Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/03273/2017**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision and Reasons Promulgated**
On 30 May 2019	**On 12 June 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

AA
ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Profumo, Counsel
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original first Appellant in this determination identified as AA.

Introduction

1. Having already found that the decision of the First-tier Tribunal ('FTT') dated 26 June 2018 contains an error of law in an ‘error of law’ decision sent on 22 January 2019, I now remake the decision.

2. Ms Profumo submitted that there was ample medical evidence to support the appellant being treated as a vulnerable witness. Mr Diwnycz agreed with this, as did I, and the hearing proceeded on this basis.

Issues in dispute

3. The appellant, a Sri Lankan citizen of Sinhalese ethnicity, has been in the United Kingdom since 2011, but did not apply for asylum until 27 September 2016. This was refused in a decision dated 28 March 2017. The appellant's delay in claiming asylum and some of the reasons provided by the respondent for rejecting his claim are of historic interest only, because the appellant's account of what happened to him in Sri Lanka is no longer disputed. Indeed, in his decision letter, the respondent accepted much of the appellant's account as it was corroborated by a medical legal report dated 21 December 2016, prepared by Dr Peter Toon, on behalf of Medical Justice. A summary of the appellant's accepted history in Sri Lanka includes the following:

   (a) The appellant permitted a Tamil (‘Mr G’) to live in his home from around 2007. Unbeknown to the appellant, the Sri Lankan authorities believed Mr G to have links to the LTTE. In November 2010 the police took away Mr G and the appellant has not seen him since.

   (b) On 20 January 2011, the police arrested and detained the appellant. During his detention, the appellant was repeatedly interrogated about assisting Mr G and helping him with his LTTE activities. The appellant was beaten and tortured. As a result of this, he has scarring and has suffered with psychiatric difficulties. These are particularised in Dr Toon’s report.

   (c) After 10 days of detention, on 30 January 2011, the appellant was forced to sign blank pieces of paper. He was released because his family arranged for a Buddhist monk to bribe the authorities.

   (d) The appellant remained in hiding for a short period until the monk facilitated his departure from Sri Lanka through bribery, on 4 February 2011.

   (e) The authorities attended the appellant's home looking for him, whilst his mother was still in Sri Lanka in 2011-12. His mother left Sri Lanka to join her husband in Italy in 2013.

4. The only outstanding issue in dispute is whether the appellant has a prospective well-founded fear of persecution in Sri Lanka in the light of the country guidance in GJ and others (post-civil war returnees) Sri Lanka CG [20131 UKUT 00319 (IAC) and his accepted history.

Procedural history

5. The appellant's asylum appeal was allowed by FTT Judge Buchanan in a decision dated 27 June 2017, but the respondent successfully appealed this to the Upper Tribunal ('UT'). In a decision dated 24 February 2018, UT Judge Taylor considered that Judge Buchanan was entitled to look at up to date country background evidence post-dating GJ but was not entitled to "*in effect, create a further risk category*", not warranted by the application of GJ. The appeal was remitted to the FTT to enable further factual findings to be made regarding the circumstances in which the appellant left Sri Lanka.

6. The appeal was reheard by FTT Judge Cope, and in a decision dated 26 June 2018, he dismissed the appellant's appeal. Judge Cope noted that the respondent conceded that the appellant was arrested, detained and tortured by the Sri Lankan authorities in 2011 for reasons relating to his connection with an LTTE supporter, who lived with him for about three years. Judge Cope went on to address two factual matters not accepted by the respondent, and concluded that the appellant: (i) escaped from detention in the manner claimed, with the use of bribery and the assistance of a Buddhist monk and; (ii) was able to leave Sri Lanka with the assistance of bribery, notwithstanding his recent ‘release’ / escape from detention.

7. The only outstanding matter before Judge Cope was therefore whether the appellant continued to be of adverse interest to the Sri Lankan authorities. Judge Cope rejected the submissions made on the appellant's behalf and dismissed his appeal. As set out above, in my 'error of law' decision, I concluded that Judge Cope erred in law but the decision should be remade by me in the UT, at an adjourned hearing.

