



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

Appeal Number: PA/01381/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 14 February 2019**

**Decision & Reasons
Promulgated
On 02 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**MM
(Anonymity direction continued)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Toal of Counsel instructed by Birnberg Pierce & Partners, solicitors

For the Respondent: Ms J Isherwood of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a Sri Lankan Tamil born in 1981. On 04 September 2002 he arrived and sought subsidiary protection because he feared persecution on return to Sri Lanka on account of his involvement with the Liberation Tigers of Tamil Eelam (LTTE). The Respondent (the SSHD) refused the application and the Appellant's appeal rights became exhausted on 15 May 2003. The SSHD reviewed the Appellant's case in

March 2011 as a “Legacy” case and decided he had no basis to remain in that United Kingdom. On 04 May 2012 the Appellant made further representations which were refused on 25 September 2013 and made more representations on 05 November 2014.

2. The Appellant has no partner or dependants. He has made a claim based on his private life in the United Kingdom and his right for it to be respected protected by Article 8 of the European Convention.

The SSHD’s decision

3. On 12 January 2018 the SSHD rejected the further representations with a right of appeal. The Appellant had relied on claimed past association with the LTTE and the Eelam People’s Democratic Party (EPDP). These claims had been dismissed by an Immigration Adjudicator on 28 April 2013 in respect of which the Appellant had not sought permission to appeal. The SSHD relied on those findings. The Appellant had supplied recent evidence from his mother about a visit she had made on 16 July 2014 to Sri Lanka where she stated she had been questioned about the Appellant. He had also supplied a letter of 29 October 2017 from a member of the Transnational Government of Tamil Eelam (TGTE) parliament and DVD evidence of his attendance at a demonstration. The SSHD considered the evidence and did not find it showed the Appellant would be at real risk on return. The SSHD claimed it had not been possible to identify the Appellant on the DVD.
4. The SSHD reviewed the case law on Sri Lanka and on sur place claims and concluded the Appellant would not be at risk on return.
5. The Appellant did not meet any of the time critical requirements of paragraph 276 ADE of the Immigration Rules for discretionary leave based on his private life. The SSHD accepted the Appellant suffered from the conditions identified in a letter from his GP and after referring to the background evidence about the availability of medical facilities in Sri Lanka decided the return of the Appellant to Sri Lanka would not engage the State’s obligations under Articles 2 or 3 of the European Convention. There were no exceptional circumstances which might justify the grant to the Appellant of leave on compassionate circumstances by way of reference to paragraph 353B of the Immigration Rules.

Proceedings in the First-tier Tribunal

6. The Appellant appealed and by a decision promulgated on 02 November 2018 Judge of the First-tier Tribunal Keane found the Appellant had attended political events and demonstrations in the United Kingdom as well as meetings of the TGTE but there was no evidence he was known to the Sri Lankan authorities or would be perceived by them as having an adverse profile. He rejected the Appellant’s account of events before he left Sri Lanka. He gave little weight to the Appellant’s private life in the United Kingdom developed during a substantial period of time when his

immigration status had been precarious. He dismissed the claim based on the Appellant's medical circumstances by reference to the jurisprudence in *N v UK (App.26565/05)* and *J v SSHD [2005] EWCA Civ.629*.

7. The Appellant sought permission to appeal on the basis the Judge had:
 - (a) failed to consider the Appellant's extensive diaspora involvement with the Tamil movement
 - (b) did not give sufficient regard to the letter of 20 October 2014 from the member of the TGTE parliament at Appellant's bundle (AB) p.221
 - (c) failed to make a clear finding on the evidence of the Appellant's aunt about her 2014 visit to Sri Lanka at AB p.217
 - (d) erred in concluding the Sri Lankan authorities would not be interested in the Appellant on return by not considering the relevant country guidance in *GJ and others (post-Civil War: returnees) [2013] UKUT 49*
 - (e) did not adequately consider the medical evidence and suicide risk and
 - (f) to raise a query whether the Appellant's representative at the hearing was a person qualified within the meaning of s.84 Immigration and Asylum Act 1999 to represent the Appellant by reference to a statement made by his current solicitors
8. On 10 December 2018 Judge of the First-tier Tribunal Lambert extended time for applying for and granted permission to appeal because it was arguable the Judge had failed to make a finding about the evidence of the Appellant's aunt and had not analysed the evidence presented to show the Appellant had established a profile of sur place activities which would bring him to the attention of the Sri Lankan authorities, irrespective of the adverse findings made in relation to his claims about events in Sri Lanka before he came to the United Kingdom.

