



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/03776/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 6 February 2019

Decision & Reasons Promulgated  
On 19 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

RMA  
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms C Bayati (for S Satha and Co)  
For the Respondent: Mr S Walker (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. This is the appeal of RMA, a citizen of Sri Lanka born 10 November 1993, against the decision of the First-tier Tribunal (Judge Birk) of 23 August 2018 dismissing his appeal, itself brought against the refusal of his asylum claim on 22 February 2018.
2. His asylum claim is summarised in the refusal letter thus. He was arrested in 2006 and detained for 1 or 2 days, beaten and accused of assisting the LTTE. He was forcibly recruited by LTTE and was responsible for collecting food and delivering it to front line troops, during which time he was injured by shrapnel. He was mistreated (including suffering sexual torture) in detention at St Joseph's camp from 16 May 2009 to 14 January 2013; he was released after his parents paid a bribe. He was arrested and

detained for 2 days by the CID on 15 March 2014. He suffered from PTSD and depression due to this ill treatment. He feared torture or death at the hands of the army if he returned to Sri Lanka.

3. The Appellant entered the UK on 21 June 2016, using a false passport supplied by an agent, and claimed asylum on 11 March 2017. His immigration history also recorded that he had applied unsuccessfully for a Tier 4 student visa, the application being refused on 12 September 2013.
4. The Respondent refused his asylum claim, on the basis that his account of past events was not credible and that in any event he was merely a low level activist.

*The hearing before the First-tier Tribunal*

5. In oral evidence he elaborated on his case, stating that from 2014 to 2016 he had avoided searches of the family home by the security forces, initially by staying elsewhere, but at some point by hiding under the bed. In the UK he had become involved with the TGTE on 27 November 2017; mixing with other TGTE members made him happy and relieved his mental stress. His UK-based brothers were not so involved. He only participated in demonstrations, and held no position beyond being a member. His father had been arrested and questioned about him in 2018; he did not know when he had been released though he had last spoken to him two weeks earlier.

*The First-tier Tribunal Decision*

6. The First-tier Tribunal noted the most recent medical report from Dr Dhumad, of July 2018, stating the Appellant was suffering from PTSD and severe depression for which he received medication and counselling, and that he had the capacity to attend the hearing and give evidence, albeit that he required breaks to assist him. Accordingly it was appropriate to proceed with regard to the Vulnerable Witness Practice Direction.
7. The First-tier Tribunal accepted much of the Appellant's account of past events including his forced involvement with the LTTE and the subsequent arrests, detention and ill treatment in Sri Lanka. The Dr Dhumad report suffered from the disadvantage of having postulated no alternative causation for the Appellant's presentation to that afforded by the Appellant's account. Dr Lawrence's report of November 2016 was more impressive, for its diagnosis of PTSD and severe secondary depression was made in the context of having considered that it was highly unlikely that the Appellant could have simulated his symptoms to the point of faking an entire syndrome. The Judge concluded that there was a good and strong likelihood that the Appellant had suffered severe trauma that went beyond simply having grown up in a war-torn area but also due to events that had befallen him personally. Furthermore his account was generally consistent when read in the context of the background country information, bearing in mind the photographs of him in combat gear and his cogent responses to the refusal letter.