Hearing

8. At the beginning of the hearing before me, Mr Diwnycz re-emphasised that the appellant's factual account of what happened in Sri Lanka is not in dispute and as such there was no need to cross-examine him. As the appellant is a vulnerable witness, Ms Profumo agreed with me that it was important to explain this clearly to him and I stood the matter down for this to take place. In addition, the representatives agreed the issues to be determined by the Tribunal should be narrowed further, as follows:

    (i) As it is accepted that the appellant was ‘released’ or escaped from detention and Sri Lanka through the use of bribery, is it

reasonably likely that since this time, there is an outstanding arrest warrant such that he is on the 'stop' list and for reasons relating to this is at risk of serious harm upon return to Sri Lanka pursuant to the risk category identified at headnote 7(d) of GJ?

(ii) In the alternative, if the appellant is not on the 'stop' list, is he nonetheless at risk of serious harm in the light of the GJ country guidance when considered together with the country background evidence post-dating GJ?

9. After the short break, the representatives returned to make submissions. Mr Diwnycz simply accepted that it was highly likely that the appellant meets the requirements of the GJ risk category relevant to the 'stop' list and did not wish to add anything beyond that. He clarified that he was unable to resist the submissions made on the appellant's behalf in Ms Profumo's very detailed and comprehensive skeleton argument in this regard, but did not have the authority to concede the appeal at the hearing.

10. Ms Profumo relied upon her skeleton argument and took me to relevant extracts from the detailed bundle, including a country expert report prepared by Dr Chris Smith dated 25 February 2019, in support of her submissions.

11. I reserved my decision, which I now provide with reasons.

Country guidance

12. It is clear from the headnote in GJ that those on a 'stop' list face a real risk of persecution upon return to Sri Lanka. The headnote includes the following:

> "...
>
> (4) If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.
>
> (5) Internal relocation is not an option within Sri Lanka for a person at real risk from the Sri Lankan authorities, since the government now controls the whole of Sri Lanka and Tamils are required to return to a named address after passing through the airport.
>
> (6) There are no detention facilities at the airport. Only those whose names appear on a "stop" list will be detained from the airport. Any risk for those in whom the Sri Lankan authorities are or become interested exists not at the airport, but after arrival in their home area, where their arrival will be verified by the CID or police within a few days.
>
> (7) The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, are:

> (a) 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.
>
> …
>
> (d) 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 pursuance of such order or warrant.
>
> (8) The Sri Lankan authorities' approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrant and also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war. In post-conflict Sri Lanka, an individual's past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government.
>
> (9) The authorities maintain a computerised intelligence-led "watch" list. A person whose name appears on a "watch" list is not reasonably likely to be detained at the airport but will be monitored by the security services after his or her return. If that monitoring does not indicate that such a person is a Tamil activist working to destabilise the unitary Sri Lankan state or revive the internal armed conflict, the individual in question is not, in general, reasonably likely to be detained by the security forces. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual."

13. The GJ country guidance on the ‘stop’ list continues to be accepted by the respondent as valid — see his June 2017 CPIN on Tamil separatism in Sri Lanka at 2.3.34 to 2.3.38.

Re-making the decision

14. Both representatives agreed that if there is a reasonable degree of likelihood that the appellant's name appears on a computerised ‘stop’ list at the Sri Lankan airport, he will be stopped and handed over to the appropriate Sri Lankan authorities, at which point there would be a risk of ill-treatment. The first question that therefore arises is whether the appellant's name is reasonably likely to appear on the ‘stop’ list. If the answer to that question is affirmative, then it is undisputed that this would be the end of the matter and the asylum appeal must be allowed.

15. The country guidance in GJ makes it clear that the ‘stop’ list includes those against whom there is an extant court order or arrest warrant. It

has been submitted on the appellant's behalf that it is reasonably likely that the person who accepted the bribe to release the appellant reported this as an escape, which would have led to an arrest warrant being issued against the appellant. As acknowledged by Mr Diwnycz, there is cogent and credible support for this proposition in the circumstances of this case.

