



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/13436/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2nd August 2018

Decision & Reasons Promulgated
On 28th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

CJM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H Short, Counsel, instructed by Gurney Harden Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Sri Lanka, appealed to the First-tier Tribunal against a decision of the Secretary of State of 21st November 2016 refusing his application for asylum. First-tier Tribunal Judge Goodman dismissed the appeal in a decision

promulgated on 23rd May 2018. The Appellant appeals to this Tribunal with permission granted by First-tier Tribunal Judge Lambert on 18th June 2018.

2. In summary, the Appellant's claim is that he is at risk on return to Sri Lanka because of his involvement with the LTTE in 2004 when he was 16; the fact in May 2009 he handed over a CD (said to contain footage of human rights violations on Tamils) to a man in Colombo; his arrest and detention in November 2010 when he was tortured and questioned about his involvement with LTTE between 2004 and 2007; the fact that in February 2013 the Appellant had a message from his aunt in Sri Lanka to say that local enquiries had been made there by a group of men in balaclavas about his involvement of the handover of the CD; and his *sur place* activities composing songs about Tamil martyrs which he posted on YouTube.
3. In the decision the judge set out the background before going on to the findings of fact at paragraphs 25 to 33. Although the findings of fact appear to be a summary of the Appellant's evidence it appears that the judge accepted what is set out in those paragraphs. There is no challenge by the Secretary of State to the findings.
4. The Grounds of Appeal put forward two grounds. The first is that the judge's assessment of risk on return is flawed. The second ground contends that the judge failed to properly apply country guidance in relation to the assessment of historic activity.
5. The complaints about the decision concentrate on paragraphs 34 to 41. In essence, it is contended that the judge applied the wrong standard of proof. Ms Short relied on the case of **Karanakaran v Secretary of State for the Home Department [2000] Imm AR 271** (which was referred to by the judge at paragraph 9). There the Court of Appeal said in relation to the standard of proof:

"This approach does not entail the decision maker (whether the Secretary of State or an Adjudicator or the Immigration Appeal Tribunal itself) purporting to find 'proved facts', whether past or present, about which it is not satisfied on the balance of probabilities. What it does mean, on the other hand, is that it must not exclude any matters from its consideration when it is assessing the future unless it feels that it can safely discard them because it has no real doubt that they did not in fact occur (or, indeed, that they are not occurring at present). Similarly, if an applicant contends that relevant matters did not happen, the decision maker should not exclude the possibility that they did not happen (although believing that they probably did) unless it has no real doubt that they did in fact happen.

... when considering whether there is a serious possibility of persecution for a Convention reason if an asylum seeker is returned, it would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision maker believes, on what may sometimes be somewhat fragile evidence, that they probably did not occur. Similarly, even if a decision maker finds that there is no serious possibility of persecution for a Convention reason in the part of the country to which the Secretary of State proposes to send

an asylum seeker, it must not exclude relevant matters from its consideration altogether when determining whether it would be unduly harsh to return the asylum seeker to that part, unless it considers that there is no serious possibility that those facts are as the asylum seeker contends.”

6. It is well established that the appropriate standard of proof in an asylum claim is that of a reasonable degree of likelihood, a reasonable chance, substantial grounds for thinking, or a serious possibility (**Sivakumuran, R (on the application of) v Secretary of State for the Home Department [1987] UKHL1**).
7. In essence, Ms Short contended that the judge here applied too high a standard of proof. Mr Bates contended that the judge applied the correct standard of proof.
8. The reason this is a matter of debate is because of the language used by the judge in the discussion section. At paragraph 34 the judge said that the Appellant's claim that he was beaten after release from detention “seems unlikely”. The judge considered that it was “unlikely” that the Appellant would be on a watch list. The Appellant’s aunt provided a written statement to the Tribunal and the judge considered that her aunt made this part of the claim “more credible” [35]. The judge said that the evidence suggests that if a visit took place it was only the CD that concerned the authorities (and not allegations of smuggling weapons) and went on to say:

“It is possible that the authorities are still interested in this, but the lack of follow up or documents make this doubtful. On the Appellant’s account he was told the CD concerned army atrocities, but it seems unlikely that at this distance in time that merely transmitting the CD on one occasion eight years ago, (rather than showing it or writing about it), will put him in the **GJ** category of someone at risk for human rights activities. It comes into the category of possibility rather than probability.”

