



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA092332016

THE IMMIGRATION ACTS

**Heard at Bradford
On 14th July, 2017**

**Decision & Reasons
Promulgated
On 20th July 2017**

Before

Upper Tribunal Judge Chalkley

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PS

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

*For the Appellant: Mrs Pettersen, a Senior Home Office Presenting Officer
For the Respondent: Mr Lingajothy, a Solicitor*

DECISION AND REASONS

1. PS is a citizen of Sri Lanka born on [] 1957.

2. The appellant claims to have left Sri Lanka on 18th December 2015, by plane and then travelled the rest of the journey by car. He arrived in the United Kingdom on 20th December 2015, and claimed asylum.
3. The appellant explained that he was forcibly taken by the LTTE and became a Sea Tiger. He worked as such until May 2009, when his unit surrendered themselves to the Sri Lankan Army. He claims to have been detained until November 2015.
4. During his asylum interview the appellant claimed that he escaped using the intervention of his uncle, who bribed a CID officer. The respondent refused the appellant's application, but he appealed to the First-tier Tribunal and First-tier Tribunal Judge G R J Robson heard his appeal in Bradford on 3 February 2017. For completeness I set out below paragraphs 8 to 15 inclusive of the judge's determination since they set out the basis for the appellant's claim:-

- 8. I summarise the appellant's case based on the screening and asylum interviews and other documents prior to the respondent's decision to refuse.*
- 9. I set out the immigration history of the appellant above. He explained that he was born in Mulliathivu, that he had received education in the same school until year 11 and that his father was a fisherman whom he helped on occasions.*
- 10. He was married and had his mother's younger brother, or that is to say his uncle, in the United Kingdom. His wife and son lived in Sri Lanka.*
- 11. He joined the LTTE on 5th September 2006 when six men armed with guns came to his home and seized him. He was taken because the LTTE had a shortage. Ultimately he was taken to Anpu Camp at Vaddakachi where he was given a name, Nilavan, a name tag and number, and a uniform. He had a period of training lasting for some six months and became a Sea Tiger, which involved a further two months' training at sea. He was under the leader Chelian.*
- 12. He worked as a Sea Tiger from 2006 until 17th May 2009 and said that he was involved in two fights, one in Somani in 2007 and one in Salai in 2008. He was captured on 17th May 2009 at Mulliwaikal and he was released on 11th January 2012 (question 63) through the intervention of an uncle who bribed a CID officer. That date of release was corrected by the appellant in a letter received by the respondent on 2nd June 2016, to the 1st November 2015.*
- 13. His brother had been a special member of the Charles Anthony Fighting Unit and was killed in fighting in 2008.*
- 14. He explained that on his surrender he was detained in a camp, Baswer, and thereafter the building in Colombo to the fourth floor. He explained that he had been tortured during his period of detention.*

15. *He left Sri Lanka on 18th December 2015 with the assistance of his uncle who had found an agent."*
5. The respondent conceded that the appellant had been involved in active service.
6. During the course of hearing submissions, the appellant's solicitor sought to give further evidence to the First Tier Tribunal Judge. He referred to what the appellant had said about his detention and being taken to Colombo. The appellant's solicitor, in making his submissions, said that the fourth floor could be "any floor" and basically meant the CID headquarters, a place where things happened. The judge pointed out to the appellant's solicitor that he was seeking to give evidence himself. I make reference to this in view of the appellant's representative's attempt to rely on fresh evidence at the hearing before me.
7. In making his findings the judge carefully examined a detailed medical report. He explains that the expert considered that the majority of the scars displayed by the appellant were highly consistent with injuries caused by torture as described by the appellant, and whilst the author of the medical report considered the possibility that the injuries might have been caused by self-infliction by proxy, he found no evidence to support it. The judge placed considerable weight on the expert evidence and found, despite a negative finding in relation to the location of the appellant's detention, that the appellant did suffer torture and abuse during detention.
8. The judge also considered a consultant psychiatrist's report wherein the psychiatrist concluded that the appellant suffered from post-traumatic stress disorder. The judge found that the appellant not only suffered physical injuries during his claimed detention, but also suffered psychologically. At paragraphs 68 to 75 inclusive the judge makes various specific findings in respect of the appellant's claim. For completeness I set them out below:-
- "68. I have considered the evidence both oral and in writing in coming to my conclusion in this matter.*
- 69. It has been accepted by the respondent that the appellant had been involved with the LTTE and therefore it must follow that he was involved in war zones as claimed.*
- 70. The appellant claimed that he had sustained physical injuries during his period of detention.*
- 71. The detention, he was adamant, took place on the fourth floor of a building. The appellant's representative told me in submissions that in fact the fourth floor could mean any floor. Further, euphemistically, it could mean the CID headquarters. I do not accept without any objective evidence that the fourth floor can mean any floor, nor can it mean necessarily that it could mean the CID headquarters. Further, if*

people like the appellant were to be kept in a secret place, then I find it is hardly likely that he would be kept in the CID headquarters, a building which I am sure would be known to many Colombons, let alone other Sri Lankans.

