Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13018/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 May 2019	**On 10 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

S K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Tobin, Counsel
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with the permission of the Upper Tribunal against a decision of Judge of the First-tier Tribunal Courtney dismissing his appeal against a decision of the respondent, dated 2 November 2018, refusing his protection claim.

2. The appellant is an adult Sri Lankan national of Tamil ethnicity. He arrived in the UK on 9 May 2018 and claimed asylum. The appellant's account was, in summary, as follows. In August 2006 he was forcibly recruited into the LTTE. He received three months' training. He was then placed in an infantry unit and sent

© CROWN COPYRIGHT 2019

to fight in Mannar. After one day he was pulled back from the front line and injured in a shell attack whilst taking food to an officer. After a week in hospital he was assigned duties as a walkie-talkie operator passing on messages. The appellant continued in this post for the next two years. Orders were received to relocate to Valayanmadam and it was realised they would have to pass through an army-controlled area. The appellant was given a pass to go to a distribution centre to collect food. Instead of returning to the camp, he went to nearby Mathalan and join his mother.

3. In April 2009 the appellant and his mother entered the army-controlled area with the appellant passing as a civilian. However, he was stopped, interrogated and beaten. He denied being in the LTTE and refused to give his name. He and his mother were taken to a camp in Cheddikuliam where they remained for six months. After that time a cousin in Vavuniya managed to get them released and, in 2010, they were permitted to return to Puthukudiyiruppu.

4. The appellant had no further problems until October 2013 when he was abducted by in a van whom he believes to have been CID and army personnel. He recognised one of the occupants of the van as an LTTE member. They were taken for questioning and the appellant admitted he was a member of the LTTE. He was asked about where the LTTE's weapons were. He said he did not know and he was kicked and beaten. He was detained for two and half years in a building in the jungle during which time he was questioned and tortured. On 11 March 2016 someone took him out of his cell to a waiting van driven by army personnel. He was taken to Wattala where his uncle explained he had secured his release by the payment of a bribe.

5. The appellant said the CID and police have visited his parents and cousin searching for him. On 12 May 2016, the appellant returned to Puthukudiyiruppu to get married. The police found out and searched for him. The next day the appellant left for Point Pedro where he remained for five months, keeping a low profile. He then returned to Wattala to the house of an agent, who obtained a passport for him. He left Sri Lanka by air on 28 February 2017. He was escorted through security by an officer associated with the agent.

6. Since his departure from Sri Lanka, CID officers have been visiting both his house and that of his father-in-law enquiring about his whereabouts. The family have been threatened. The appellant has been active in the TGTE, attending demonstrations as a result of which his photograph has appeared in the media.

7. The respondent rejected the appellant's claim. His account of spending time in the LTTE was considered both inconsistent and contradictory. It was rejected. The respondent also considered there were inconsistencies in the appellant's account of his problems with the authorities and these were also rejected.

8. The appellant appealed on protection grounds. His appeal was heard by Judge Courtney on 12 December 2018 and dismissed on all grounds in a decision promulgated on 11 January 2013.

9. In a lengthy, detailed and carefully constructed decision, the judge found that she was satisfied on the lower standard of proof that the appellant was forcibly recruited to the LTTE in August 2006 and that he was detained from October 2013 until March 2016 when he was released on payment of a bribe. She accepted that, during his detention, the appellant was physically abused. She noted he has scarring and he suffers from PTSD as a result of his experiences. However, she found there was no reliable evidence that there was a court order or arrest warrant which would result in the appellant's name appearing on a computerised "stop" list at the airport. She accepted the appellant had spent a short time in London, which was a diaspora hotspot, and that he has attended a small number of demonstrations.

10. In relation to the appellant's sur place activities, the judge accepted he was a member of the TGTE but did not accept that, being a member for some six months without playing any significant role in the organisation would bring him to the adverse attention of the Sri Lankan authorities. Nor did she accept that enquiries had been made with the appellant's family in the wake of his departure from Sri Lanka. She dismissed the protection claim on the basis that the appellant would not be perceived to be a destabilising threat in post-conflict Sri Lanka.

