Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07807/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 February 2017	**On 19 September 2017**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR W
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant (Secretary of State):	Ms A Brocklesby-Weller, Senior Home Office Presenting Officer
For the Respondent (Mr W):	Mr A Bandegani, Counsel, instructed by Wilson Solicitors LLP

DECISION AND REASONS

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.

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Colvin, who in a decision promulgated on 12 October 2016, following a hearing at Taylor House on 16 September 2016, had allowed Mr W's appeal against the Secretary of State's decision refusing to grant him asylum/humanitarian protection. For ease of convenience, I shall throughout this decision refer to Mr W, who was the original appellant, as "the claimant" and to the Secretary of State, who was the original respondent, as "the Secretary of State".

2. This appeal was before me on 16 February 2017, when, having heard submissions on behalf of both parties, I reserved my decision. I considered the arguments to be finely balanced, and wished to consider them further before reaching a definitive decision.

3. Having considered the submissions carefully, I reached a provisional view which I recorded in note form. However, I wished to give further consideration to the decision I had to make, and so put the file to one side in order that I could reflect further on the issue which had been raised.

4. Regrettably, the file was then mislaid, but neither the claimant's representatives nor the Secretary of State has made any enquiry as to when my decision could be expected, and my obligation to give a Decision with regards to this appeal was overlooked as the pressure of other work intervened.

5. Fortunately, the Administration at Field House has alerted me to my need to give a Decision in this case and following a search I was able to locate the file. I am accordingly giving my Decision without further delay. This Decision remains as I had provisionally decided after I had originally considered the arguments, and in substance is taken from the notes I made shortly after the hearing. However, I apologise to both parties for the delay.

6. The claimant is a national of Sri Lanka, who was born in 1987. He applied for a student visa in January 2010 which was refused but a further application made in December 2010 was successful and he was issued with entry clearance. He travelled to the UK using his own passport in January 2011 with a visa which was valid until May 2013. He made a brief visit to Sri Lanka from January to February 2012 but then applied for asylum on 27 February 2013. This application was refused by the Secretary of State on 27 April 2015, but as already noted, his appeal against that refusal was allowed by First-tier Tribunal Judge Colvin. The Secretary of State now appeals against that decision, leave having been given by First-tier Tribunal Judge J M Holmes on 8 November 2016.

7. The judge dealt very fully with the credibility issues which arose during the hearing. She noted that it was accepted on behalf of the claimant that he had "lied about his claimed detention in 2012 and submitted false documents" (at paragraph 21). However, having considered the evidence before her, she concluded (at paragraph 34) that she was "satisfied on the standard of proof in asylum cases that the

[claimant's] account of what happened to him in 2008 is credible and plausible" and that:

> "It is consistent with the background information as described in the Expert Country Opinion and, on the basis of the verification report prepared ..., the documents submitted by the [claimant] are genuine or authentic. These documents show that he was detained in 2008 for exactly the reasons he claims and his serious mistreatment in detention is supported by the medical evidence".

8. The judge took into consideration, before reaching these findings, that the claimant had previously made a false claim that he had been further detained and ill-treated when he returned to Sri Lanka for a visit in 2012, but considered that this was possibly because "he did not think [his claim] could succeed after he had had a problem-free visit to Sri Lanka in 2012", and had for this reason embellished his account. The judge found, still at paragraph 34, that "Whilst I do not in any way condone the [claimant's] false account, I do not find that it is of probative value in undermining his account relating to 2008 when all the other evidence is taken into consideration".

9. It was in the context of her positive credibility findings that the judge then went on to consider the risk on return, and her starting point (see paragraph 36) was the country guidance case of *GJ and Others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC), which, as the judge rightly stated, "considered a large amount of evidence concerning the situation in 2012-2013 and gave guidance as to the approach of the authorities in who was likely to be of interest to them on return". At the conclusion of paragraph 36, the judge made the following important finding:

> "I find on the facts of this case the [claimant] does not fit within any of the stated categories in *GJ* and this was perhaps shown when he returned to Sri Lanka in 2012 without further problems from the authorities".

10. However, the claimant's case had been argued before the judge on the basis that the situation in Sri Lanka "has significantly changed including the risk to returnees since 2012-2013" (see paragraph 37). The judge notes that:

> "These changes are identified in the Expert Country Report and illustrated by reference to several authoritative international actors such as the International Crisis Group stated in its report published in May 2016 that: '*There continue to be credible reports of torture and sexual abuse by 'counter terrorist' police and military intelligence units against Tamils returning to the country who are suspected of past LTTE involvement*'."

11. Reliance was also placed on "the recent Country Information and Guidance Sri Lanka: Tamil separatism Version 3.0 August 2016", and the judge set out extracts from that Country Information and Guidance, which had been highlighted in the skeleton argument prepared on behalf of the claimant.