72. *The explanation by the appellant about how he knew that he was on the fourth floor was that he was told by his captors that it was the fourth floor and the building was in Colombo.*
 73. *I also do not find the method of his escape credible. If he was wanted and of serious interest to the authorities, I cannot believe that the appellant could have been taken down four floors of a building without being challenged and I cannot find that there is any plausible explanation to justify the method of escape.*
 74. *The appellant also said in his supplementary statement that after a month of acute torture in captivity he admitted to tendering ships engines and loading rifles, and, ultimately, he was forced to sign a confession when the torture eased and he was relocated to a more secure unit 'within the camp'.*
 75. *Although the torture eased, he was still interrogated and he believed, and still believes, that his captors were under the impression that some senior LTTE members might have escaped and that was why the appellant was held for such a long period."*
9. The judge allowed the appellant's appeal, but did identify the risk the appellant might face on his return to Sri Lanka.
 10. The Home Office challenged the determination and permission was granted by First-tier Tribunal Judge Froom, who said this:-
 - "2. *The FtTJ was entitled to find the appellant had been detained and tortured for the reasons he gave. However, in the light of his finding that the appellant's account of his escape was not credible, the FtTJ arguably fails to provide adequate reasons for concluding that the appellant was at further risk on return."*
 11. Mrs Pettersen addressed me briefly and referred me to paragraph 95 of the determination, where the judge found it would be likely that the appellant would be at risk of persecution based on his political opinion. However, the judge has not made an assessment of the risk this appellant faces (if any) based on the judge's findings, by applying *GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)*.
 12. For the appellant, Mr Lingajothy asked me to consider a document he had sent to me by facsimile which he said gave evidence about the 'fourth floor'. I pointed out to him that neither he had not the respondent had challenged the judge's findings. He referred me to paragraphs 50, 71 and 73 of the decision. He said if the judge had made an error in relation to the fourth floor then he may have made an error in relation to his finding that the appellant's escape was not credible. I explained again to Mr

Lingajorthy that this was a Home Office challenge to the determination and that they had not challenged these findings; he had not made any challenge to the findings even though it was open to him to do so. The respondent had merely challenged the determination on the basis that, given those findings, the judge had allowed the appeal without considering the risk to the appellant on his return to Sri Lanka. Mr Lingajorthy said that any error on the part of the judge was not material and could not affect the decision.

13. Mrs Pettersen invited me to apply *GJ* to the judge's findings and to correct the determination. I reserved my decision.
14. I find that the judge did err by failing to consider and apply *GJ and Others* before allowing the appeal. He should have considered his findings and then, having applied *GJ* to those findings, reached a conclusion on whether or not the appellant would be at risk on return. I reject the suggestion that the error was not a material one; it very clearly is material.
15. The respondent conceded that the appellant had been in active service in Sri Lanka and the judge found that he had been involved with the LTTE as claimed. He found that the appellant had been detained and tortured.
16. However, having heard the appellant give oral evidence, the judge found that he was unable to accept all of it as being credible. The judge did not believe that the appellant had been held in the place where he claims to have been held, and neither did he believe the appellant's method of escape. The judge believed that if the appellant was wanted and was of serious interest to the authorities, then he could not have been taken down four floors of a building without being challenged. The judge could not find that there was any plausible explanation to justify the method of escape.
17. The judge having found that the appellant was detained by the authorities and seriously tortured, but that he did not escape captivity in the way he claims, it follows that the appellant must have been released by the authorities as being of no further interest to the Sri Lankan authorities, following his detention and torture.
18. The reason the appellant had to fabricate a story about where he was held and how he escaped in order to support his asylum claim, was because he did not escape at all. If he had managed to have escaped lawful detention, he would have been able to give a credible account of his escape.
19. *MP (Sri Lanka) & Anor v Secretary of State for the Home Department* [2014] EWCA Civ. 829 examined the risk categories identified in *GJ* and concluded that those with elaborate links with the LTTE could be at risk on return. *GJ* makes it clear that the Sri Lankan Government's present objective is to prevent a resurgence of LTTE or similar Tamil separatist

organisations, and the revival of a civil war within Sri Lanka. If the appellant has been detained by the Sri Lankan authorities and subsequently released (notwithstanding the fact that he suffered persecution and torture during his detention), then he is hardly likely to be of any interest to the Sri Lankan authorities on return to Sri Lanka. There is no reason to believe that the appellant's name might appear on a stop list. The judge did not believe that the appellant had escaped detention in the manner claimed. If the appellant had been detained at some other place and had escaped custody by other means, then there would have been no reason for him to have made the fabricated claims he did.

20. If the appellant had been detained and subsequently released, then he is hardly likely to be of any further continuing interest to the authorities who are now, of course, in control of the whole of Sri Lanka. The appellant would hardly have been released from custody if he was thought to have been a threat to the integrity of Sri Lanka as a single state, or if he was thought likely to have been involved in post-conflict Tamil separatism. Applying *GJ* to the facts as found by the First-tier Tribunal Judge, it appears to me that there are no reasons for believing that if returned to Sri Lanka this appellant will be at risk of persecutory harm. **I dismiss the appellant's asylum appeal. I dismiss the appellant's humanitarian protection appeal. I dismiss the appellant's human rights appeals based on Articles 2 and 3 since they are based on the same factual matrix as the appellant's claim to asylum. The appellant has not raised any Article 8 claim.**

Summary

21. I find that the making of the determination by First-tier Tribunal Judge G R J Robson did involve the making of an error on a point of law. The judge failed to provide any or adequate reasons for concluding that the appellant was at risk of further harm on return to Sri Lanka, notwithstanding his finding that the appellant had been detained and tortured for the reasons he gave, in the light of the judge's finding that the appellant's account of his escape was not credible. I remake the decision myself. For the reasons I have given, **I dismiss the appellant's appeals.**

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.

Richard Chalkley
Upper Tribunal Judge Chalkley

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Richard Chalkley
Upper Tribunal Judge Chalkley

19th July 2017