



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04417/2017

THE IMMIGRATION ACTS

Heard at Field House
On 21st November 2017

Decision & Reasons Promulgated
On 7th December 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

MR K. T.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani, Counsel, instructed by Duncan Lewis & Co
Solicitors (Harrow Office)

For the Respondent: Ms N Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Oliver promulgated on 4th July 2017 in which he dismissed the Appellant's asylum appeal.
2. Judge Oliver noted within his decision that the Appellant had previously claimed asylum and his appeal against the original refusal dating back as far as 1st August 2001, had been heard by the First-tier Tribunal on 27th March 2002, at which time the First-tier Tribunal had dismissed the Appellant's asylum appeal, and that the

Appellant had become appeal rights exhausted on 3rd September 2002, after a failed attempt to appeal to the Upper Tribunal.

3. The history of the case was then further set out by Judge Oliver explaining the intervening years, but eventually it was noted that during that time there had been further submissions made for applications for judicial review and further evidence submitted. A further asylum decision had actually been then made dated 20th March 2017. It is that decision which was being considered in the appeal before Judge Oliver. He stated in paragraph 31 of his decision that the Respondent had asserted that nothing had changed in his application, apart from the inconsistent account of the length of detention, how he was freed from detention and whether he arrived in the United Kingdom unlawfully or not and reliance was placed upon the earlier determination in 2002.
4. The Respondent's case was that she accepted that the Appellant had supported the LTTE in a low-level capacity, but did not accept that he had been detained or tortured and did not accept that he had escaped on payment of a bribe.
5. Judge Oliver in his findings, which run just between paragraphs 35 and 39 of the decision, found that very little had changed since the arrival of the Appellant in 2001 and the refusal of his first application in 2002. He found that and accepted that a report from Dr Arnold was evidence which supported the Appellant's claim to have been detained and tortured, although he found the Appellant's account of the detention and his release had not always been consistent and to that limited extent therefore Judge Oliver found that that aspect of the determination from 2002 could properly be looked at again. He found that other key findings were to remain and in particular he found that the Appellant had never been a member of the LTTE and that the activity for them, in which he has claimed to have been forced to take part was only that of raising money, at the very lowest end of support.
6. Judge Oliver then went on to consider whether or not the Appellant would be at risk upon return in light of the country guidance given in the case of **GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)** and did not accept that the Appellant fell into any of the categories that would put him at risk following that country guidance case and on that basis he refused the Appellant's appeal.
7. The Appellant has now sought to appeal against that decision and within the Grounds of Appeal it is argued that the First-tier Tribunal has failed to consider or give any reasons for accepting or rejecting an expert report prepared by Dr Nadarajah. It is also argued that the judge failed to assess credibility and/or risk upon return in the context of the country background material provided and that the judge has failed to approach and consider the evidence in the round and with anxious scrutiny.
8. Although within the file before me there was an original report from Dr Suthaharan Nadarajah, who is a lecturer at the Centre for International Studies and Diplomacy, School of Oriental and African Studies at the University of London, dated 17th December 2015, which, I am told by Mr Bandegani of Counsel, was a preliminary report, having considered the Record of Proceedings and some further evidence

submitted on behalf of the Appellant in terms of a witness statement from Laura Smith dated today's date on 21st November 2017, together with email correspondence dating back from 5th June 2017 and records of conversations she had with Mr Bandegani, who represented the Appellant at the First-tier Tribunal, in terms of her attendance note and in light also of having considered the Record of Proceedings from Judge Oliver it does seem clear that, in fact, in addition to that preliminary report there was in fact a much fuller final report from Dr Nadarajah, who was one of the experts in the country guidance case of GJ and others, which final report was dated 5th June 2017.