12. Having considered the submissions which had been made to her (and, which is important in this case, the absence of any substantive challenge to this evidence on behalf of the Secretary of State) the judge concluded as follows, at paragraphs 40 and 41:

> "40. The question before me is whether this recent background information signifies such changes to the risk to returnees as to justify a departure from the CG case of *GJ*. It has been observed in other cases, that country guidance is not inflexible and it must be applied by reference to new evidence as it emerges. In *KS (Burma)* [2013] EWCA Civ 67 it was held that in order to depart from a CG case there needs to be cogent and reliable evidence that the appellant would face a risk.
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> 41. Again, after careful consideration of all the evidence before me including the recent CIG published in August 2016, I have reached the conclusion that there is sufficient cogent and reliable evidence that failed asylum seekers currently returning to Sri Lanka may be at real risk on *suspicion* of having actual perceived LTTE connection or involvement in the past. This is different from the evidence that was before the Upper Tribunal in 2012-2013 in the CG case of *GJ*. And in applying this to the circumstances of the [claimant] I am satisfied that there is a reasonable likelihood that he will be treated with suspicion because of the event in 2008 when he came to the adverse attention of the authorities and that this suspicion is reasonably likely to result in his detention and ill-treatment as before so as to come within the Refugee Convention and the ECHR".

13. It is not in issue that if the claimant was at risk of being detained, he would be entitled to protection under the Refugee Convention.

14. The argument now advanced on behalf of the Secretary of State is that the evidence which had been placed before the First-tier Tribunal was not sufficient as to entitle her to depart from the country guidance which had been given in *GJ*, which had considered an abundance of evidence. It is said on behalf of the Secretary of State that in effect the judge "cherry-picked" from the evidence which had been given (or, probably more accurately, that the claimant's Counsel "cherry-picked" from that evidence) and she did not adequately analyse this evidence herself before making her decision.

15. I do not propose myself to embark on a detailed analysis of this evidence, because unless and until an error of law is established, it is not a function of the Upper Tribunal to entertain submissions which both could and should have been advanced before the First-tier Tribunal. The issue for this Tribunal now is to consider not whether the judge's decision was in fact correct, but whether it was open to her on the basis of the evidence which had been put before her and the submissions which had been made.

16. The real difficulty with the case as now advanced on behalf of the Secretary of State, is that the challenges to the "expert evidence" and other documents which had been submitted before the First-tier Tribunal had not been challenged during that hearing. I refer to the note of hearing which I made immediately following the previous hearing before me on 12 December 2016 when I stated as follows:

> "...
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> 3. The basis of the Secretary of State's appeal was that the First-tier Tribunal Judge should not have departed from the extant country guidance given in the Tribunal decision of *GJ and Others*. It is right to say that within the grounds the [Secretary of State] did not seek to argue that the decision to the effect that the Tribunal was entitled to depart from that guidance was inadequately reasoned, but this was an issue which was identified by this Tribunal.
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> 4. Mr Bandegani, who has represented this claimant today as he has throughout sought an adjournment in order to deal specifically with this point and to enable him to give further assistance to the Tribunal in the form of a skeleton argument and also in order to enable him to put before the Tribunal in an intelligible form that evidence which he says was before the First-tier Tribunal and which justified the decision which that Tribunal made".

17. I also noted my concern to the bearing that my decision in this case might have on other appeals which might be brought by other applicants.

18. Having given further consideration to the submissions, and notwithstanding my concern as to the possible impact of this decision on other cases (which on reflection I now consider should be minimal, for reasons which I will give below) I have concluded that while it might have been open to Judge Colvin to have reached a different conclusion, her reasoning for making the findings she did were adequately expressed and are sustainable.

19. I have already set out the judge's self-direction (at paragraph 40 of her Decision) with regard to the circumstances in which a departure from a country guidance decision is permissible (see paragraph 12 above) and the Judge directed herself appropriately. The difficulty in the Secretary of State's case is that it is not apparent (and it has not been argued before this Tribunal) that there was any challenge made to the cogency or reliability of the evidence relied upon by the claimant in order to justify departing from *GJ*; the Secretary of State did not even submit within the original grounds to this Tribunal that Judge Colvin's finding that she was entitled to depart from the guidance given in *GJ* had been inadequately reasoned. It appears that the submissions before her were focused rather on whether the applicant's claim was credible (see paragraph 20 of the Decision where the Secretary of State's submissions were summarised).

20. Accordingly, I am unable to find that the decision of Judge Colvin was not one which was open to her on the basis of the evidence and submissions which had been advanced before her; this appeal is essentially an attempt to advance arguments for the first time before this Tribunal which both could and should have been advanced before Judge Colvin. Without the judge being invited to consider argument as to the cogency and reliability of the evidence relied upon by the appellant, it is not now open to the Secretary of State to challenge the findings she made, which were open to her.

21. Although, as I have already noted, this decision might be finely balanced, because country guidance decisions should not lightly be departed from, my initial concerns that this decision might be viewed as giving a "green light" to judges in the future departing from *GJ* are probably unfounded. The reason that I have upheld Judge Colvin's decision is not because I have carefully analysed all the evidence and myself concluded that the situation in Sri Lanka is now different from what it was at the time *GJ* was decided; rather, I have simply concluded that on the basis of the evidence which was before her, which was not subject to the detailed challenge it might have been at the time, I cannot say that Judge Colvin's findings were not open to her.

Notice of Decision

There being no material error of law in Judge Colvin's decision, this appeal by the Secretary of State against her decision is dismissed. The decision of the First-tier Tribunal, allowing the claimant's appeal, is affirmed.

Signed:

Upper Tribunal Judge Craig Dated 15 September 2017