8. However, the Tribunal did not accept the more modern aspects of the Appellant's asserted history. It was not credible that he was pursued in Sri Lanka for some two years after his release without being found, particularly given his assertion that he was able to evade searches by hiding under the bed. Furthermore
  - (a) Photographs allegedly showing his family being harassed by the police in 2018 were unreliable, given that they were not referenced in the statements of the Appellant of August 2018 statement or that of his father;
  - (b) The Appellant's father had written a letter referring to the CID continuously visiting the family home seeking information about the Appellant, but it was difficult to tally the assertions made with the chronology otherwise provided in the case.
9. The Appellant had not had any significant role in diaspora activities in the UK, merely attending demonstrations in November 2017 and February 2018; there was no evidence of activities with the TGTE extending beyond membership, and this was not enough to give him a sufficient profile to place him at risk, applying the Country Guidelines. There was no reliable evidence of adverse interest in him since his departure from Sri Lanka to raise a possibility of him being on a “stop” or “watch” list. Accordingly his international protection claim failed.
10. As to his mental health, whilst he required ongoing medication and psychiatric treatment, he lacked any clear plan to commit suicide and was not mentally unstable or fragile that he was unable to communicate. This did not reach the high threshold established by the authorities including *N v United Kingdom* (26565/05 [2008] ECHR 453) even having regard to the difficulty of locating and accessing psychological facilities in Sri Lanka referenced in *GJ* §454-456.
11. Grounds of appeal contended that the First-tier Tribunal had materially erred in law:
  - (a) In failing to take account of material evidence, including a statement from Attorney-at-Law Anton Punethanayagam who had recounted the Appellant's mother's attendance at his office seeking assistance in relation to the authorities' asserted continued harassment of the family, and had explained that his colleague's enquiries had confirmed that there *was* interest in the Appellant from the security forces; and a letter from the MP to whom complaint was said to have been made;
  - (b) In misunderstanding the Appellant's evidence, which was not that he had repeatedly avoided detection at home by hiding under the bed, but merely that he had generally stayed with a friend of his father following his release from detention, but that, at one time when he *was* at the family home, he avoided detection during a search: that search was not directed particularly at him, but followed the discovery of an arms cache at the house of a friend who had himself been detained;

(c) In failing to appreciate that the country evidence, as summarised by the Court of Appeal in *ME (Sri Lanka)*, showed that a post-conflict arrest necessitated the conclusion that its subject fell into the first of the risk categories identified in *GJ*;

(d) In failing to apply the appropriate test for a suicide risk case, which was whether A could access the necessary treatment for his mental health problems such as to avoid the risk of completed suicide, bearing in mind that he would be returning to the country where the mistreatment underlying his mental health problems occurred.

12. Although the First-tier Tribunal refused permission to appeal, the Upper Tribunal granted permission on 11 December 2018. Whilst recognising the force of the grounds of appeal relating to international protection, it stated that the Article 3 mental health ground lacked substance given the findings that the Appellant lacked any clear plan to commit suicide, given the family support he had in Sri Lanka.
13. Mr Walker for the Respondent accepted that the decision was inadequate for failing to take account of critical evidence. Ms Bayati emphasised that my disposal of appeal should consider preserving those positive findings made in the Appellant's favour given that the asserted errors in the grounds of appeal had not undermined the thinking behind them.

### **Findings and reasons**

14. This is an appeal where the Appellant's asylum claim had several strands to it. He potentially faced risks of harm because of:
  - (a) Firstly, his history of arrest and detention;
  - (b) Secondly, the asserted ongoing interest by the authorities in the period leading up to his departure from Sri Lanka;
  - (c) Thirdly, his activities in the UK.
15. The First-tier Tribunal accepted the facts relating to the first and third aspects, but rejected the veracity of the second. It concluded that those aspects of his claim that were accepted presented no real of persecution.
16. The headnote of *GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC)* sets out that the Sri Lankan government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. The categories of persons at real risk relevant here (leaving aside the cases of journalists and those associated with the Lessons Learned and Reconciliation Commission) were:

“(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.

...

(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.”

17. Given the stance of the parties, I can be brief in my reasons. The First Ground of appeal is particularly significant.
18. There was material evidence before the First-tier Tribunal that was ostensibly independent of the Appellant himself and thus potentially corroborated his asylum claim. The lawyer recorded a visit to his office by the Appellant's mother, and that she had given an account of visits from the security forces that was generally consistent with the evidence summarised above. His letter continued:

“I through my junior Attorney-at-law inquired about this and I was informed that [the Appellant] was arrested and end by the Sri Lankan authorities because now is in UK and involving in activities against the Sri Lankan Government there. Due to this reason they need more information about him and they are seeking for his arrest. Until they get history under their custody they will not stop their activities. This was informed to [the Appellant's mother] and I could not prevent activities of the government authorities at this stage.”

19. The sense, if not the syntax, of that letter is clear enough. It is patently evidence that might have caused the First-tier Tribunal to come to a different conclusion than that which it reached, given that it apparently emanates from the member of the legal profession. However it receives no mention in its decision. That represents a failure to take account of highly material evidence that could have had a bearing on the appeal's outcome.
20. It seems to me that that was such a significant failing as to demand the appeal's re-hearing. The relevance of the other asserted errors somewhat falls away given my conclusion, though they nevertheless have some force.
  - (a) The MP's letter was also overlooked, though it repeated the Appellant's family's claims rather than representing any independent investigation into them. It nevertheless has some evidential value, as one presumes that Members of Parliament do not lightly write on their constituents' behalf.
  - (b) It does seem that the First-tier Tribunal misunderstood the evidence before it as to the Appellant's ability to avoid detection at his family home: he was not there for a

lengthy period and the single raid where he avoided detection arose from a general search of the area rather than being an attempt to apprehend him as an individual.

