



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

Appeal Number: PA/09494/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 20th June 2019**

**Decision & Reasons Promulgated
On 12th July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

**M T
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Lewis, Counsel, instructed by Jein Solicitors

For the Respondent: Mr L Moore, Home Office Presenting Officer

DECISION AND REASONS

This is an appeal from the decision of Judge Gaskell to dismiss the Appellant's appeal from the decision by the Secretary of State to refuse his protection claim. I continue the anonymity direction that was made in the First-tier Tribunal

Background

The Respondent had refused an earlier protection claim on 11th January 2013. That claim had been based upon the Appellant's account of being detained and tortured by the Sri Lankan authorities by reason of his suspected involvement

with Tamil separatism. The Appellant's appeal against that refusal was dismissed by Judge Birkby in a decision promulgated on 17th April 2013. Judge Birkby had not found the Appellant to be a credible witness of truth and disbelieved his account of having been detained and tortured by the Sri Lankan authorities as a suspected Tamil separatist.

On 4th May 2018, the Appellant's representatives made further submissions. They submitted further evidence that had not been before Judge Birkby, including a further medical report in support of the Appellant's claim to have been tortured whilst in Sri Lanka and evidence of numerous sur place activities undertaken by the Appellant whilst in the UK in support of the Transnational Government of Tamil Eelam (TGTE). The Respondent considered the new evidence and accepted that it amounted to "a fresh claim" under paragraph 353 of the Immigration Rules, but nevertheless substantively refused it for reasons contained in an explanatory letter dated 18th December 2018. It is the dismissal of the appeal from that decision against which the Appellant now appeals to the Upper Tribunal, having been granted permission to do so by Upper Tribunal Judge Rintoul.

The First-tier Tribunal decision

Before considering the grounds, I shall set out the kernel of Judge Gaskell's decision, beginning at paragraph 47.

47. In my judgment, the two central questions which must be answered in this case are:
 - (a) Were the Appellant's activities in Sri Lanka before his departure such that upon his return he is likely to be arrested and interrogated?
 - (b) Are his activities within the UK such that he will have come to the adverse attention of the Sri Lankan authorities; and again, upon return is he likely to be arrested and interrogated.
48. If the answer to either of these questions is in the affirmative then, applying the guidance in GJ, I must inevitably conclude that, upon return to Sri Lanka, the Appellant would be at risk of further detention; further torture; and possibly death. If however, the Appellant's account is unreliable, and there is no basis to conclude that he is of any interest to the Sri Lankan authorities and he could safely return.
49. In my judgment, the answer to both of these questions is in the negative. I have applied the lower standard of proof and I am not persuaded that the Appellant is at risk on either basis.
50. The Appellant's account of what happened in Sri Lanka has already been found to be not credible. And, applying the principle in Devaseelan, I cannot depart from that finding absent new evidence which persuades me to do so. My judgment is that there is no such new evidence.

51. Throughout his evidence before me the Appellant speaks of *fleeing* from Sri Lanka in 2010: but this is misleading. The Appellant left Sri Lanka with a student visa issued in his own name. On the basis of what is known about the Sri Lankan authorities, he could not have departed the country without their knowledge; and, if the Appellant's account was true, he would have been apprehended at the airport.
52. In my judgment, this is a case where Section 8 of the 2004 Act comes fully into play: the Appellant was living in the UK for two years before making his application; he knew about immigration control because he had applied for the visa before coming to the UK and he knew that his visa was to expire in April 2012; rather than making an application to regularise his status in the UK after April 2012, or make an application for asylum, the Appellant departed the UK in March 2012 for Germany; he took no step to make an application for asylum until after his arrest by German immigration authorities.
53. As I have already indicated, whilst it is clear that the Appellant is active in a number of organisations supportive of the cause of Tamil separatism, he is not a leader or organiser. In my judgment, he does not have a profile which would have attracted the attention of the Sri Lankan authorities. The only element of the evidence which exists which, if believed, would support the proposition that he is known to the Sri Lankan authorities is the Appellant's account of a gunpoint threat made to his brother. However, I find this account to be not credible for the simple reason that, in my judgment, if such a threat had been made; and, if it was taken seriously, then quite simply the Appellant would have desisted in his public activities in the UK rather than place his brother's life at risk.
54. My judgment is that the Appellant is not in one of the at risk categories identified in Gj. For these reasons the appeal in respect of asylum; humanitarian protection; Article 2 ECHR; and those aspects of the Article 3 claim which relate to his likely treatment because of political activity are all dismissed.
55. Regarding the Appellant's current medical condition, and his claim that based on this his enforced return to Sri Lanka would breach his Article 3 ECHR rights, my judgment is, that, whilst he clearly has mental health problems, these appear to be related to anxiety about his immigration claims and his desire to remain in the UK. No evidence has been provided to me that appropriate medical care would not be available to him in Sri Lanka; and I do not find therefore that his medical condition is such that his return to Sri Lanka would breach his Article 3 rights.

The grant of permission to appeal

In granting permission to appeal, Upper Tribunal Judge Rintoul said as follows:

It is arguable that the judge's conclusion that the Appellant was not an organiser is contradictory. It also appears that at [46] the judge accepted that some of the Appellant's activities had been reported in Sri Lanka. In the light of the acceptance of his involvement with the TGTE, it is arguable

that these errors are material, KK (Sri Lanka) [2019] EWCA Civ 59 notwithstanding.

Permission is granted on all grounds, although there is very limited merit in the submission that Article 3 is engaged on account of mental ill health.

It is observed that the Appellant will need to explain the evidential basis for the submission at [16] that the Appellant will be questioned on return.