11. The judge gave separate consideration to the appellant's mental health. There was medical evidence suggesting the appellant's suicide risk was moderate but the judge noted the absence of any history of attempted suicide and considered the presence of his wife and family in Sri Lanka would be a protective factor. The judge noted the appellant had been prescribed mirtazapine, an antidepressant, and that he was receiving counselling.

12. The appellant applied for permission to appeal which was refused in the first instance by the First-tier Tribunal.

13. The renewed grounds seeking permission to appeal made a number of challenges to Judge Courtney's decision.

14. Firstly, the judge failed to consider the impact of the appellant's past persecution by reference to paragraph 339K of the Immigration Rules. The appellant had been detained in post-conflict Sri Lanka for almost 2½ years at a time when the focus of the authorities was on those they perceived to be seeking to destabilise the integrity of Sri Lanka.

15. Secondly, the judge misdirected herself in law in rejecting the appellant's claim that the authorities had visited his house enquiring about his whereabouts. She should not have required corroboration and, given the fact that the appellant had

been released informally, the judge was required to assess the claim in the context of the background evidence.

16. Thirdly, the judge made errors when assessing whether the appellant's name was likely to be on the "stop" list. Country guidance showed that an informal release was likely to be treated as an escape such that absconder action would be taken.

17. Fourthly, the judge's assessment of whether the appellant would be viewed as a destabilising influence on return to Sri Lanka by reference to his activities in the UK was flawed. The appellant will be questioned on arrival and cannot be expected to lie in order to avoid the consequences of his membership of the TGTE, which is a proscribed organisation.

18. Fifthly and finally, the judge erred in her assessment of the mental health claim with particular reference to the risk of suicide. The judge failed to address the central issue which was whether the appellant had the means or capacity to access any treatment which was available in Sri Lanka so as to avoid the risk of suicide.

19. Granting permission to appeal, Upper Tribunal Judge Kebede found arguable merit in the argument that the judge's assessment of the risk on return was flawed owing to a failure to consider the fact the appellant had been detained for 2½ years in post-conflict Sri Lanka and to take that into account when considering his diaspora activities. She found little arguable merit in the ground challenging the judge's findings on article 3 but did not exclude it. All grounds could be argued.

20. No rule 24 response has been filed by the respondent.

21. I heard submissions from the representatives as to whether the First-tier Tribunal Judge made an error of law in her decision.

22. Ms Tobin's submissions largely followed the grounds which were drafted by her colleague. She argued the judge's assessment of the risk to the appellant on return was flawed because she failed to give weight to the relevance of the appellant's past persecution in the context that he had been detained after the end of the civil war. At the time he was detained he fell within the risk categories described in *GJ and Others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC). As such, the judge's finding that the appellant as not at risk on return was not in accordance with country guidance. She relied heavily on the Court of Appeal's judgment in *ME (Sri Lanka) v SSHD* [2018] EWCA Civ 1486, although this case does not appear to have been cited to the judge.

23. Ms Tobin argued there was a further failure to follow country guidance with respect to the judge's consideration of the nature of the appellant's release. Had

she done so she would have come to a different conclusion as to whether the appellant would be on the "stop" list or a watch list.

24. Ms Tobin argued that, coupled with his adverse history, the appellant's sur place activities with the TGTE would have placed him at risk.

25. Ms Everett agreed that, in line with *ME*, an "exceptionally strong case" would be needed before it could be concluded that the appellant would not be at risk on return. However, she argued the judge's assessment was sufficient to show that was the case. She argued the judge had been entitled to reach the conclusions she reached on the appellant's sur place activities.

26. I have carefully considered the submissions. Having done so I am forced to the conclusion that the judge's decision is erroneous in law and should be set aside, albeit her findings of fact can be preserved. My reasons are as follows.

27. As noted, the judge made many positive findings of fact and accepted the majority of the appellant's account, including the salient points that he was a former member of the LTTE and he had been detained for 2½ years between October 2013 and March 2016, when he was released on payment of a bribe. The judge accepted he was tortured during his detention. She also accepted his activities with the TGTE.

28. The judge followed the guidance in *GJ & Ors* scrupulously and noted that the appellant's past activities are likely to be regarded as indicative of present sympathies. However, she reasoned that the authorities would no longer hold an adverse interest in the appellant because the government's concern was now whether a person is a destabilising threat in post-conflict Sri Lanka.

29. That is all legally correct. However, in *ME*, a case in which the appellant had been a member of the LTTE and had been detained in December 2014 for questioning about the LTTE's weapons caches during which time he was beaten, the Court of Appeal found the judge had erred in concluding the appellant would no longer be of interest. Lewison LJ said:

> "16. The following are, in my judgment, the pertinent points. ME's arrest took place long after the cessation of the conflict in Sri Lanka. That led (or ought to have led) to the conclusion that he was perceived at that time as being of significant interest to the authorities. He was therefore a person who had fallen into category (a) of the risk categories identified in *GJ*. It would have needed an exceptionally strong case to persuade the FTT that he had now ceased to be at risk. The mere fact that he was released without charge and without reporting restrictions was not enough, because the authorities not only made two subsequent visits to his home; but they also searched it. The conclusion that should be drawn from that is that ME was still a person of significant interest; and moreover, that the authorities perceived that he might have more to tell them. Mr Jolliffe, in support of the FTT's decision, submitted that ME was no longer a person of interest because the authorities had got what they

> wanted from him. But that does not explain why, having obtained the information from ME about the location of one arms cache, the authorities nevertheless twice visited his home and searched it. Thus, the FTT was right to proceed on the basis that there was a real risk that the authorities would wish to question him further.
>
> 17. What, then, persuaded the FTT that there was no real risk of the questioning taking place in detention? It seems to me that the FTT's conclusion is founded on its perception that ME had passed on the information that he had; and that if he had any more he would be willing to give it over. The parenthesis in [39] is not a finding that ME had no more information. Rather it is a finding that he is willing to give over such information as he has. ME may be truthful in saying that if he has any further information he will hand it over; and the FTT was no doubt justified in believing him. But that is not, in my judgment, a complete answer. The real question is whether the Sri Lankan authorities would believe him; or perhaps to put it more accurately whether there was a real risk that they would not. The FTT's finding could only be a complete answer if the FTT could have been satisfied that the Sri Lankan authorities would accept at face value, and without further beating or detention, the completeness of any further revelation that ME might make. The FTT does not confront that question. As Ms Jegarajah submitted, those who torture others do so for a variety of reasons, not all of them rational. The authorities had already had some success in extracting information from ME after beating him; which shows that at least at that time they did not accept his account at face value. What had changed in the conduct of the Sri Lankan authorities? The FTT did not explain this. Where, as here, a person has been tortured for alleged participation in political crimes a heightened degree of scrutiny is required: *R (Sivakumar) v Secretary of State for the Home Department* [2003] UKHL 14, [2003] 1 WLR 840 at [16]."

30. As already noted, Ms Everett accepted the test was whether there was an exceptionally strong case so as to find the authorities would no longer have any interest in the appellant notwithstanding the fact they clearly did so long after the end of the civil war.

31. In fairness to the judge, it does not appear that *ME* was cited to her by counsel appearing on behalf of the appellant. It was not mentioned in his skeleton argument. However, the case did not change the law; it simply illustrated how *GJ & Ors* should be applied in circumstances that there had been past persecution some years after the conflict ended. The error by the judge was to read paragraphs 365(2) and (3) of *GJ & Ors*, which as the judge noted was approved by the Court of Appeal in *MP (Sri Lanka) & Anr* [2014] EWCA Civ 829, as if the end of the conflict meant that post-conflict detention was not a strong indicator of adverse interest and therefore future risk.