The Upper Tribunal Proceedings

9. The Appellant did not attend in relation to which I make no adverse finding.

Submissions for the Appellant

10. Mr Toal referred to the aunt's letter at Appellant's bundle (AB) p.217 and paragraphs 15-16 of his witness statement at AB p.27. The issue before the Judge had been the likely consequences on the Appellant's return to Sri Lanka in the light of his claimed sur place activities. It was accepted that mere participation in such activities would not alone place an individual at risk on return as found at paragraph 336 of *GJ and others*.
11. The Judge had found at paragraph 10 of his decision the Appellant had been involved in various sur place activities critical of or opposed to the

Sri Lankan government. He submitted that the description of such activities which the Judge gave did not fairly reflect the evidence before him. The TGTE's parliamentarian's letter described the Appellant as an activist distributing leaflets, attending meetings and demonstrations etc to expose the "Tamil genocide". The distribution of leaflets and other activities created a nexus with the TGTE. The letter dated 29 June 2018 at AB pp.32-33 from the TGTE Deputy Minister of Sports and Community Health also referred to the Appellant's involvement with the TGTE, stating he had volunteered in organising public events as well as attending various "projects". The gap of almost 4 years between the two TGTE letters also demonstrated a continuity of involvement.

12. The Judge had concluded at paragraph 10 there was no evidence the Appellant was known to the Sri Lankan authorities but in order to reach this conclusion he had needed to consider the evidence from the Appellant's aunt. Regardless, his conclusion the Appellant was of no interest was not reasonable in the light of the evidence of his sur place activities.
13. The Judge was obliged to consider the evidence and state reasons why he found little weight could be attached to this correspondence. This was important since the TGTE is a movement proscribed by the Sri Lankan authorities and returnees may be questioned by the Sri Lankan authorities on return whether they have been involved in Tamil diaspora activities. He referred to paragraphs 12-13 of the judgment in *UB (Sri Lanka) v SSHD [2017] EWCA Civ. 85* mentioning evidence from the British High Commission in Colombo.
14. The decision contained a material error of law and should be set aside.

Submissions for the SSHD

15. Ms Isherwood submitted there was no material error of law in the decision although it was accepted the Judge had not made reference to the evidence from the Appellant's aunt. It was to be noted that the hearing before the Judge had proceeded by way of submissions only. I noted from the Judge's record of Proceedings that the reason the Appellant had not given evidence was that he had taken medication which had had an adverse effect on him and his then Counsel had judged that in all the circumstances he should not be called to give evidence.
16. The Judge accepted the Appellant had engaged in some sur place activities. These had been described by the Appellant as described in paragraphs 19ff. of his statement of 2 July 2018 at AB pp.28ff. She referred to the last sentence of paragraph 336 of *Gj and Others* and head note para. 8. The Appellant's account of events in Sri Lanka had been rejected by the First-tier Tribunal in 2003. That decision had not been challenged. Relying on *Gj and Others* the Judge had sufficient reason to find the Appellant would not be at risk on return.

17. The Court of Appeal at paragraph 24 of *UB (Sri Lanka)* had found that:

“... consideration of the risk to the Appellant turns not merely on him showing that he was actually a member of the TGTE, but relies on his membership being detected on arrival in Sri Lanka. There is no suggestion that this Appellant is on any list of individuals of interest to the authorities in Sri Lanka. The objective findings by the FTT are clear that any activity by the Appellant in this country, even if observed or recorded, was no level and not likely to carry risks. That activity itself would not demonstrate membership of the TGTE. In addition, I bear in mind the very clear findings that the Appellant lied and exaggerated in alleging mis-treatment during his last visit to Sri Lanka, and thus his credibility is low.”

Additionally, at paragraph 10 of his decision the Judge had noted that the Sri Lankan authorities would take account of the possibility that an individual would engage in sur place activities to bolster a claim for subsidiary protection. They would not perceive the Appellant as having any motive to destabilise the Sri Lankan government. There was no evidence that any details of the Appellant’s sur place activities had been placed on the Internet.

