Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00238/2018

THE IMMIGRATION ACTS

Heard at UT (IAC) Hearing in Field House	**Decision & Reasons Promulgated**
On 11 March 2019	**On 27 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

J K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Benfield, Counsel, instructed by Theva Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is a cross appeal. The Appellant is a national of Sri Lanka and is born on 16 December 2001. He claimed to have left Sri Lanka on 30 December 2016 with the assistance of an agent. He went to India and travelled from there to Singapore, Malaysia and then France arriving in the United Kingdom on 31 March 2017. He claimed asylum shortly after on 18 April 2017 on the basis that he had a well-founded fear of persecution due to imputed political opinion. He was at that time aged 15. His asylum application was refused in a decision dated 12 December 2017 and the Appellant appealed against that decision. His appeal came before First-tier

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Tribunal Judge Davidson for hearing on 6 December 2018. In a decision and reasons promulgated on 21 January 2019 the judge dismissed the Appellant's asylum appeal, but allowed his appeal on Article 8 grounds, based on his private life.

2. The Secretary of State sought permission to appeal to the Upper Tribunal, in time, on the basis that the judge had materially erred in allowing the appeal on the basis of the Appellant's private life, in that he had failed to take into account the statutory provisions set out in Section 117B of the Nationality, Immigration and Asylum Act 2002 and had further failed to give adequate reasons relating to the second stage of the *Razgar* test nor to set out why the Appellant's case raised consequences of such gravity so as to engage Article 8.

3. Permission to appeal was granted by Judge of the First-tier Tribunal O'Brien in a decision dated 8 February 2019 on the basis

> "3. *The judge dismissed the Appellant's appeal on health grounds under Article 3 but allowed it under Article 8. However no reference was made by the judge to Part 5A of the 2002 Act and no mention of the weight to be attached to the public interest in removal save for a mere comment that the judge had taken into account the Respondent's aim was to control immigration. No finding was made as to why removal would be a sufficiently grave interference to engage Article 8. Indeed it is not clear how the judge found the Appellant's case fell within the Article 8 paradigm having dismissed this under Article 3. All the grounds are arguable."*

4. The Appellant's representatives subsequently sought permission to appeal, out of time, on the basis that the judge had erred in dismissing the Appellant's asylum appeal. Three grounds were put forward. Firstly the judge had erroneously failed to apply paragraph 339K of the Immigration Rules, given his acceptance that the Appellant had been detained prior to escaping from Sri Lanka. The Appellant's claim was during that period of detention he had also been tortured and thus paragraph 339K was directly applicable. This provides

> *"The fact that a person has already been subject to persecution or serious harm or to direct threats of such persecution or such harm will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm unless there are good reasons to consider that such persecution or serious harm will not be repeated."*

5. Reliance was also placed on the recent judgment of the Court of Appeal in <u>ME</u> (Sri Lanka) [2018] EWCA Civ 1486 at [16] where the court expressly found relating to that Appellant that given that his arrests had taken place long after the cessation of the conflict in Sri Lanka, that he was perceived at that time to have been of significant interest to the authorities and thus fell within category A of the risk categories identified in *GJ and Others* (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). The court held *"it would have needed an exceptionally strong case to persuade the FTT that he had now ceased to be at risk."*

6. The second ground of appeal asserted that the judge erroneously failed to apply the relevant country guidance i.e. <u>GJ</u> (*op cit*) in relation to the risk of detention on return in light of the Appellant's family associations with the LTTE and the Respondent's current CIG regarding Tamil separatism dated June 2017 bearing in mind the Appellant had been smuggled out of Sri Lanka with the use of agents having escaped from detention by payment of a bribe.

7. The third ground of appeal asserted that the judge erred in failing to consider the Appellant's *sur place* activities given that he was involved with the TGTE and it was known that the Sri Lankan Tamil diaspora is heavily monitored as the government of Sri Lanka actively seek to identify those working against them. It was pointed out the TGTE remains a proscribed organisation and that there was a real risk the Appellant may have been identified by the GOSL due to his diaspora activities. Thus it was incumbent on the judge to give this aspect of the Appellant's case anxious scrutiny.

