



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/00641/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 29 August 2017

Decision & Reasons Promulgated  
On 18 September 2017

Before

DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL

Between

MR VIVEKANATHAN JEYARUBAN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Popal, Counsel, instructed by KQ  
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Sri Lanka aged 31. In a decision sent on 16 December 2016 First-tier Tribunal (FtT) Judge N Osborne dismissed his appeal against the decision made by the respondent on 20 July to make a deportation order against him under s.32(5) of the UK Borders Act 2007 on the basis that he was a foreign criminal. On 4 September 2013 he had been convicted of violent disorder and sentenced to 42 months' imprisonment. He had also been convicted in October 2005 of an offence of wounding. He also committed more than one other offence of a minor nature. On the same day a decision was made by the respondent to refuse his protection and

asylum claim and certify it under S.72 of the Nationality, Immigration and Asylum Act as a result of which the appellant was presumed to have been convicted by final judgment of a particularly serious crime, and to constitute a danger to the community of the UK. Having upheld the S.72 certificate the judge then turned to consider the appellant's human rights grounds under Articles 3 and 8.

2. The appellant's appeal on Article 3 grounds encompassed a challenge to the judge's conclusion that the appellant's asylum claim lacked credibility.

3. For the purposes of assessing the appellant's Article 3 claim the judge noted his claim that he had been arrested, detained and ill-treated by the Sri Lankan Army in 2001/2002 and his more recent claim that he had become active in protests in London against the Sri Lankan government since 2010 and that a warrant had been issued for his arrest in Sri Lanka in 2013. The judge was prepared to accept that as a teenager the appellant had carried out low-level activities on behalf of the LTTE and also appeared to accept his claim that when a 14/15 year old boy he had been arrested, detained and ill-treated for several weeks in 2001/2002 before being released upon payment of a bribe by his family. However:

(i) he was not satisfied that the appellant's conduct/behaviour even on his own account was anything other than low-level and did not consider it would concern the Sri Lankan authorities some fifteen years later and some seven years after the civil war had ended; and

(ii) he was not satisfied that the appellant had suffered injuries resulting in scars as a result of his ill-treatment in 2002. At paragraph 31 the judge stated:

31. Even if I was satisfied (which I am not) that the Appellant's injuries were caused by the Sri Lankan Army as long ago as late 2001, I find that I am far from satisfied for the reasons set out below that the Appellant now after such a long time has anything to fear from the Sri Lankan authorities. However, due to the age of the scars and due to the nature of the private life exercised by this Appellant since he has been in the UK in terms of his involvement in violent behaviour, I am not satisfied that the scars which now appear upon his body were not suffered after he arrived in the UK in any one or more of the violent incidents in which the Appellant has been involved.

4. As regards his sur place activities, the judge first of all considered the appellant's claimed activities in support of the British Tamil Forum (BTF). He concluded that the appellant had adduced no or no adequate evidence to establish that he attended any demonstrations in support of the BTF or that he did any work on behalf of the BTF. The judge next considered his claim that he was also involved in volunteer activities for the Transnational Government of Tamil Eelam (TGTE). In this regard he considered a copy (undated) letter from a Mr Sockalingam Yogalingam who was described as the Deputy Minister for Sports and Community Health. It stated that the appellant had joined TGTE as a volunteer in organising several public events in

the UK in support of creating a free Tamil state in Sri Lanka. Alongside this letter the judge considered copy photographs produced showing the appellant attending inter alia a rally in August 2016 near Downing Street, a rally in October 2015 to protest against the killing of students at Jaffna University and attending a TGTE meeting on 2 October 2016. At paragraphs 43 and 44 the judge said:

“43. All these photographs that the Appellant has adduced in evidence in an attempt to show his commitment to the cause of the TGTE are dated between the date of the first tribunal hearing on 26 July 2016 and the date of this hearing. Mr Arkless properly put to the Appellant that his involvement in relation to this cause or indeed any other Tamil activities in the UK has been and will be proved to be short-lived. Mr Arkless put to the Appellant that he has been in the UK since early 2002 and it is only now shortly before this final hearing that the Tribunal is shown any evidence of any involvement by the Appellant in Tamil activities. I find that this point raised by Mr Arkless was well made. I find that if the Appellant, as he claims, is genuinely committed to and has been genuinely supporting Tamil causes since his arrival in this country in January 2002 that this Tribunal would have been shown far more evidence in the form of photographs and would have heard far more oral evidence from individuals who could have confirmed the Appellant’s involvement. As it is, no witnesses have been brought to the Tribunal to confirm the Appellant’s activities in this regard whether as claimed by the Appellant or at all.