18. The decision did not contain any material error of law and should stand.

Response for the Appellant

19. Mr Toal replied that the evidence of the Appellant’s aunt was material because if it was accepted it showed the Sri Lankan authorities already had an interest in the Appellant. It was notable that although the Judge had not heard any oral testimony he had accepted a substantial part of the Appellant’s evidence. It could not be said that it was a foregone conclusion the aunt’s evidence would have been rejected and there were no express findings that the Appellant was so unworthy of credit that any evidence he produced could not be accepted as credible.

Error of Law Consideration

20. At the end of the hearing I reserved my decision. There was a discussion whether if I found an error of law I should proceed to re-make the decision. Mr Toal referred to the concerns of his instructing solicitors about the original representation afforded the Appellant at the hearing in the First-tier Tribunal and Ms Isherwood noted that the Appellant had then been represented by Counsel from whom there was no statement. The decision to proceed without the Appellant had been made by Counsel. Mr Toal countered that this was a claim for subsidiary protection and anxious scrutiny was required. The aunt’s evidence was important and there were questions about the conduct of the appeal in the First-tier Tribunal. In the any event, even if I were immediately to find an error of law decision, neither party was ready to proceed to a re-hearing, if one was necessary.

21. The determination promulgated on 26 April 2003 dismissing the Appellant's asylum claim made extensive adverse credibility findings against him. That determination has not been successfully challenged and the findings about the Appellant's account of events before he left Sri Lanka should be the starting point for the consideration of his present appeal. There was no evidence before the Judge in 2018 which sought to upset the Adjudicator's findings.
22. The Judge found the Appellant had engaged in Tamil diaspora activities against the Sri Lankan authorities. There was documentary evidence from the Appellant's aunt that the Sri Lankan authorities had an interest in the Appellant. The Judge did not make any finding on that evidence.
23. The Upper Tribunal in *GJ and others (post-Civil War: returnees) (Sri Lanka) CG [2013] UKUT 319* noted that forced returnees are in the travel documentation process or on arrival asked about their sympathies for the LTTE and that the Sri Lankan authorities consider London to be a hotspot of Tamil separatist activity. Further, the Upper Tribunal noted that the Sri Lankan authorities use photographic recognition technology at Tamil diaspora separatist demonstrations: see paragraphs 308, 324-326 and 335. It also found there was no risk to returning Tamils who had merely and only attended demonstrations.
24. With this in mind, I find the Judge erred in law in not giving a sufficient analysis of the precise nature and extent of the Appellant's Tamil separatist activities in London in which he found the Appellant to have engaged. Given the comments in *GJ and others* referred to in the preceding paragraph, it was an error of law to limit the risk assessment to the Appellant on return to a finding that there would be nothing to differentiate the Appellant from any other returning Sri Lankan and that if questioned the authorities would readily conclude they never had an interest in the Appellant: see paragraph 12 of the Judge's decision. The Appellant would be distinguished by the fact that he would be a forced Tamil returnee from an international centre of Tamil separatism who had, even on the Judge's own findings, engaged in Tamil separatist activities.
25. I make no specific findings on the matters referred to in paragraph 7(f) above but would comment there appears to be no explanation why the Appellant's aunt was not called to give oral testimony or why an adjournment was not sought in the light of the claimed temporary incapacity of the Appellant to give oral testimony. With this in mind, I consider the safest course is to set aside the decision of the First-tier Tribunal and not to preserve any findings of fact. Accordingly, and having regard to the extent of the fact-finding exercise which will be necessary on the hearing afresh of the appeal, it is remitted to the First-tier Tribunal.

Anonymity

26. The First-tier Tribunal decision contains an anonymity direction although it gives no reason why it is proportionate to the need for transparency in the Tribunal's administration of justice. This is a subsidiary protection appeal and on that basis and because the matter was not addressed at the hearing before me I propose to continue the anonymity direction.

SUMMARY OF DECISION

The decision of the First-tier Tribunal contains an error of law and is set aside.

The appeal is remitted for hearing afresh.

Anonymity direction continued.

DIRECTIONS

The Appellant's bundle in the Tribunal file is missing pages 35-218 (inclusive) and the Appellant's solicitors are directed to file the missing pages with the First-tier Tribunal promptly after receipt of notice of the re-hearing.

Anonymity Direction

Unless and until a tribunal or court directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the Appellant or any family member. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed/Official Crest
2019

Date 26. 03.

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal