



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

Appeal Number: PA/09634/2017

THE IMMIGRATION ACTS

Heard at Field House

On 9th January 2019

Decision & Reasons

Promulgated

On 29th January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**VINOTHAN [R]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Paramjorthy, Counsel

For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sri Lanka born on [~] 1986. The Appellant applied for asylum in the United Kingdom asking to be recognised as a refugee based on a claim to having a well-founded fear of persecution in Sri Lanka on the basis of his political opinion. The Appellant has previously had a fairly extensive immigration history having originally arrived in the UK on 3rd September 2010 on a visa for the purpose of study. His claim for asylum was based on a fear that if returned he would be perceived to have links to the LTTE. The Appellant's application was refused by Notice of Refusal dated 12th September 2017.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal O'Brien sitting at Birmingham on 5th July 2018. In a Decision and Reasons promulgated on 2nd August 2018 the Appellant's appeal was dismissed on protection grounds and on human rights grounds.
3. The Appellant lodged Grounds of Appeal to the Upper Tribunal on 17th September. That application for permission was refused by Judge of the First-tier Tribunal Adio on 4th September 2018. Renewed grounds were lodged to the Upper Tribunal on 24th September 2018. Those grounds contended firstly that there had been a failure by the judge to properly consider the case law, in particular *MP and NT (Sri Lanka) v SSHD [2014] EWCA Civ 829* in that it was submitted that the First-tier Tribunal Judge had failed to have any proper regard to the Appellant's evidence that his family were linked to the LTTE. Secondly, that the judge had failed to adequately assess the Appellant's sur place activities and that the judge had erred in law by failing to properly consider the leading authority of *GJ* in the light of the evidence. Thirdly, it was contended that there had been an error in the findings of credibility.
4. On 19th November 2018 in a very succinct grant of permission, Upper Tribunal Judge Chalkley concluded that the grounds were properly arguable. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by his instructed Counsel, Mr Paramjorthy. Mr Paramjorthy is extremely familiar with this matter. He appeared before the First-tier Tribunal and he is also the author of a document entitled "the Appellant's written submissions" which is effectively the Appellant's skeleton argument. The Secretary of State appears by her Home Office Presenting Officer, Mr Walker.

Submissions/Discussions

5. It is the first two Grounds of Appeal upon which Mr Paramjorthy predominantly relies, but in particular he indicates that the judge has failed to grasp the implications of the Appellant's sur place activities. He points out that those sur place activities postdate a previous decision by a Judge of the First-tier Tribunal and that the key issues to be considered were firstly that the Appellant continues to be involved with the TGTE which is a prescribed and therefore recognised as a terrorist organisation and to involve himself with significant post-war separatism, particularly by way of his involvement in his sur place activities. Secondly, that he would be perceived in this manner when returned to Sri Lanka, and to that extent there is reliance by Counsel upon the country guidance authority of *GJ*, particularly at paragraph 356(7A), and thirdly, that the Appellant would be asked questions as to what he has been doing in the UK and that he would not be in a position to lie or expected to lie about such activities and his TGTE involvement. To that extent Mr Paramjorthy refers me to Appendix C paragraphs 4 and 15 of *GJ* pointing out that that Appendix was in fact draughted by a Home Office representative and represents the Home Office's policy and stance.

6. He asked me to give due consideration to paragraphs 36 to 39 of the First-tier Judge's decision. Those paragraphs address the issue of the Appellant's sur place activities and at paragraph 39 the judge considers that the Appellant's involvement with the TGTE in sur place activities would appear to be a recent development and that this reinforces the impression that such activities are opportunistic to avoid a return to Sri Lanka.
7. Mr Paramjorthy does not seek to challenge such a finding. He indicates that the problem is to be found specifically in paragraph 41 of the judge's decision. It is worth specifically referring to that paragraph:-

“41. It might be that the Appellant's circumstances are such that he might appear on a 'watch' list. However, I am entirely satisfied that the Appellant is an opportunist and that he would not continue any Tamil activism upon return to Sri Lanka. Therefore, he would not be at real risk of persecution or serious harm.”
8. It is the submission made by Mr Paramjorthy that the judge has misapplied the core questions in *GJ*, in particular as to whether or not the Appellant would be perceived as a Tamil separatist. He accepts that he might be considered an opportunist and that it may well be arguable that his attendance was tactical in attending sur place activities, but there has been a demonstrable failure to engage with his involvement with what is accepted as a prescribed terrorist organisation and the implications of what would happen to him on return, and particularly to how he would be dealt with by the authorities at the airport.
9. Mr Paramjorthy reminds me that the TGTE is banned in Sri Lanka, so the Appellant would not be in a position to continue sur place activities if returned, but that the judge has dispensed with considering the risk posed by being involved with the TGTE in the UK purely by stating that his actions are opportunist. He indicates that he considers that the manner in which the judge has assessed the risk is wrong and that the judge has failed to address the important questions that would be posed to the Appellant on his return. He further points out that there were certain factual findings made with regard to letters produced by the TGTE as to the support given by the Appellant and a letter from his father, none of which are actually challenged by the judge, or indeed by the Secretary of State which give support to the submissions made in support of the Appellant's appeal.
10. Secondly, it is submitted that the judge has inadequately dealt with the Appellant's psychiatric problems. These are addressed at paragraph 34 of the judge's decision and the judge has concluded that he is not persuaded that the Appellant suffers from PTSD and to the extent that he suffers from severe depression that is not unique among failed asylum seekers. Mr Paramjorthy takes me to his skeleton argument and points out that it is accepted to a certain extent that the Appellant has psychiatric problems and he points out that there is grave concern as to someone who has psychiatric problems as to how he would relate and how he would cope

with being questioned at the airport. He submits that the judge has failed to address this and this in itself constitutes a material error of law.

11. I am considerably assisted by the submissions made thereafter by Mr Walker. Mr Walker acknowledges that paragraph 41 is unfortunately drafted (to use his words) and it does give credence to the Appellant's involvement in Tamil activism and that the paragraph is not well-reasoned and fails to give reasoned findings merely relying on a conclusion of opportunism. He concedes that taken together with the failure to give due and proper consideration to the psychiatric report, that the decision is unsafe and contains material error of law. Both advocates asked me to remit the appeal for rehearing.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

14. The manner in which this has been addressed by the advocates before me has been of considerable assistance to me. Mr Paramjorthy has addressed the principle problems that the decision highlights and points out that the judge may well not have been wrong in drawing a conclusion that the Appellant has been opportunist in attending the activities of the TGTE by way of attending sur place activities in the UK. That in itself, however, does not suffice to defeat the claim. The judge has failed at paragraph 41 to make reasoned findings that accord with the perceived manner in which the Appellant would be considered on return to Sri Lanka as set out in the

guidance given within *GJ* and as to the questions that he will be asked at the airport and the manner in which he would be expected to address them. It is insufficient merely to state that he is opportunistic. Further, the judge has failed to give credence to the factual acceptance of certain parts of the evidence, i.e. the production of the letter from the Appellant's father and from the TGTE, albeit that the weight that could be given to those letters is one that the judge was perfectly entitled to make.

15. In addition, the judge has failed to give due and full consideration as Mr Walker points out to the psychiatric evidence, and for all these reasons the decision is unsafe. That is not to say that on a rehearing of the matter that another judge fully reasoning the arguments put before him may not come to exactly the same conclusion as the original judge. What is important however is that the issues that would face the Appellant are fully aired and given due consideration leading to findings by the judge.

Notice of Decision

16. The decision of the First-tier Tribunal Judge contains material errors of law and is set aside.
17. Directions are given hereinafter for the rehearing of this matter:-
 - (1) On finding that there are material errors of law in the decision of the First-tier Tribunal Judge the decision of the First-tier Tribunal is set aside and the matter is remitted to the First-tier sitting at Birmingham on the first available date 28 days hence.
 - (2) That the rehearing of this matter is to be before any Judge of the First-tier Tribunal other than Immigration Judges Norton-Taylor and Immigration Judge O'Brien.
 - (3) That none of the findings of fact are to stand.
 - (4) That the estimated length of hearing is three hours.
 - (5) That there be leave to either party to file and serve a bundle of up-to-date subjective and/or objective evidence upon which they seek to rely at least seven days prior to the restored hearing date.
 - (6) That a Tamil interpreter do attend the restored hearing.
 - (7) No anonymity direction is made.

Signed

Date 24th January 2019

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date 24th January 2019

Deputy Upper Tribunal Judge D N Harris