which should specifically have been considered by the judge and therefore to the extent that it was said at paragraph 100 that the appellant had not put forward any new evidence regarding his asylum claim this was not correct.

26. While for the sake of completeness the judge might have made a passing reference to this sentence within the appellant's witness statement in my judgment if this was an error it was not a material one. There was very limited evidence as to precisely what activities the appellant had been engaged in in this country but the fact that he had engaged or taken part in peaceful protests against some of the activities carried out by the Sri Lankan government in light of all the other matters considered by the judge cannot in the judgment of this Tribunal have brought him within the risk categories as set out within *GJ*. Had this been arguable no doubt submissions would have been made to this effect by Counsel who represented the appellant before the judge; this Tribunal's conclusion is that such submissions could not have succeeded.

27. It follows that there having been no material error in Judge Beach's decision this appeal must be dismissed and I so find.

Notice of Decision

The appellant's appeal is dismissed and the decision of Judge Beach is affirmed.

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:

Upper Tribunal Judge Craig Date: 8 February 2016