16. Dr Smith's evidence before the Tribunal in GJ is summarised at Appendix J to the decision and includes the following at [13]:

> "If someone of adverse interest is released upon payment of a bribe, those who accepted the bribe will be responsible for ensuring there is a record of why the suspect was released; a note indicating that a person was released because they were a person of no further interest, being one option. If the person who accepted the bribe could not acquire access to the records, it is more likely that they would report the release as an escape which would lead to an arrest warrant being issued. Someone who is recorded as escaped or missing would be of significant adverse interest to the authorities."

17. Dr Smith has been recognised as an authoritative country expert on Sri Lanka, albeit the Tribunal in GJ did not accept the entirety of his evidence (see for example [264] to [272] of GJ). Although the Tribunal accepted Dr Smith's evidence regarding the presence of 'stop' lists and the proliferation of intelligence gathering, it did not expressly accept that a person released informally from detention was likely to be the subject of an arrest warrant, and described this aspect of his evidence as based on speculation at [131]. However, the Tribunal in GJ did not have to resolve this issue on the facts of the three appellants before it. Although the first appellant was released with a payment of a bribe the Tribunal found at [397] that his and his family's significant past involvement with the LTTE together with the enquiries made by the Sri Lankan authorities and his sur place activities were sufficient to allow his appeal. In relation to the second appellant, the Tribunal noted at [425] that if he was on a 'stop' list, in the circumstances of his case the Grama Sevuka would have been aware of this, and concluded that he was therefore not on the stop list. The third appellant lived and worked in Sri Lanka for some three years after his release. I emphasise that I have applied and followed the country guidance provided in GJ. Whilst those on the stop list are in a risk category and that includes those with an arrest warrant, the exact delineation of all those who may have an arrest warrant outstanding has not been specified in GJ. My findings are therefore based on assessment of the particular accepted facts and cogent evidence available, set sensibly against the country guidance in GJ.

18. I did not have the benefit of oral evidence from Dr Smith and was unable to tease out matters that required clarification. With this caveat in mind, I do not accept the entirety of Dr Smith's evidence in his recent report. There are aspects that are insufficiently explained,

and which contradict part of the guidance in GJ without clearly identifying cogent evidence in support. However, the disputed issues in this appeal are very narrow. I accept Dr Smith's evidence in his recent report at [20] to [24] that, given the extensive use of records in order to support intelligence gathering which are logged on a permanent basis, a person who was detained and tortured because of suspected LTTE links in January 2011 and then obtained his release by bribery, would either be recorded as a consequence of this as a person of no further interest or an escapee. However, the more pertinent question is whether it is reasonably likely that this appellant would have been recorded as the latter, as opposed to the former, by the Sri Lankan authorities. That is a question of some significance because if recorded as an escapee, it is likely (but it does not necessarily follow) that an arrest warrant would be drawn up against the appellant.

19. Dr Smith's evidence that it is more likely that this appellant would be recorded as an escapee, is consistent with his evidence before GJ that it is generally more likely that a 'release' by bribery would be recorded as an escape which would lead to an arrest warrant being issued. This is also supported by Mr Punethanayagam's evidence in GJ, as recorded at [1461]: those cases recorded as 'escaped from detention' in the database of the police would lead to absconder action and details being passed to the National Intelligence Bureau. I note that the Tribunal commented that this information was not sourced at [147] but it also commented that Mr Punethanayagam is a barrister who represented about 3000 detainees and his evidence regarding criminal process in Sri Lanka was generally useful and reliable - see [275] of GJ. In addition, in his recent report, Dr Smith maintains this analysis by reference to further interviews and country background evidence. I also note that the Tribunal accepted in GJ that a bribe can be paid to secure release even where the person remains of ongoing interest.

20. Thus far, my analysis has been on the general situation in Sri Lanka. There are no certainties. One act does not inevitably lead to another. I now address the particular circumstances of this appellant and assess the likelihood of there being an arrest warrant against him.