9. It seems clear from the email correspondence referred to by Laura Smith and attached to her witness statement, that a full copy of that report was emailed both to the Tribunal and also to the Respondent on that date and indeed considering the Record of Proceedings from Judge Oliver, times appears to have been given to the Respondent to consider that report at the time of the hearing and submissions were made by Mr Bandegani in respect of that final report, which are recorded within the judge's Record of Proceedings.
10. Although today before me Ms Willocks-Briscoe did not have a full copy of the report and indeed a copy of the final report had not actually been retained for some reason upon the court file, a full copy had been kindly provided by Mr Bandegani and I am grateful to him in that regard. I have given Ms Willocks-Briscoe time to consider the full report. She accepts that it seems to have been sent through to the Respondent and it seems to have been considered by the Respondent in the First-tier Tribunal, but concedes that there was no application for an adjournment made by the Respondent for time to further consider that report before the First-tier Tribunal and the application for an adjournment before the First-tier Tribunal was an application made by the Appellant's Counsel, given the intoxicated state of the Appellant at that stage. That application for an adjournment had been refused by the First-tier Tribunal Judge.
11. No application has actually been made after time having been given to Ms Willocks-Briscoe for consideration of that report to adjourn the appeal before the Upper Tribunal today and she made the submissions that she has made in light of that report. Although she stated that she had not actually received a full copy of it and various pages seem to missing from her copy, but she was perfectly happy to proceed on the basis of the evidence before the Tribunal today.
12. Having carefully scrutinised the decision of First-tier Tribunal Judge Oliver, although it is clear that he had that report before him as he has made reference to it within his Record of Proceedings and noted that the submissions which Mr Bandegani, Counsel for the Appellant, had made in respect of that fuller report dated 5th June 2017 in the Record of Proceedings, nowhere within his determination does he actually give consideration to that report. Although it is sought to be argued on behalf of the Secretary of State by Ms Willocks-Briscoe that in effect the report from him does not take the matter very much further than the case of GJ and the risk categories there, when one actually considers the report from Dr Nadarajah, he does within that report set out a position that in his expert opinion there has in the two years

following **GJ and Others** been a deterioration in respect of human rights and general repression suffered by people in Sri Lanka.

13. He noted in paragraph 15 of his report that the objective country evidence that had accumulated showed that initially perceived improvements in relation to human rights abuses of Tamils involved or suspected of being involved with the LTTE and/or Tamil separatism, following the 2015 change in government, are demonstrably negated by subsequent developments in the country and in his expert opinion, in the absence of continuing close attention and determined pressure by the international community, the human rights situation in Sri Lanka will deteriorate. He stated that in particular, in the context of the security forces remaining committed to a general mobilisation against potential LTTE resurgence and Tamil separatism, both in the country and in the Tamil Diaspora, the risks to those linked or suspected to be linked with either the LTTE and Tamil separatism remained considerable and in his expert opinion can be expected to increase.

14. He went on, for example, at paragraph 19 to find that:

*“Consequently, although the Upper Tribunal’s decision in **GJ and Others** stated*

‘the focus of the Sri Lankan government’s concern has changed since the civil war ended in May 2009. The LTTE in Sri Lanka itself is a spent force ... and the Government’s present objective is to identify Tamil activists in the Diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state’,

*the objective country evidence elaborated below demonstrates that the authorities’ general focus – which as the **GJ and Others** determination noted is ‘on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka’ – comprises close attention to actual and suspected LTTE members and supporters and to actual or suspected separatist activities, both within Sri Lanka and abroad. In this regard, the authorities’ attention also encompasses deported failed asylum seekers.”*

15. At paragraph 24 he noted that with regards to individuals drawing adverse attention on the basis of links, actual or suspected, to the LTTE, the authorities and security forces’ criteria for deciding this are vague and broad and it is noted that the UN Committee Against Torture noted in November 2016 that even after the change in government numerous individuals suspected of having a link, even remote, with the LTTE had been abducted and then subject to brutal torture.

16. So in that regard the evidence from the expert was clearly expressing both his own expert opinion but also his view of the country guidance background evidence that had arisen since the country guidance of **GJ** and the evidence given to the Tribunal for that country guidance case.

17. It is also clear from his report that he also goes on not simply to consider the position in general in respect of those said to be at risk but went on to answer questions that had been posed by the Appellant’s solicitors regarding this Appellant himself and had answered and given evidence upon questions that had been put to him

regarding the Appellant's case that he had worked crossing the LTTE-army borders for four years, before having problems. He gave an expert opinion in respect of that and how the security forces would actually deal with someone in that context and also gave evidence regarding the evidence given by the Appellant, which appears to have been rejected by the previous Tribunal, that he had been able to pass through checkpoints and at the airport with a false ID if wanted by the authorities and whether or not the claim was consistent with what was happening in the northern provinces during that period.