9. The judge went on to consider the final factor raised by the Appellant as a matter which would put him at risk and that is his sur place activity, which consisted of his participation in a demonstration and recordings of songs he said were about Tamils martyrs on YouTube. The judge concluded that it would be hard to identify the Appellant from the songs, which do not have his face or full name, and that his participation in one demonstration was unlikely to make him a person of interest as being involved in Diaspora organisations and that in the light of **GJ** this limited involvement “seems unlikely to make him a person likely to be investigated or followed up”.

10. Having considered all of these matters, the judge concluded at paragraph 37:

“Although each factor carries a low risk only of coming to the authorities’ attention, putting these risk factors together, there is a possibility that the authorities will be interested in the Appellant for one of these three, of which the first is unlikely, the second possible, while the third, the sur place activity, on the country information, while bare, might render him liable to interrogation, which if it takes place carries the real possibility of ill-treatment.”

11. The judge went on to consider the case of **X and Y v Switzerland** and went on at paragraph 39 to consider the prospect of the Appellant being interviewed upon return at the airport. The judge considered that the Appellant is likely to be returning on a temporary travel document as he has lost his passport and said:

“... He is more likely as a result to be come to the attention of authorities than if on a passport. As he left under his own name on a student visa there is less likely to be a problem accounting for his actions than for some. It is also argued that his depression will make him less able to handle questioning about past LTTE or sur place involvement. Accepting that the questioning he undergoes to get a travel document or at the airport may put him under more pressure than in this hearing, this is possible, but even so, there is little to tell that on the objective evidence of what the authorities are interested in that puts him at risk of detention for interrogation when in his home area.”

12. The above extracts show the judge’s use of the following words and phrases in relation to the prospect of risk to the Appellant – “possible”; “doubtful”; “possibility rather than probability” [35]; “low risk”; “possibility”; “might”; “real possibility” [37]; “may”; “possible”; “at risk of detention” [39]. This is particularly evidence at paragraph 37 where the judge concludes that the three risk factors together raise the “possibility” that the authorities will be interested in the Appellant which “might” render him liable to interrogation which carries “the real possibility” of ill-treatment. Also, at paragraph 39, the judge thought that it is possible that the Appellant would be questioned at the airport and that as a result of his depression he would be less able to handle questioning about past LTTE or sur place involvement.
13. Mr Bates contended that, although finding that there was a possible risk to the Appellant, the judge did not find that there was a real possibility or a real risk or a reasonable degree of likelihood. He contended that the judge found that the Appellant would pass through the airport without being detained. Mr Bates accepted that the judge could have been clearer in her reasoning but submitted that the reasoning was sufficient.
14. I do not accept Mr Bates’ submissions. I accept Ms Short’s submission that read together that it is clear that the judge was referring to more than a mere or negligible possibility. The judge played around with the language but it is clear that, reading in particular paragraph 37, that the judge concluded that the three elements of the Appellant’s case put together raised the possibility that the Appellant would be of interest to the authorities, that he might be liable to interrogation, which carries the real possibility of ill-treatment. The judge found at paragraph 39 that it is possible that the Appellant would be less able to handle questioning at the airport. Putting all of these findings together, despite the judge’s conclusions at paragraph 40, it is more than clear that the findings made by the judge are inconsistent with the conclusion that the Appellant had not met the lower standard of proof to show that he has a well-founded fear of persecution and that he would face a real risk upon return to Sri Lanka. An analysis of the judge’s use of language indicates to me that, on the judge’s own findings, the Appellant has in fact established that there is a serious possibility or

reasonable degree of likelihood that he has a well-founded fear of persecution in Sri Lanka.

15. In these circumstances, I set aside the conclusion and decision of the judge. Given that there has been no challenge to the findings made by the judge and no cross-appeal by the Secretary of State, my decision to set aside the appeal has the logical conclusion that I remake the decision by allowing the appeal on the basis of the judge's findings.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and I set it aside.

I remake the decision by allowing the Appellant's appeal on asylum and human rights grounds.

An anonymity direction is 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 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.

Signed

Date: 17th August 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT **FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 17th August 2018

Deputy Upper Tribunal Judge Grimes