8. Permission to appeal was granted by Upper Tribunal Judge Blum who also extended time so as to admit the application in time on 21 February 2019 finding *"for the reasons succinctly and clearly set out in the Appellant's cross-appeal grounds at paragraphs 14 to 31 I find there is merit in the grounds of appeal."*

Hearing

9. At the hearing before the Upper Tribunal, in light of the fact that both parties raised arguable challenges to the findings of the First-tier Tribunal Judge, I indicated my provisional view that that decision contained material errors of law as a result of which it was unsustainable. The parties essentially agreed with that position and I therefore decided to remake the decision in light of the judge's findings of fact that had been not subject to challenge. The parties also agreed that, given the Appellant's age; the fact he remains a minor and is vulnerable given it was accepted he was a victim of torture, the appeal could be dealt with on the basis of submissions only. I therefore set the matter back to allow Mr Avery time to prepare his submissions.

10. In his submissions, Mr Avery asserted that whether the Appellant is at risk from the Sri Lankan authorities would depend on their likely perception of him. *GJ (op cit)* is quite clear that the approach of the authorities is generally intelligence lead and the issue is whether somebody is trying to establish a threat to the integrity of the Sri Lankan state. This Appellant had no direct involvement with the LTTE but rather this was through his father. Whilst it is not surprising that the government of Sri Lanka took an interest in him when his father disappeared, it is the case that he has now been out of the country for some time and he submitted it is unlikely that the authorities would now be interested in pursuing him as his knowledge would bevery limited.

11. In respect of the Appellant's involvement with the TGTE in the diaspora, Mr Avery submitted that the relevant question was whether the Appellant has a significant role in that organisation and it was his position that the Appellant does not. Therefore, even putting both planks of the Appellant's claim considered together it is not likely

that the Appellant would be somebody on the radar of the government of Sri Lanka as a person risking or threatening the integrity of the Sri Lankan state. Applying *GJ* appropriately, he submitted that it is unlikely that the Sri Lankan authorities would be interested in him.

12. In relation to Article 8, Mr Avery submitted that this did not take the Appellant much further given that he has extant leave as an unaccompanied asylum seeking child. In relation to the medical evidence Mr Avery's stated position was that there was no reason to believe that the Appellant would not have the support of his family on removal and thus the medical experts have not properly considered the circumstances in which the Appellant would be living if returned to Sri Lanka.

13. In her submissions, Ms Benfield sought to rely on her skeleton argument dated 10 March 2019. She submitted that, applying the requisite standard of proof, it was highly likely that the Appellant does remain on the radar of the authorities and this is clear from the fact that he was detained by them in 2016 and he would thus be at risk of persecution on return in light of the judgment of the Court of Appeal in ME [2018] EWCA Civ 1486 at [16] per Lord Justice Lewison.

14. She submitted it must be assumed that at the time he was detained he did fall within the risk category set out in *GJ* particularly given his father was involved in attempts to renew hostilities in Sri Lanka. It is clear that the authorities thought the Appellant himself had a level of involvement in activity and a level of information about his father and his father's colleagues, given that the Appellant's father was a senior military commander of the LTTE who had joined in the 1990s and had risen through the ranks. He was one of many people who did not surrender to the authorities but was later identified at an IDP camp. Whilst the Appellant's father was rehabilitated when he was released in 2011, reporting conditions were imposed and he is someone in whom the government of Sri Lanka have sufficient adverse interest to maintain that level of monitoring. Given that his father was involved in attempts to revive the LTTE and that the Sri Lankan authorities are particularly harsh in their treatment of suspected insurgents there would be a high level of interest in him as somebody who also kept in contact with other high-level members.

15. However Ms Benfield submitted that the appellant would be at risk not just through association but as he sets out in his statement at page 15 of the main bundle at [18] he was not only asked about his father's activities and training role but also as to who he had met and the Appellant stated that his father had met individuals involved in the resurgence of the LTTE and despite disallowing involvement himself, he was asked about this.