21. The accepted circumstances relevant to this particular appellant supports the submission that he would have been recorded as an escapee (with an associated arrest warrant issued) rather than a person of no interest. Firstly, the appellant was severely tortured and made to sign blank pieces of paper, indicative of a 'confession', before being released. The respondent's own fact finding report on Sri Lanka dated 11-23 July 2016, makes it clear at 8.1.14 that after torture the detainee is normally made to sign a 'confession' that they have been associated with the LTTE. In other words, the blank pieces of paper tend to signpost to the authorities having recorded a signed 'confession' from the appellant. If he was no longer of interest there

would have been no need to force him to sign the blank pieces of paper. Second, it has been accepted that there was continued interest in the appellant in 2011 to 2012. In particular, his mother told him that the authorities visited several times after his release from detention and departure from Sri Lanka looking for him - see the appellant's responses to questions 94 to 98 in his asylum interview. Although there is no firm evidence that the appellant has been charged with any offence and there is no up to date evidence of the authorities enquiring into his whereabouts, these matters do not necessarily obviate a reasonable likelihood that after his escape, an arrest warrant was drawn up. Confirmation of this would not necessarily be known by the appellant. He and his parents have been out of Sri Lanka for many years. In addition, if having made enquiries, the authorities were told that the appellant's whereabouts were unknown or that he was abroad, there would have been no need to continue to make enquiries.

22. The appellant's ability to leave with the assistance of the monk through the airport does not mean that there was no extant arrest warrant in existence – see [146] and [170] of GJ. This is also consistent with the evidence summarised by Dr Smith in his 2019 report at [35] to [37].

23. I note that on his own case, the appellant has not actually participated in separatist activity. However, whilst important, this is not a pre-requisite - see [43] and [50] of the Court of Appeal's decision in MP and NT (Sri Lanka) v SSHD [2014] EWCA Civ 829. In his recent report, Dr Smith referred to numerous examples of those who have been targeted for serious harm upon return when they have not been involved in any separatist activity. I also note that the appellant is Sinhalese and not Tamil. The appellant's ethnicity was of course insufficient to prevent his detention and torture in 2011 (after the end of the conflict) when the authorities continued to perceive that he had links to the LTTE, considered to be worthy of sustained interrogation under torture. The appellant was of past adverse interest and suffered serious harm in the past.

24. Although many years have passed and the situation in Sri Lanka has changed, it remains the case that the appellant is reasonably likely to have become the subject of an arrest warrant in all the circumstances of his case, in particular for reasons relating to the information held by the authorities against him together with his release from detention and the continued adverse interest shown after his release. I acknowledge that at first blush the appellant appears to be at low risk of having any ongoing interest in Tamil separatism and this is the more typical barometer for risk. Although the ‘stop’ list generally includes those who have committed very serious crimes or those who are perceived to be connected to terrorism, it also includes those with a warrant outstanding. It is reasonably likely that this appellant falls into that last category for the reasons I have provided. In reaching

this conclusion, I acknowledge that the country guidance in GJ does not expressly state that those in the appellant's particular circumstances are reasonably likely to have a warrant outstanding. However as observed by Green LJ (with whom Baker LJ and Moylan LJ agreed) in SB (Sri Lanka) v SSHD [2019] EWCA Civ 160 at [70]:

> "But Country Guidance must be applied with some degree of subtlety. By its nature it is "guidance"; and however valuable it cannot, and does not purport to, cover definitively every permutation of fact or circumstances which emerges. Each case must be assessed on its facts and sensibly against the Guidance."

Conclusion

25. I conclude that the risk category identified at (7)(d) of the headnote in GJ applies to the appellant and he faces a prospective risk of serious harm for reasons relating to a political opinion imputed to him.

26. Ms Profumo also relied upon the appellant additionally falling within the risk category identified at (7)(a) of the headnote by reference to more up to date material post-dating GJ. It is unnecessary to make any findings on this alternative submission, which in any event is due to be considered in an upcoming country guidance case on Sri Lanka.

Decision

27. I remake the decision by allowing the appellant's appeal on asylum grounds.

Signed: *UTJ Plimmer*

Ms M. Plimmer

Judge of the Upper Tribunal

Date:
10 June 2019