



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08013/2016

THE IMMIGRATION ACTS

Heard at Field House
On 29 April 2017

Decision Promulgated
On 03 May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VV SRI LANKA
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy (Senior Presenting Officer)

For the Respondent: Mr A Gilbert (counsel instructed by Wimbledon Solicitors)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal of 13 February 2017 allowing the appeal of VV, a citizen of Sri Lanka, itself brought against the decision of 1 March 2016 to refuse his asylum claim.
2. VV's asylum claim is based on having been forcibly recruited to the LTTE in January 2009. He was then detained by the army from March 2009 until October 2015, during which period he was tortured, before being released to the custody of his uncle and father-in-law. He married his now wife immediately upon release, on 12 October 2015. He fled to the UK, arriving on 20 October 2015, and claimed asylum.

3. A medical report from Dr Hajioff stated that VV presented with scars consistent with his description of their acquisition, and which were unlikely to be attributed to “self injury by proxy”. He suffered from chronic Post Traumatic Stress Disorder.
4. The First-tier Tribunal accepted that VV was a vulnerable witness given a medical report which raised concerns as to his mental health and ability to give evidence given he was of below average intelligence. It referred to extracts from the Home Office Operational Guidance Note of August 2016, particularly the following:

“6.5.2 The Immigration and Refugee Board of Canada reported in February 2015 that: 'Sources report that individuals returning from abroad are particularly subject to screening.' ... A July 2015 International Truth & Justice Project (ITJP) Sri Lanka report on Sri Lanka's Survivors of Torture and Sexual Violence 2009-2015 stated that: 'A security force insider testified since the presidential election in 2015 that military intelligence officials from Joseph Camp were actively looking for any Tamils returning home from abroad in order to interrogate them. The witness stated that the intention was to abduct, detain and torture them.' ...

6.5.5 The International Crisis Group noted in an August 2015 report that: 'Tamils returning from abroad continue to be arrested under the PTA [Prevention of Terrorism Act] on suspicion of old LTTE involvement. According to some reports, after police detention, many are sent to the military-run rehabilitation program. Tamil politicians and activists allege that secret detention centres established by the old government continue, though officials deny this.' ...

6.5.6 In an August 2015 study of 148 Sri Lankan torture cases perpetrated since the end of the Sri Lankan civil war in May 2009, Freedom From Torture recorded that 139 people (94 percent of all cases) were of Tamil ethnicity, and the majority (142) described an association with the Liberation Tigers of Tamil Eelam (LTTE) at some level and/or said that they had been associated with the LTTE by the Sri Lankan authorities in some way (96 percent of all cases). It further reported that 'It is of particular concern to Freedom from Torture that more than one third of the people whose cases were reviewed in this study were detained and tortured in Sri Lanka after returning from the UK following the end of the armed conflict (55 of 148 cases or 37- [percent]). Most had been in the UK as students but three had claimed asylum and were forcibly removed after their asylum claims were rejected. All but seven of these people were detained within weeks of their arrival in Sri Lanka and the majority were specifically interrogated about their reasons for being in the UK, their activities and/or their contacts in the UK. Twenty-one people were accused of attending particular protests and demonstrations in the UK and eleven were shown photographs taken at these events'. ...”

5. The First-tier Tribunal considered the credibility of the Respondent’s account. The Judge was very concerned with the lack of particularity provided in the evidence regarding the very lengthy period of detention which was central to the claim: aspects of the account were vividly detailed, yet that long imprisonment was glossed over, and his wife addressed it only in two lines of her own statement; her father was similarly brief in his treatment of this period. There were various discrepancies and vagaries in his account. The judge considered that the lack of interest evinced by the

authorities in the Respondent following his departure from Sri Lanka was inconsistent with his facing any real risk of ill treatment on a return.

6. The medical evidence offered only limited support to VV's account given the descriptor "consistent" was defined in the Istanbul Protocol as being used to report a presentation that was relatively non-specific and permitting of "many other possible causes." Overall, the First-tier Tribunal rejected the veracity of his story, because it was implausible that the Sri Lankan state would visit such lengthy detention on an epileptic fisherman of below average intelligence whose involvement with the LTTE cause was minor; and as, had he been detained for so long, it was unlikely that arrangements for his escape would not have been made sooner, or that he would have been able to leave the country without difficulty.
7. Stepping back from the individual facts of his case and broadly assessing risk based on VV facing return as a failed asylum seeker without a passport and on emergency travel documents, and being a Tamil with limited historic involvement with the LTTE, the background evidence cited above from the Respondent's OGN indicated a real risk of detention on return.
8. The Secretary of State appealed against that decision on the basis that the First-tier Tribunal had not determined whether there were cogent reasons to depart from the extant Country Guidelines, and permission to appeal was granted by the First-tier Tribunal on 13 March 2017 on the basis that the Judge may have erred in relying on risk categories beyond those identified by the prevailing authorities.
9. Mr Duffy submitted that the First-tier Tribunal had failed to apply the threshold test of evaluating whether there were cogent reasons for departing from the Country Guidelines decision below.
10. Mr Gilbert submitted that there were multiple authoritative sources cited in the OGN relied upon that post-dated the Country Guidelines decision. The reasons given by the First-tier Tribunal were cogent when viewed objectively; it was for the Upper Tribunal to apply the cogency threshold, not the judge below.
11. I invited submissions on the disposition of the appeal were I to find an error of law within it. Mr Duffy considered the factual findings to be clear and thus for it to be suitable for final decision in the Upper Tribunal; Mr Gilbert argued that in fact there was no clear finding ultimately on whether or not the Respondent had been detained for any particular period, notwithstanding the rejection of the long period of detention that he had asserted, and that no finding was made on his activities in the UK.

