



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/04727/2017**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 20 December 2017**

**Decision & Reasons  
Promulgated  
On 29 January 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**T K  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr S Jaisri of Counsel instructed by A & P Solicitors  
For the Respondent: Mr N Bramble, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Manyarara promulgated on 3 July 2017 dismissing the Appellant's appeal against a decision of the Respondent dated 3 May 2017 refusing his application for protection in the United Kingdom.
2. I am grateful to both representatives for the helpful and realistic discussion that was had during the course of the hearing such that common ground was reached as to disposal of the appeal before the Upper Tribunal - essentially that the decision of the First-tier Tribunal

Judge should be set aside and the decision in the appeal remade before the First-tier Tribunal in front of a different Judge with all issues at large. In circumstances where the parties are in general agreement, I do not propose to go into quite so much detail in rehearsing the background to the appeal as I might otherwise. Nonetheless it is appropriate to set out some of the more essential facts.

3. The Appellant left Sri Lanka on 18 August 2016 travelling by airplane, in the first instance to Dubai. Later he travelled to Russia and thereafter traversed a number of unknown countries before arriving in the United Kingdom on 10 October 2016. He applied for asylum upon arrival.
4. The substance of the Appellant's asylum claim involves a narrative account referring in particular to three separate incidences where he encountered difficulties with the authorities in Sri Lanka. The first such incident took place in September 2013: the Appellant says he was arrested after trying to film an assault on a Tamil male by police. He says that he was released after three days following payment of a bribe.
5. A second incident is said to have taken place in August 2014 following the Appellant discussing an incident about which he had read in the newspapers concerning a sexual assault by a navy officer on the wife of a former LTTE member. The Appellant claims that subsequent to this discussion he was assaulted by members of the army and pushed down a well. This resulted, he claimed, in a head injury and a broken hip requiring treatment both at Point Pedro Hospital and at Jaffna Hospital.
6. The Appellant refers to a third episode in July and August of 2016. He says that in July he had seen a protest whilst travelling with his uncle and aunt, and had taken photographs which he had uploaded to Facebook. Subsequently, he claims, he was arrested and held for a number of days before being released upon payment of a bribe. During this period of detention it is the Appellant's case that he was ill-treated, and in particular he was burned with cigarettes. Shortly after his release arrangements were made for his departure from Sri Lanka - and as I have indicated above it is said that in due course he departed on 18 August 2016.
7. It may be seen that there are substantial periods between the three incidents narrated by the Appellant where he does not claim to have been the subject of any particular adverse attention on the part of authorities. In such circumstances it is understandable that it might well be said, for example, that after the first incident there was no reason to believe that the authorities had any ongoing continuing adverse interest in him in respect of the filming episode. However, to counter this it has been said on behalf of the Appellant that whilst he does not rely on the earlier two incidents as *per se* determinative of the issue of risk, they inform a

consideration of his profile and how he might be perceived by the authorities - that is to say as a person who has taken a position in respect of support for members of the Tamil community. More particularly what has been said on the Appellant's behalf is that the incident in July 2016 is a relatively recent incident and as such is a significant indicator as to the likelihood of the Appellant being the subject of further adverse interest on the part of the authorities in the event of his return. In this regard it is to be noted that at paragraph 8 of the Skeleton Argument before the First-tier Tribunal (drafted by Ms Amanda Walker of Counsel who appeared for the Appellant before the First-tier Tribunal), considerable emphasis was put on the nature of the situation in Sri Lanka in the post-conflict period. In particular a report about Tamil separatism published in August 2014 was quoted at some length with certain passages of the quotation emboldened by way of highlighting. In particular the following matters are emboldened,

*"... the state machine of Sri Lanka is extremely paranoid and is trying to contain any resurgence of this group, or the germination of tendencies of independence alongside the Tamils. This concern has direct repercussions on all of the Tamils in the North and East because their ethnicity could indicate possible proximity to the LTTE."* (paragraph 8);