21. Ms Bayati submitted that aspects of the First-tier Tribunal's findings should be preserved. Given that there is no challenge by the Secretary of State to the acceptance of the Appellant's past arrest and detention, and as the errors identified do not impact on that aspect of the Judge's reasoning, there is no reason for those findings to be revisited.
22. Two further points arise.
23. Firstly, in *UB (Sri Lanka)* [2017] EWCA Civ 85 the Court of Appeal set out Home Office policy guidance dated 28 August 2014, entitled "Tamil Separatism". The judgment records:

"12. Annexed to the guidance is the text of two letters from the British High Commission in Sri Lanka. This material is authoritative and clearly intended to be read with the guidance. The first letter is dated 16 April 2014:

**"Proscribed Terrorist Groups**

On 1 April 2014, the government of Sri Lanka announced the designation of 16 Tamil Diaspora organisations and 424 individuals under the UN Security Council resolution 1373 on counter-terrorism. The order was issued by the Secretary of Defence. The government asserts that this action has been taken to stop attempts to revive the LTTE. The BHC [i.e. British High Commission] has asked the government of Sri Lanka to provide evidence to support this decision.

Among the organisations proscribed are the Transnational Government of Tamil Eelam (TGTE) and the UK-based Global Tamil Forum (GTF) and British Tamil Forum (BTF). When making the announcement on 1 April, Brigadier Ruwan Wanigasooriya said that individuals belonging to these organisations would face arrest under anti-terrorism laws ... [T]o date, there have been no known arrests based on membership of one of the newly proscribed groups."

13. The later letter is dated 25 July 2014 and the relevant text reads:

"The spokesperson from the DIE stated that returnees may be questioned on arrival by immigration, CID, SIS and TID. They may be questioned about what they have been doing whilst out of Sri Lanka, including whether they have been involved with one of the Tamil Diaspora groups. He said that it was normal practice for returnees to be asked about their activities in the country they were returning from.

The spokesperson from the SIS said that people being "deported" will always be questioned about their overseas activities, including whether they have been involved with one of the proscribed organisations. He said that members of the organisations are not banned from returning to Sri Lanka, they are allowed to return, but will be questioned on arrival and may be detained."

24. Given that material it is apparent that even bare membership-level involvement with the TGTE may create some risk of interest from the Sri Lankan security forces.

Whether or not the situation remains as it was when that Guidance was issued will need to be considered on a re-hearing. Any risks arising from the Appellant's return to Sri Lanka must be assessed with this in mind. He cannot be expected to dissemble if he is questioned by the authorities.

25. Secondly, there is the question of the Appellant's mental health. The ground of appeal to the Upper Tribunal contesting the lawfulness of the First-tier Tribunal's approach to this issue was not granted permission to proceed. However, the matter does not necessarily end there, given that the First-tier Tribunal is under a statutory duty to assess matters as at the date of any future hearing. So if there is further evidence adduced relating to the Appellant's mental health, that *may* require that the issue be reopened.
26. Mental health claims arising from historic torture do not fall to be assessed only via Article 3 ECHR. Notably, the CJEU in *MP* [2018] EUECJ C-353/16 finds that where a torture victim still suffering the effects of torture is returning to a country where the national authorities do not meet their obligations to make appropriate reparation, and where their health problems would be significantly aggravated, they may have a viable claim for humanitarian protection. That decision may become relevant depending on the evidence before the First-tier Tribunal.
27. So in conclusion, the First-tier Tribunal erred in law. The matter must be re-heard. There is no reason to revisit the findings on the Appellant's past arrest and detention

Decision:

The decision of the First-tier Tribunal contains material errors of law.  
The appeal is allowed to the extent it is remitted for re-hearing before the First-tier Tribunal.

Anonymity Order

I make an anonymity order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure of any information or matter likely to lead members of the public to be able to identify the Appellant.



Signed:  
Deputy Upper Tribunal Judge Symes

Date: 6 February 2019