I should say at the outset that Mr Lewis did not pursue the ground concerning the risk to the Appellant's mental health on return under Article 3 of the Human Rights Convention. I shall not therefore consider this further.

Analysis

The kernel of the Grounds of Appeal appears at paragraphs 12 to 14 of the renewed application to the Upper Tribunal:

12. The judge dismissed the appeal and in doing so stated as follows: [para 45]

‘... but there was no evidence to show that the Appellant was the organiser of such events or campaigns.’

13. With respect, given that the judge had referred to a leader of the TGTE having attended the hearing and who described the Appellant as an ‘organiser’ in the preceding paragraph of the determination it is entirely unreasonable for the judge to assert that there was ‘no evidence’ to show that he had such a role. The judge then relied upon this finding to find that he does not have a ‘profile which would have attracted the attention of the Sri Lankan authorities’ [para 53]. Accordingly it is contended that the error in the assessment of the evidence was clearly material.
14. The judge then rejects the Appellant's account of his brother having been questioned and threatened on account of his role within the Diaspora solely on account of his finding that had the Appellant's brother received such a threat then he would have ceased his involvement [para 53]. The Appellant specifically addressed this and stated that he had continued in his activities on account of his belief that this was the only way to bring about change in Sri Lanka.

There can be little doubt that on the judge's own account of the evidence that he heard, it was factually incorrect to suggest that there had been no evidence that the Appellant was an “organiser” of events on behalf of the TGTE. Thus, at paragraph 44, he recites the evidence of the Deputy Minister of Sports and Community Heath for the TGTE as including a statement that, “... the appellant was a volunteer who has helped in organising several public events in the UK” and yet, at paragraph 46, the judge states, “... there was no evidence to show that the appellant was the organiser of such events ...”. It is clearly an error of law to make a finding that is unsupported by evidence or, worse, to make a finding that is incompatible with the evidence. The extent to which this error

was material to the outcome of the appeal (if at all) is considered at paragraphs 10 to 13, below.

I am less impressed by the complaint made about the judge's rejection of the Appellant's account of his brother being questioned and threatened by reason of his role within the diaspora. It seems to me to be implicit in the judge's finding that he rejected as implausible the Appellant's claim that he was willing to put his brother's life at risk for the greater cause of achieving change in Sri Lanka. I therefore find that the judge did not err in making that finding.

Reconsideration

I note that there is no challenge to the fact that Judge Gaskell followed and adopted the findings of Judge Birkby concerning the appellant's claim that he was detained and tortured by the Sri Lankan authorities by reason of his activities in support of Tamil separatism. I therefore preserve that aspect of the decision. Moreover, for the reasons I gave in the previous paragraph, I also preserve the finding concerning the Appellant's claim that his brother had been threatened in Sri Lanka by reason of his (the Appellant's) activities in the UK.

I conduct my assessment of the risk on return on the basis that the TGTE is a proscribed organisation in Sri Lanka. It follows that if there is a real risk that the Sri Lankan authorities either are or may become aware of the appellant's involvement as an organiser of TGTE events in the United Kingdom, he will be perceived as, "... a threat to the integrity of Sri Lanka as a single state because [he has or is perceived to have] a significant role in relation to post-conflict Tamil separatism within the diaspora" (see risk category 7(a) in GJ and others [2013] UKUT 00319 IAC).

Mr Lewis criticised the judge for failing to give weight to what were said to be press reports in Sri Lanka of the appellant's activities in the United Kingdom. He was however unable to point me to any translations of those reports confirming that this was what was in fact being reported in the newspaper articles contained within the appellant's bundles of documents.

Mr Lewis also criticised the judge for his dismissive characterisation of the events with which the appellant had been involved as, "innocuous". I consider that this criticism has some force, for whilst it is true that those events have seemingly innocuous titles (such as 'sports meet', 'keep Britain tidy', and 'blood donation campaign') it is equally true that the appellant made it clear that some of these events were held in order to commemorate the heroism of a particular Tamil military leader (see paragraph 50 of his witness statement, dated the 4th May 2019). I shall therefore take account of this in conducting my own assessment of the risk to the appellant on return.

I also have regard to the nature of the appellant's acts of organisation. Essentially, these have involved leading a team of volunteers in publicising events and acting as a uniformed marshal at them (see paragraph 50 of his witness statement, *infra*).

Given the above, I have no doubt that if the Sri Lankan authorities are or were to become aware of the Appellant's activities in the UK, then they would conclude that he had played a significant role in post-conflict separatism and thus to pose a risk to the unitary state. However, for the reasons I have given above, I am not satisfied that there is evidence to show that the Sri Lankan authorities are currently aware of these activities.

Concerning the evidence that the appellant would be questioned on return, Mr Lewis relied upon the Home Office guidance dated 28th August 2014 entitled, "Tamil Separatism". That guidance is cited at paragraphs 10 to 12 of the decision of the Court of Appeal in UB (Sri Lanka) [2017] EWCA Civ 85. In particular, Mr Lewis relied on a letter attached to that guidance, dated 25th July 2014, as quoted at paragraph 13:

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 spokesman 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.

Given this evidence, I have concluded that there is a real risk that the appellant would be questioned on return to Sri Lanka about his activities whilst in the United Kingdom. As he would be under no obligation to be untruthful about those activities, I conclude that there is a real risk that the appellant would at that stage be perceived as a threat to the unitary state of Sri Lanka and would consequently suffer ill-treatment amounting to persecution by reason of his political opinion.

Notice of Decision

The appeal from the First-tier Tribunal is allowed. The decision of the First-tier Tribunal to dismiss the appeal is set aside and is substituted by a decision to allow the appeal.

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 8 July 2019

Deputy Upper Tribunal Judge Kelly