44. For the avoidance of doubt I find that the copy letter which purports to have emanated from the Transnational Government of Tamil Eelam is a most unimpressive document which is undated, is relatively vague in its description of the Appellant’s specific activities and the specific extent to which the Appellant has helped that organisation. I give the letter little if any weight for those reasons and because its author failed to attend to be cross-examined and/or to confirm its contents. I would have thought that if the Appellant were genuinely involved in Tamil activities that members of the Tamil organisations with which he claims to be involved would have been only too ready to attend the Tribunal to support his appeal knowing that if he is returned to Sri Lanka he would be of interest to the state authorities. The distinct lack of support from within the Tamil community for the Appellant’s claimed commitment to the Tamil separatist cause is illuminating. It undermines the Appellant’s reliability as a witness, his personal credibility, and the credibility of his claim to be genuinely involved with any Tamil separatist cause whether as claimed by him or at all.”

5. The judge went on to reject the appellant’s evidence seeking to establish that the Sri Lankan authorities had issued an arrest warrant against him. The judge also considered and rejected the appellant’s claim that he qualified as an EEA extended family member and that he was entitled to succeed on the basis of his Article 8 circumstances based primarily on the long-term cohabitational relationship with Ms S Ganay, a French citizen.

6. The appellant's grounds of appeal raised the following challenges. First it was submitted that the judge materially erred in respect of his assessment of the medical evidence. Second that the judge had failed to adequately weigh in the balance when assessing risk that he had found that the appellant had been detained and ill-treated in 2001 on suspicion of LTTE involvement. Thirdly, it was submitted that the judge had failed to engage adequately with the appellant's risk on return due to his perceived involvement with the TGTE (which was a proscribed organisation). Finally it was submitted that the judge had failed to engage with paragraphs 4 and 15 of Appendix C of **GJ and others (post-civil war: returnees)** Sri Lanka CG [2013] 00319 UKUT and the fact that the appellant will be questioned about his pro-LTTE sur place activity and cannot be expected to lie about that.
7. The appellant's grounds were considered by a First-tier Tribunal Judge in May 2017 and permission to appeal was refused. However in a decision made on 7 July 2017, Upper Tribunal Judge Smith granted permission on "limited grounds" which she specified as being

"grounds set out at [6] and [7] of the renewed application for permission which both related exclusively to the appellant's sur place activities: the essence of [6] was alleged failure to engage with "the appellant's risk on return due to his perceived involvement with the TGTE" and the essence of [7] was failure to engage with paragraphs 4 and 15 of Appendix C of **GJ (Sri Lanka)**" (see above).
8. At the hearing Ms Popal applied for permission to argue all the grounds set out in the applications for permission. She explained that she had only been instructed late in the day and to her understanding it was open to the Upper Tribunal to consider all grounds notwithstanding the grant made by UTJ Smith on limited grounds. In addition she submitted that it was in the interests of justice that I permit her to argue all the grounds because there were compelling reasons for the UT reconsidering the issue of the judge's treatment of the medical evidence.
9. Having considered the parties' submissions I ruled against Ms Popal's request to allow her to argue all the written grounds. Ms Popal is correct to state that I am not prevented by the TCEA 2007 or the Tribunal Procedure (Upper Tribunal) Rules 2008 from considering the written grounds in full, notwithstanding UTJ Smith's specific restriction. However, I do not consider the appellant has demonstrated a sufficient basis for me to take this step.
10. First of all, the limited basis on which UTJ Smith granted permission was unequivocal.
11. Yet the appellant's representatives took no steps to challenge this limitation either by way of an appellant's reply or any other step. The appellant's representatives have had since early July to register such a challenge but did nothing. No explanation has been provided from the appellant's solicitors as to why they failed to take any action to raise with the UT the scope of the grant of permission.

12. Secondly, I am unable to accept Ms Popal's contention that there are compelling circumstances for going outside the restricted remit of the grant of permission arising from what she termed the clearly questionable treatment by the FtT Judge of the medical evidence. The grounds seek to rely on the findings of Dr Al-Wakeel in his report of September 2016 that the appellant's scars are "typical" of the events described by him of being intentionally burnt. However, it was also a finding of Dr Al-Wakeel that it was not possible to give a precise age to the scars, which were fully mature. It is well established in the medical literature that there is no scientific basis for determining the age of scars after a period of six months to two years: as stated in **KV (scarring – medical evidence) Sri Lanka [2014] UKUT 230 (IAC)** at paragraph 5 of the head note (whose contents is unaffected by the subsequent Court of Appeal decision):

"5. Whilst the medical literature continues to consider that scarring cannot be dated beyond six months from when it was inflicted, there is some medical basis for considering in relation to certain types of cases that its age can be determined up to two years".

