



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

Appeal Number: PA/03273/2017

**THE IMMIGRATION ACTS**

**Heard at Bradford**

**On 6<sup>th</sup> February 2018**

**Decision & Reasons  
Promulgated  
On 1<sup>st</sup> March 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**[A A]**

**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mrs Pettersen

For the Respondent: Ms Jagaraja

**DECISION AND REASONS**

1. This is the Secretary of State's appeal against the decision of Judge Buchanan made following a hearing at North Shields on 3<sup>rd</sup> May 2017.

**Background**

2. The appellant is a Sinhalese citizen of Sri Lanka born on [ ] 1984. He arrived in the UK on 4<sup>th</sup> February 2011 with a valid visa to 25<sup>th</sup> June 2013.

3. On 29<sup>th</sup> April 2016 the appellant was arrested for fraud and sentenced to eight months' imprisonment. He claimed asylum on 27<sup>th</sup> September 2016 but was refused on 28<sup>th</sup> March 2017.
4. The appellant said that he had a Tamil friend with whom he lived for approximately three years. In November 2010 the police attended his home and questioned him about his friend, returning on 20<sup>th</sup> June 2011 when they arrested him. He was held for ten days and badly mistreated. He claimed that his mother and uncle, with the help of a Buddhist monk, secured his release and subsequently arranged for his exit from the country.
5. The appellant produced a medical report which described scars consistent with the appellant's account and diagnosed PTSD and moderate depression.
6. The Secretary of State believed the appellant's claim that he had been detained and suffered ill-treatment but did not accept that he had been released with the help of a Buddhist monk as claimed or that there would be any ongoing interest in him.
7. The judge set out the evidence in the appellant's witness statement and in the oral evidence. He noted the concession given by the Secretary of State. He then considered the case of GJ (post civil war returnees) Sri Lanka CG [2013] UKUT 319 and concluded that the appellant was not someone who was perceived to have a significant role in post conflict Tamil separatism nor someone who had publicly published criticism of the Sri Lankan government or who had given evidence against the authorities.
8. The judge then turned to the Home Office Report on Fact-Finding Mission to Sri Lanka 2016. He set out the report in some detail together with a report from the appellant from Freedom of Torture.
9. He concluded as follows:

"It is in the light of the contents of these reports that I conclude that the appellant is entitled to international protection. He is someone in whom the authorities in Sri Lanka have had a recent (2011) interest in because of perceived links to the LTTE. He now bears the physical and mental scars of the torture which was inflicted upon him. He is therefore branded in the physical sense discussed in the reports mentioned above. He would on the objective fact-finding report produced by the Home Office relating to matters found to exist in July 2016, be someone in whom the authorities would have an interest on a return to the country. His return from the UK will be questioned. His perceived links with the LTTE would be identified. As someone returning from overseas after an absence of five years he would be likely to be questioned about his time in the UK. His return would, according to the evidence mentioned in the reports detailed above, be likely to give rise to his arrest because he falls within the description given of those whom the authorities in Sri Lanka will question, detain

and arrest. When arrested as the likelihood is, the prospects are that the appellant will be subjected to further abuse and torture.”

10. The judge recognised that the appellant had failed to claim asylum for over five years but was satisfied that the appellant was so afraid of being deported to Sri Lanka that he was prepared to sit it out with his false passport rather than face the prospect of questioning and return to Sri Lanka.
11. On that basis he allowed the appeal.

### **The Grounds of Application**

12. The Secretary of State sought permission to appeal on the grounds that the judge had made a material error in law in not following the country guidance case of GJ. The Secretary of State referred to a previous country guidance case of LP (Sri Lanka) CG [2007] UKIAT 00076 which recorded that material from NGOs could be selective and that much of the background evidence which comes from sources with a special interest or specific agenda. She relied on the Court of Appeal decision in SG (Iraq) [2012] EWCA Civ 940 which requires country guidance determinations to be followed unless very strong grounds supported by cogent evidence are adduced justifying there not doing so. The judge’s reference to the two reports did not amount to very strong grounds supported by cogent evidence.
13. Permission to appeal was initially refused but subsequently granted by Upper Tribunal Judge McWilliam.

### **Submissions**

14. Mrs Pettersen relied on her grounds. She accepted that there had been interest in the appellant in 2011 but, as a Sinhalese who had undertaken no activities in the UK it was not possible to see from the judge’s determination why he would be at risk on return.
15. Ms Jagaraja defended the determination. She submitted that it was unlawful for the Secretary of State to rely on LP in the grounds since this had been specifically withdrawn as country guidance. The judge had undertaken a detailed analysis of the fact-finding report which in fact had been produced by the Secretary of State herself and it was a matter for him to decide what passages in it were relevant.
16. I told Ms Jagaraja that, in my opinion, there was a lacuna in this determination since the judge had not made any findings of fact upon a central issue in this appeal, namely whether the appellant had in fact escaped with the help of a Buddhist monk as claimed. Ms Jagaraja accepted that there was no specific finding on that point, but the only logical inference from his consideration of the background evidence was that the appellant’s evidence had been accepted. In any event this was not a matter which had been raised by the Secretary of State in the

grounds and it would be unfair to allow the Secretary of State to now plead a ground which had not been relied upon originally. There would be obvious unfairness in depriving the respondent of a favourable judgment and the Tribunal should be cautious in reopening a question which had not been raised by the Secretary of State.

### **Findings and Conclusions**

17. The country guidance case of GJ sets out the persons who are at risk of persecution or serious harm on return to Sri Lanka. They are as follows:

- (i) “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.
- (ii) Journalists (whether in print or other media) or human rights activists who, in either case, have criticised the Sri Lankan government, in particular its human rights record or who are associated with publications critical of the Sri Lankan government.
- (iii) Individuals who have given evidence to the lessons learned and reconciliation commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the no fire zones in May 2009, only those who have already identified themselves by giving such evidence will be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.
- (iv) 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 pursuit of such order or warrant.”

18. The judge stated that the appellant does not fall within the first three categories but then concluded that, in reliance on the July 2016 Report, there was cogent evidence that there was a risk of torture for someone such as the appellant,.

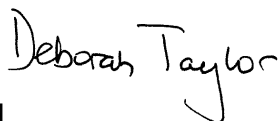
19. He wrote:

“The report is littered with confirmation from several sources that those with perceived links to the LTTE are still, in July 2016, at risk of being arbitrarily removed and tortured.”

20. Whilst the judge was entitled to look at more up-to-date evidence since the country guidance was published, in order to decide whether the appellant would be at risk, he was not entitled to, in effect, create a further risk category.
21. The decision of Judge Buchanan is set aside.
22. Ms Pettersen asked that the appeal should be dismissed. However there are insufficient findings of fact to enable me to do so. In particular, there is no finding about the circumstances in which the appellant left Sri Lanka. I am not prepared to infer from the judge's assessment of the background evidence that positive findings of fact in his favour had been made.
23. Accordingly the appeal is remitted to be heard in the First-tier Tribunal by a judge other than Judge Buchanan so that the relevant findings can be made.

**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 their 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.



Signed

Date 24 February 2018

Deputy Upper Tribunal Judge Taylor