16. Ms Benfield submitted that bearing in mind that the Appellant's release was unofficial due to the payment of a bribe, the risk to him had not evaporated in his absence. She further submitted that it was relevant that his mother is still under reporting conditions and is routinely questioned about the Appellant and his father. She submitted when all these factors are considered it is clear that there is a serious risk the Appellant would be persecuted if he were forcibly removed to Sri Lanka. Ms

Benfield further submitted that as part of the emergency documentation process the Appellant would be required to give family details and he would be asked about the LTTE sympathies of any family members and his own diaspora involvement, thus the government of Sri Lankan authorities would clearly be aware in advance of the Appellant's particular circumstances and that would also give rise to a risk of detention and being subjected to persecution or ill-treatment contrary to Article 3.

17. Ms Benfield submitted that the Appellant does not claim to be a high-level member of the TGTE, but he does express views in accordance with them. If the Appellant were to disclose that he had been working with the TGTE this would in itself give rise to a risk of detention and ill-treatment. According to the statement from the Appellant's uncle at [7] on page 3, his mother has been shown pictures of the Appellant attending demonstrations in the UK by the Sri Lankan authorities, who are already therefore aware of his activities. She submitted that applying the relevant standard of proof, the Appellant has a well-founded fear of persecution. Ms Benfield also sought to rely on the Appellant's illegal exit, which according to *GJ* would result in his detention on return and conditions in detention do amount to a breach of Article 3.

18. In relation to the Appellant's human rights claim, Ms Benfield submitted that the Appellant's mother lives in Jaffna. What is said in *GJ* is that there is an absence of medical treatment in Jaffna and that this would adversely impact on the Appellant if returned, due to his mental health problems. She submitted it would be disproportionate in any event to return the Appellant as a young person under 18 who has been subjected to torture and rape in detention and still suffers from mental health problems and that this would amount to very significant obstacles to his integration either under paragraph 276ADE(vi) of the Rules or Article 8 outside the Rules.

19. In respect of the public interest considerations pursuant to Section 117B of the NIAA 2002, the Appellant has been attending school in the UK and speaks English, albeit he gave his evidence in Tamil before the First-tier Tribunal. He is not in receipt of public funds. He paid privately for his asylum claim via his extended family and he continues to attend education, currently an A level course due to be completed in the summer of 2019. Ms Benfield submitted for the reasons set out above that the Appellant's appeal should be allowed.

Findings and reasons

20. I deal first with the errors of law, permission to appeal to the Upper Tribunal having been granted to both the Secretary of State and the Appellant. The Secretary of State's challenge was to the decision by the First tier Tribunal Judge to allow the appeal on Article 8 grounds, in that he had failed to take into account the statutory provisions set out in Section 117B of the Nationality, Immigration and Asylum Act 2002 and had further failed to give adequate reasons relating to the second stage of the *Razgar* test nor to set out why the Appellant's case raised consequences of such gravity so as to engage Article 8.

21. The Judge considered Article 8 succinctly at [48]-[51] and made reference to the test set out in Razgar [2004] UKHL 27 at [50]. I find that it is clear from [49] that the Judge considered that Article 8 was engaged due to the Appellant's mental health, considered as part of his private life. However, I find that in failing to set out and apply the public interest considerations at section 117B of the NIAA 2002 that the Judge materially erred in his assessment of the proportionality of removal.

22. In respect of the Appellant's challenge to the First tier Tribunal Judge's decision to dismiss the appeal on asylum grounds, this is based on three grounds:

    (i) the judge had erroneously failed to apply paragraph 339K of the Immigration Rules, given his acceptance that the Appellant had been detained prior to escaping from Sri Lanka;

    (ii) the judge erroneously failed to apply the relevant country guidance i.e. GJ (*op cit*) in relation to the risk of detention on return;

    (iii) the judge erred in failing to consider the Appellant's *sur place* activities given that he was involved with the TGTE.

23. I find that the first ground, which is fully particularised in the grounds of appeal, is made out in light of the failure by the Judge to apply paragraph 339K of the Rules, which when read alongside ME (Sri Lanka) [2018] EWCA Civ 1486 at [16] makes clear that it is at least arguable that the Appellant falls within the risk categories set out in *GJ (op cit*). It follows that the second ground of appeal is also made out, particularly when considered alongside the Appellant's family connections, escape from detention with a bribe and illegal exit from Sri Lanka.

24. In respect of the third ground of appeal, this is dealt with at [44](a) where the Judge held: "*His involvement with diaspora activities is insignificant and he cannot be said to be (sic) key individual in diaspora activities. He is still a child and his main involvement in diaspora activities is playing sport, or helping out with minor tasks. He is not an organiser or an activist.*" Ms Benfield submits and I accept that the Judge's consideration is somewhat simplistic and that he failed in so finding to take account of material considerations, in particular the fact that the Appellant's diaspora activities are for the TGTE, an organisation which is proscribed in Sri Lanka and also that the diaspora is heavily monitored because the Sri Lankan authorities actively seek to identify those working against the Sri Lankan government. Ms Benfield further submitted that the Judge's analysis was not grounded in the country guidance: *GJ* at [336] or relevant country material *cf.* the Respondent's policy guidance at 6.2. This is correct.

25. I set aside the decision of First tier Tribunal Judge Davidson and proceed to re-make the decision.

26. I turn first to the judge's preserved findings of fact and I set these out as follows.

    (1) The Appellant's father was involved with the LTTE and his family were of interest to the authorities at that time (41).

(2) The Appellant had shown sufficient evidence of detention prior to his escape from Sri Lanka [41];

(3) There are no significant inconsistencies and his account is generally consistent with the objective evidence (41).

(4) The Appellant failed to show sufficient evidence that there is an arrest warrant outstanding for him (42).

(5) The Appellant has mental health conditions based on the diagnosis of medical experts. The risk of suicide is currently moderate but likely to increase if removed to Sri Lanka and the Appellant suffers from PTSD [43].

27. I have had regard to the substantial bundle of evidence submitted by the Appellant's solicitors; to the skeleton argument by Ms Benfield dated 10 March 2019 and to the submissions of both parties. I proceed to determine the appeal on the basis that the Appellant is from a family considered to be of interest to the authorities, due to his father's senior role in the LTTE and in attempting to re-build the LTTE from 2015, as a result of which he was arrested in April 2016 and has been missing since that time. The Appellant claims and the Judge at [41] accepted that he was arrested on 11 December 2016 and detained for 2 weeks during which he was interrogate, beaten and sexually assaulted. His mother had arranged an agent to pay a bribe to have him released from detention and thereafter to flee Sri Lanka, which he did so illegally. Since his arrival in the UK, he has been diagnosed with PTSD, for which he is receiving treatment and he has, along with his uncle, attended weekly meetings and events in the UK, organised by the TGTE. The Appellant is now 17 years of age and continues to live with his maternal aunt and uncle.

28. I have concluded that the Appellant has demonstrated a well founded fear of persecution if he were to return to Sri Lanka. My reasons for so finding are as follows:

28.1. He has been subjected to past persecution in Sri Lanka during his detention in December 2016. Applying paragraph 339K of the Rules and the judgment of the Court of Appeal in ME (Sri Lanka) [2018] EWCA Civ 1486 at [16] I find that, given this detention was after the cessation of the conflict in Sri Lanka, the Appellant would at that time have been perceived as being of significant interest to the authorities, as his father's son and he thus falls within the risk category set out at 356 7(a) of *GJ viz 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."* The Court of Appeal considered that in such circumstances "*(I)t would have needed an exceptionally strong case to persuade the FTT that he had now ceased to be at risk."*

28.2. The Respondent's case is that, given that the Appellant was only of interest because of his father and due to his absence from Sri Lanka and the fact that the approach of the authorities is generally intelligence lead in respect of whether somebody is trying to establish a threat to the integrity of the Sri Lankan state, the Appellant would no longer be of interest. I find that these submissions, though well made by Mr Avery,

are unsustainable in light of the judgment in *ME* and do not constitute a sufficiently strong case to show that the Appellant would no longer be at risk on return.