Findings and reasons

12. I reserved my decision at the hearing before me and now provide my findings and reasons.

13. The Country Guidelines decision of *GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC)* concluded (I cite the headnote, in so far as relevant to this appeal) that:

“(3) 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 enshrined in Amendment 6(1) to the Sri Lankan Constitution in 1983, which prohibits the ‘violation of territorial integrity’ of Sri Lanka. Its focus 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. (4) If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection. (5) Internal relocation is not an option within Sri Lanka for a person at real risk from the Sri Lankan authorities, since the government now controls the whole of Sri Lanka and Tamils are required to return to a named address after passing through the airport. ...

(7) The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, are:

(a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka. ...

(d) A person whose name appears on a computerised "stop" list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.”

14. And from the text of *GJ*:

“308. During the re-documentation process in the United Kingdom, or at the airport on return, a forced returnee can expect to be asked about his own and his family’s LTTE connections and sympathies.

309. Those with Sri Lankan passports returning on scheduled flights will be able to walk through Colombo airport without difficulty, unless their names are on a “stop” list, by reason of an outstanding Court order or arrest warrant. Those on a “watch” list are not stopped at the airport but will be monitored and if considered to be a destabilisation risk, may be picked up from their home area.

310. There are no detention facilities at the airport. Although individuals may be interviewed at the airport by the security forces, the Sri Lankan authorities now aim to move returnees relatively quickly out of the airport and on their way to their home areas and to verify whether they have arrived there soon afterward. If the authorities have an adverse interest in an individual, he will be picked up at home, not at the airport, unless there is a “stop” notice on the airport computer system. There is no evidence that strip searches occur at the airport; the GOSL’s approach is intelligence-led rather than being driven by roundups and checkpoints as it was during the civil war.”

15. The Home Office August 2016 Guidance states

“A person being of Tamil ethnicity would not in itself warrant international protection. Neither in general would a person who evidences past membership or connection to the LTTE unless they have or are perceived to have a significant role in relation to post-conflict Tamil separatism or appear on a ‘stop’ list at the airport.”

16. Stanley Burnton LJ in *SG (Iraq)* [2012] EWCA Civ 940 §47 stated that “decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so.” In so doing he had regard to predecessor provisions to those now found in the Practice Directions of the Immigration and Asylum Chambers of the First tier Tribunal and the Upper Tribunal (13 November 2014):

“12.2 ... unless it has been expressly superseded or replaced by any later “CG” determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:

(a) relates to the country guidance issue in question; and

(b) depends upon the same or similar evidence. ...

12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law.”

17. This was clearly an appeal where the findings of the Country Guidelines decision in *GJ* were highly relevant to the issues considered relevant by the First-tier Tribunal: quite expressly *GJ* creates specified risk categories, and it considered the general risk of return for failed asylum seekers. There is no reference in the decision of the First-tier Tribunal whatsoever to the requirement identified in *SG (Iraq)* that findings in a Country Guidelines decision should be departed from only where the evidence reaches a certain threshold, that of “very strong grounds supported by cogent evidence.”18. I do not accept Mr Gilbert’s submission that the question of cogency falls to be evaluated by the Upper Tribunal only. The reality is that the primary fact-finder, the Judge of the First-tier Tribunal, has evaluated the evidence before him via the wrong lens. It is not possible to determine whether the Judge below would have considered that the material that impressed him on a consideration without regard to the appropriate threshold would have justified departure from *GJ* based on very strong grounds.

19. This leaves the question as to whether any further hearing should be by way of continuation in the Upper Tribunal or in the First-tier Tribunal. I do not consider there is any lack of clarity in the findings as to the Respondent’s claimed detention: as I read

his case he asserted only a single period of detention at the hands of the security forces and that has clearly been found incredible. However, Mr Gilbert made it clear that VV he had put a case based on diaspora activities before the First-tier Tribunal previously (albeit that at the time of his full asylum interview he disclaimed any such involvement). No findings were made on this aspect of the case. Accordingly it seems to me that it would be appropriate, in order for the requisite anxious scrutiny to be afforded to his claim, that the appeal be remitted to the First-tier Tribunal, to leave open the possibility of a further appeal in order to ensure that the next decision below is a lawful one.

20. I accordingly allow the appeal to the extent that it is remitted to the First-tier Tribunal. The findings as to the Appellant's experiences in Sri Lanka are to stand. The question of his involvement in diaspora activities, and the risks he faces based on his personal profile including those activities, will be a matter for the Tribunal below to evaluate.

Decision:

The decision of the First-tier Tribunal contained a material error of law.
The appeal remitted for re-hearing in the First-tier Tribunal.

ANONYMITY DIRECTION

Given that this appeal involves a fear of persecution held by a vulnerable asylum seeker with family members remaining in the country of origin, I make a direction under Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Failure to comply with this direction could lead to contempt of Court proceedings.

A handwritten signature in black ink, appearing to read 'MAS', with a long, sweeping underline that extends across the width of the signature area.

Signed:
Deputy Upper Tribunal Judge Symes

Date: 29 April 2017