18. He then also went on to give his opinion as to whether or not the Appellant in this case is at risk now of detention and torture and set out the background factors which are considered important at paragraph 183 and went on at paragraph 184 to find that in his opinion, were the Appellant forcibly returned to Sri Lanka that would put him at risk of being detained and ill-treated or worse and went to find that former members and supporters of the LTTE and those suspected to be former members or supporters and even individuals with tenuous links continue to be at risk of intimidation, harassment and arrest in Sri Lanka, paragraph 185.
19. Clearly, in that regard I find that regrettably for whatever reason although Judge Oliver clearly had the full report from the expert, he has not taken that account in reaching his findings and when in circumstances such as in this case where he accepted that the report from Dr Arnold had indicated and supported the Appellant's account of having been detained and tortured, so that he was able to look at that part of the claim again, following Devaseelan, he simply found that other key findings remained.
20. In that regard the expert report was evidence which was not before the Tribunal back in 2002, as clearly it had not been prepared and written at that date, but it did actually deal with other aspects of the Appellant's credibility regarding his account and the risks that he was said to have faced at that time and it dealt with some issues in respect of which he had not been found to be credible by the original Tribunal.
21. That report though has not been considered by the First-tier Tribunal Judge in reaching his decision nor to the extent that the expert deals with the situation in his opinion regarding the country situation since the case of GJ and Others, that also has not been adequately dealt with or explored or reasons given by the First-tier Tribunal for either rejecting or accepting that evidence. As argued within the Grounds of Appeal, in addition, although a lot of the background evidence was summarised by the expert report it is argued that in addition there were further full reports including the Country Information and Guidance from the Respondent, reports from the International Truth and Justice Project, the UN Office of the High Commissioner for Human Rights, the UN Commission Against Torture and reports from Amnesty International, which again in terms of that background evidence again had not been dealt with by Judge Oliver in his decision.
22. Although clearly the country guidance was clear as to the categories of people at risk if there was evidence as in this case which was said to postdate the country guidance in GJ I find that the judge was duty-bound to at least consider that evidence and to

fully and properly consider it and to say whether or not in his judgment it was sufficient to depart from the country guidance given in **GJ and Others**. Simply to ignore it is a failure to take account of relevant evidence in that regard. Obviously in this case it was being sought to return the Appellant now and therefore whether he is at risk now had to be considered by the judge and that was a matter which was dealt with in the expert report.

23. Whether ultimately or not the First-tier Tribunal Judge either accepted or rejected that report or relied simply upon the country guidance in **GJ** I cannot know as he has not dealt with it. However, having considered that report, it is clear that the expert, who, I repeat, was one of the experts within **GJ**, has given clear evidence that in his opinion there was a deterioration of the human rights situation and those who are failed asylum seekers since the country guidance case in **GJ** and therefore I cannot say that the decision would necessarily have been the same even if that evidence had been properly considered.
24. I make no findings in that regard as to whether it would actually have been the same as obviously that is a matter that needs consideration. But clearly I cannot say that it would necessarily have been the same and therefore I do find that the failure of the First-tier Tribunal Judge to consider that evidence and also the country guidance evidence relied upon by the Appellant is a material error of law.
25. In such circumstances the decision of First-tier Tribunal Judge Oliver does contain a material error of law and I find that it is therefore appropriate to set aside the decision of First-tier Tribunal Judge Oliver and to remit the case back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Oliver.
26. Judge Oliver did make an anonymity direction in this case and it is therefore appropriate, given the circumstances of this case, for that anonymity direction to be repeated and renewed here. I therefore do direct that the Appellant is entitled to anonymity and no report or transcript of these proceedings shall identify the Appellant or any member of his family. This direction applies both to the Appellant and to the Respondent and failure to comply with this direction could lead to contempt of court proceedings.

Notice of Decision

The decision of First-tier Tribunal Judge Oliver does contain a material error of law and is set aside.

The case is to be remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Oliver.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

The Appellant is granted anonymity and no record or transcript of these proceedings shall identify the Appellant either directly or indirectly. This direction applies both to the Appellant and to the Respondent and failure to comply with this direction can lead to contempt of court proceedings.

Signed

Date 21st November 2017

RFM^{McGinty}

Deputy Upper Tribunal Judge McGinty