28.3. The Appellant has been involved with the TGTE in the UK since 23 April 2017, when he attended a meeting in Wembley and became a member. He has undertaken a number of activities, including a demonstration at Downing St on 23 July 2017; helping at the annual sports meet in Morden on 30 July 2017; a demonstration at Downing St on 22 October 2017 and participating in an anniversary remembrance day in Surrey on 21 January 2018. There are photographs of the Appellant participating in these activities at 32-59 of the supplementary bundle. He has also provided letters attesting as to his involvement and an identity card.

28.4. Whilst there is no updating statement from the Appellant as to his activities over the last year, I am prepared to accept that he has continued with these activities given that this was his unchallenged evidence before the First tier Tribunal on 6 December 2018 and the most recent letter from the TGTE attesting to his activities is dated 29 November 2018 [pages 30-31 of the supplementary bundle refers]. The TGTE are a proscribed organisation in Sri Lanka (although not in the UK). The Appellant claimed in his evidence before the First tier Tribunal that the Sri Lankan authorities have told his mother that they are aware that the attends meetings and events organised by the TGTE in London [6](h). The Judge made no finding on this evidence. However, I find it to be consistent with the background evidence e.g. the Home Office's CIG in respect of Tamil Separatism dated June 2017 and *GJ* at [324].

28.5. I find that there is a serious possibility that the Appellant's activities for the TGTE have come to the attention of the Sri Lankan authorities and consequently, there is a real risk he would be detained on return to Sri Lanka on account of his diaspora activities: 356(7)(a) of *GJ* refers.

29. I now turn to consider Article 8 of ECHR, no challenge to the Judge's decision to dismiss the appeal in respect of Article 3 having been brought. The Appellant does not qualify for leave to remain under the Immigration Rules; whilst the risk of arrest, detention and consequent treatment amounting to persecution might well amount to very significant obstacles to his integration, the Appellant is under the age of 18 and paragraph 276ADE(1)(vi) of the Rules makes clear that it is only applicable to those aged 18 or over. I accept that the Appellant has formed a family life with his maternal aunt and uncle, with whom he lives, albeit is of only 2 years duration, because it is clear from the statements and Dr Dhumad's report that the Appellant is dependent particularly on his uncle, thus I find that this constitutes family life over and above normal emotional ties *cf.* Kugathas [2003] EWCA Civ 31, bearing in mind that the Appellant is a minor. Ms Benfield put the Appellant's case primarily on the basis that his removal would be contrary to his physical and moral integrity, due to the fact that he has been diagnosed with PTSD after his experience of detention and ill-treatment in Sri Lanka.

30. I find that the fact that the Appellant remains a minor is a sufficiently compelling or exceptional reason to consider his private life outside the Rules. Applying the test set

out in Razgar [2004] UKHL 27, I find that the Appellant has established a private and family life in the UK and that his removal would constitute an interference with that private life, but would be in accordance with the law. The question I am required to answer is whether it would be proportionate. In making that decision, I take account of the public interest considerations set out at section 117B of the NIAA 2002. Ms Benwell submits and I accept that the Appellant speaks English: he is currently studying for A levels in the UK and he is financially independent in that he is supported by his extended family without recourse to public funds: section 117B(2) and (3) refer. However, section 117B(5) provides that: "*Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.*"

31. Thus the Appellant's established private and family life in the UK and the adverse impact on his mental health if removed to Sri Lanka, based on the psychiatric report of Dr Dhumad, has to be balanced against the maintenance of immigration control and the statutory public interest considerations. I find that the public interest considerations dictate that removal of the Appellant would be proportionate. However, as I have found that the Appellant has a well founded fear of persecution on account of his perceived political opinion, arising from his father's senior role in the LTTE and his own activities with the TGTE in the UK, his removal is prohibited as it would be contrary to the UK's obligations in respect of the 1951 UN Refugee Convention and Article 3 of the ECHR.

Notice of Decision

The decision of the First tier Tribunal contained material errors of law. I set that decision aside and re-make the decision, allowing the appeal on asylum grounds.

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 *Rebecca Chapman* Date 21 March 2019

Deputy Upper Tribunal Judge Chapman