13. Given the doctor's proper acceptance that he could not date the scars that clearly qualified the scope of his finding that the scars were "typical" of those inflicted in the way the appellant had claimed. That finding was predicated on the appellant's scars having been inflicted in 2001/2002, despite it being impossible to say they were that old. The judge's assessment at paragraph 31 was that

"due to the age of the scars and due to the nature of the private life exercised by this Appellant since he has been in the UK in terms of his involvement in violent behaviour, I am not satisfied that the scars which now appear on his body were not suffered after her arrived in the UK in any one or more of the violent incidents in which the Appellant has been involved".

14. Ms Popal submitted that this assessment should be considered flawed because the scarring included cigarette burns which were most unlikely to be connected with any violent behaviour in the UK. Whether or not that is correct, the underlying problem that the scars could not be dated remains and it is clear from paragraph 31 that the judge saw this problem as adverse to the appellant quite separately from his violent behaviour.

15. I turn therefore to consider the appellant's challenge to the judge's assessment of the appellant's sur place activities.

16. As regards the appellant's account of involvement with the TGTE, I consider it was entirely open to the judge to reject his account. The grounds take issue with the judge's reliance on the lack of confirmation but Article 4(5) of the Qualification Directive only excuses non-confirmation of written statements under specified conditions – conditions which the appellant plainly did not fulfil. It was open to the judge to attach very significant weight to the failure of anyone from the TGTE to attend to give evidence on behalf of the appellant to confirm his claimed activities.

The judge analysed the photographic evidence with care. The judge also considered the reliability of the copy letter which purported to have emanated from the Tamil government-in-exile. At paragraph 44 the judge gave sound reasons for deciding to attach little or no weight to it.

17. It must be borne in mind that the appellant's claim to have achieved a significant profile as a TGTE supporter was based in part on his claim to have become passionate about its cause. The judge was singularly unimpressed by this aspect of the appellant's claim, pointing out that despite having been in the UK since 2002 it was "only now shortly before this final hearing that the Tribunal is shown any evidence of any involvement by the Appellant in Tamil activities". Given the terms of Article 5(1) of the QD it was entirely open to the judge to assess that his claimed sur place activities were not a continuation of activities in Sri Lanka and that this feature reinforced the reasons for assessing that he was not the actively involved TGTE supporter he claimed to be.
18. The grounds seek to argue that the judge failed when assessing the appellant's sur place activities to take account of how the appellant would be perceived by the Sri Lankan authorities as distinct from how genuine were his sur place activities. However, on the judge's findings the appellant had failed to establish that he had a significant sur place profile capable of generating adverse perception.
19. The above leads me to conclude that ground 6 fails to establish an error of law.
20. Turning then to ground 7, I fail to see that the judge's assessment contravened any part of the guidance given in GJ. On the judge's findings the appellant had failed to establish that the Sri Lankan authorities would have any adverse interest in him on return. To the extent that the argument is advanced that the appellant could not be expected to lie on return about his sur place activities that would entail on the judge's findings that he would have to admit that he was in fact not significantly involved with the TGTE. Bearing in mind that a further feature of the findings made by the UT in GJ was that the Sri Lankan authorities hold sophisticated intelligence, it is even less likely that they would respond to any mention by the appellant of seeking to claim he had a significant TGTE involvement by treating him as someone who required further questioning and investigation.
21. Ms Popal's submissions raised a further point which was that the judge's rejection of the appellant's evidence about his TJTE activities was contrary to authority. In this regard she sought to rely on the Court of Appeal judgment in UB (Sri Lanka) [2017] EWCA Civ 85, in which the Court of Appeal had allowed the appeal of UB on the basis that the respondent had failed to put before the FtT and UT judges the letters from the British High Commission Sri Lanka regarding the TGTE. I am not prepared to consider this further point. Despite the decision in UB dating from 22 February 2017 no point regarding these letters was raised in the appellant's grounds of appeal nor was any exception taken prior to the hearing before me to UTJ Smith's grant of permission on limited grounds. In any event I do not consider that had the judge

been referred to UB it would have made any difference to the reasons he gave for finding this appellant's sur place activities not such as to place him at risk.

22. For the above reasons I conclude that the FtT Judge did not materially err in law and accordingly his decision must stand.
23. No anonymity direction is made.

Signed

Date: 15 September 2017

A handwritten signature in black ink that reads "H H Storey". The signature is written in a cursive style with a large, looped 'S' at the end.

Dr H H Storey