And

*"Targeted for these violations are LTTE suspects or those perceived as having been connected to, or supporters of, the LTTE"* (paragraph 10)

8. To that extent, and bearing in mind the relatively recent nature of the Appellant's last claimed arrest, it was also argued before the First-tier Tribunal that the Appellant could make out a risk to himself irrespective of the direct applicability or otherwise of the non-exhaustive risk factors identified in the case of **GJ and others [2013] UKUT 319**. To this end it might fairly be considered that at paragraph 73 of the decision of the First-tier Tribunal Judge the Judge was unduly dismissive in stating, *"All of the events the appellant relies on in support of his claimed circumstances in Sri Lanka are said to have occurred after the LTTE became a spent force"*.
9. More particularly, however, it seems to me that the Judge was in error in seemingly treating the country guidance in **GJ and others** as determinative of the Appellant's appeal:

*"Even if I were to accept the appellant's claim about his past experiences I find that his circumstances do not fall within the risk categories identified in the country guidance case"* (paragraph 70).

In my judgement this indicates that the Judge did not recognise that the risk factors in **GJ and others** were not exhaustive. Moreover the Judge did not engage with Counsel's submissions as to risk beyond those factors.

10. Mr Bramble very properly acknowledged that there was a concern on the part of the Respondent in this regard to the effect that the First-tier Tribunal had failed to engage with the basis of the Appellant's case as it was being put.
11. Mr Bramble also acknowledged that there was a legitimate concern raised in the grounds of appeal to the Upper Tribunal in respect of the Judge's approach to the medical evidence filed in support of the Appellant's case. The Appellant had provided a report from Dr Andres I Martin (Appellant's bundle before the First-tier Tribunal, pages 14-30). The report is dated 17 June 2017 and is based on a date of examination of 8 June 2017. The Judge gave consideration to this report at paragraphs 56-68 of the Decision. Having referred to the fact of the report at paragraph 56, and having made reference to the case of **AAW (expert evidence - weight) Somalia [2015] UKUT 00673 (IAC)** (paragraph 57), the Judge went on to state

*"I have considered Dr Martin's findings in light of the case of KV (scarring - medical evidence) Sri Lanka [2014] UKUT 00230 (IAC) and the principles established therein"* (paragraph 57).

The difficulty with this approach, as identified in the grounds of challenge, was that the decision of the Upper Tribunal in **KV** had been overtaken by a decision in the same case by the Court of Appeal **KV (Sri Lanka) v Secretary of State for the Home Department [2017] EWCA Civ 119**. Whilst elements of the Upper Tribunal's consideration were upheld, there was much that the Court of Appeal rejected. The fact that the Court of Appeal had sat in judgment in the case of **KV** was expressly alluded to in the Appellant's Skeleton Argument before the First-tier Tribunal - see paragraph 20, *"It is important to note that the Court of Appeal has recently set aside the Upper Tribunal's determination in the case of KV (scarring)..."*. Indeed passages from the Court of Appeal's judgement were quoted at length. It is also abundantly clear that a copy of the Court of Appeal's judgement was provided to the First-tier Tribunal Judge.

12. In the circumstances it was a plain error for the First-tier Tribunal Judge to apply the no longer completely valid reasoning of the Upper Tribunal, and to fail to consider the medical evidence in the context of the Court of Appeal's decision.
13. It is accepted by Mr Bramble that this was more than a defect of form, and that it was material given in particular the focus by the First-tier Tribunal

Judge with regard to various aspects of the decision of **KV** addressing the possibility of so-called 'self infliction by proxy' ('SIBP').

14. I note that the First-tier Tribunal Judge concluded that Dr Martin's report "*Does not add any weight to the appellant's claim in relation to the claimed interest in him and subsequent treatment by the Sri Lankan authorities*" (paragraph 68). Bearing in mind the error of approach in respect of **KV**, and in any event given the convoluted, difficult-to-follow, reasoning across paragraphs 57-68, I am entirely unable to conclude that the Judge's conclusion that no weight at all could be accorded to Dr Martin's medical report as supportive of the Appellant's claim to have been ill-treated during the course of the third incident, is lawfully sustainable.
15. The materiality of this error is underscored by the proximity of the third incident to the Appellant's departure from Sri Lanka and indeed the appeal decision. If the Appellant was indeed ill-treated at that time for the reasons he has claimed, then that was a very material consideration in determining whether he would be at risk on return. Necessarily therefore it became a matter of particular scrutiny to consider the extent to which the medical evidence might or might not support his claim in this regard.
16. In my judgment the matters above are plainly sufficient to justify setting aside the decision of the First-tier Tribunal. However, there are a number of other grounds pleaded on behalf of the Appellant. I will address two of those in particular as seeming to me to have particular merit - indeed Mr Jaisri, although not the drafter of the grounds, also sought to place particular reliance on these grounds.
17. The first such matter is in respect of the Appellant's account of having been pushed down a well by members of the army during the second incident that took place in August 2014. At paragraph 47 of the Decision the Judge says in part this,

*"I find that if the appellant were pushed down a 15 foot well head first then the consequences may have been fatal. It is therefore not credible that the appellant spent just over a month in hospital before being advised to rest. The appellant does not refer to having received specialist neurological input."*
18. No indication is given as to the basis upon which the Judge felt sufficiently informed or experienced to evaluate the expected injuries from such a fall, or was otherwise in a position to determine that the injuries described by the Appellant - and in part supported by evidence, irrespective of the view that the Judge in due course took of that evidence - were in any way incompatible with such a fall, or were so unlikely as to render the

Appellant's account in this regard "not credible". I accept that this constituted a plain error of reasoning.

19. The other matter that is particularly troubling in the decision of the First-tier Tribunal is in relation to the third incident and the Appellant's account of the authorities having closed his Facebook account in consequence of his actions. The Judge says this at paragraph 53:

*"The appellant's explanation for the absence of any evidence in the form of a Facebook page is that the Sri Lankan authorities closed his Facebook account. I do not accept this explanation. This is because the deactivation of a Facebook account would not remove all evidence of the existence of such an account. I find that even if the Sri Lankan authorities were able to log on to the appellant's Facebook account in order to deactivate his account, the reactivation of the account is something that can be achieved by entering one's username and password in the account. The deletion of the account does not remove any images associated with the account as these are the possession of Facebook. I find that the absence of any evidence of having uploaded any photographs showing a demonstration is because the appellant did not upload such a photograph."*

20. Complaint is made of this in two respects. Firstly, this matter was not put to the Appellant. Certainly it features nowhere in the decision of the Respondent, and there is nothing to indicate that there was any exploration of this matter during the hearing before the First-tier Tribunal, or any indication that the Judge's raised her view as to the way in which Facebook operated. Secondly, there is no evidential support for the comments and observations of the Judge as to the way in which Facebook operates. In this regard it is also raised as a possibility that a method of blocking access to an individual's Facebook account if one has the facility to log-on, is simply to change the log-on details - which would render the user unable to access the details unless they were in some way able to crack the new log-in details. Be that as it may, I accept that procedural fairness required that the Appellant be afforded a due and proper opportunity to address any such concerns as to the manner in which Facebook operates. Moreover the Judge should not have in substance acted as a witness offering evidence and opinion as to the operation of a Facebook account in circumstances where it seems to me that matters are likely far more nuanced than are suggested in the Judge's brief observations at paragraph 53.
21. Bearing in mind that the Facebook issue relates to the third incident, its materiality is again particularly pertinent.

**Notice of Decision**

22. The decision of the First-tier Tribunal contained material errors of law and is set aside.
  
23. The decision in the appeal is to be remade before the First-tier Tribunal with all issues at large by any Judge other than First-tier Tribunal Judge Manyarara.

**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.

*The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.*

Signed:

Date: **26 January 2018**

**Deputy Upper Tribunal Judge I A Lewis**