32. I have noted the judge rejected the appellant's evidence of the authorities visiting his home after he had fled Sri Lanka. The safety of this finding was also the subject of challenge by Ms Tobin. However, I do not find any error on this matter to make any difference. Even without that particular finding, the appellant was entitled to much greater weight being given to the fact he was detained for 2½ years until March 2016, some seven years after the end of the conflict.

33. The second error which I find material to the outcome of the appeal concerns the issue of the appellant's release. The judge noted this had been achieved "informally" through the payment of a bribe. She reasoned that his release had taken place 2½ years earlier and that there was no reliable evidence of a court order or arrest warrant so as to lead to the appellant appearing on the "stop" list.

34. However, in *GJ & Ors*, the Upper Tribunal heard evidence from Mr Anton Punethanayagam, a barrister who has practised at the Sri Lankan Bar in both Colombo and Vavuniya. The judge refers to his evidence, which was accepted by the Upper Tribunal. At paragraph 146 of *GJ & Ors*, the following is recorded:

> "Approximately thirty of Mr Punethanayagam's 3,000 clients had contacted him after having left Sri Lanka when of adverse interest, using bribery. He did not say when that had occurred. Information from Mr Punethanayagam's client database about the use of bribery was as follows:
>
> > "26. …The paramilitary groups, working alongside the SLA, assist the escape of detainees in order to extort money. In my practice, I have come across several cases where the families use bribery as a last resort to secure the release of a detainee with the assistance of members of the security forces or paramilitary groups.
> >
> > 27. The bribery is very common in the IDP camps as well as the detention centers from which even known LTTE leaders have managed to escape on payment of bribes. Hence it cannot be argued that only people of low interest to the authorities are able to secure their release through a bribe. In my opinion, it is plausible that the detainee was released following the payment of a bribe, even if of significant adverse interest to the authorities. It is unlikely that the person who accepts the bribe would access the detainee's record and change them as released or no longer wanted. Hence such cases would normally be recorded as escaped from detention in the database of the Police. Subsequently an absconder action will be commenced and the detainee's details would be passed to the National Intelligence Bureau.
> >
> > 28. It is possible to leave the country using bribery with the help of an agent. The security officers and immigration officers at the international airport are no exception to the widespread bribery and corruption in Sri Lanka. It is always possible for a person to use influence or bribery to get through the airport without being detained as an LTTE suspect. I have been contacted by approximately 30 clients who managed to flee the country via the international airport whilst in the adverse interest of the authorities and I provided evidence in their asylum cases in the UK, Canada, France, Norway and Australia. Therefore leaving through the airport either with his/her own passport or false identity does not necessarily indicate a lack of interest on the part of the authorities."
> >
> > The witness' opinion that absconder action would be commenced after a person was released on payment of a bribe is not sourced."

35. At paragraph 275, the Upper Tribunal said this:

> "Mr Anton Punethanayagam's evidence is that of a practitioner who has dealt with 3000 cases of detainees, in Colombo and Vavuniya. His evidence on the process of bribery was particularly useful. We did not have the opportunity of hearing him give oral evidence, and some of his evidence goes beyond what he can be taken to know himself but where his evidence concerns the criminal processes in Sri Lanka, we consider that it is useful and reliable. We take particular account of his view that the seriousness of any charges against an individual are not determinative of whether a bribe can be paid, and that it is possible to leave through the airport even when a person is being actively sought."

36. It follows from this that the country guidance in *GJ & Ors* should be read as meaning that an informal release through the payment of a bribe would be officially recorded as an escape such that absconder action might be taken. This should have been considered by the judge and, had she done so, the outcome of the appeal might have been different, particularly when the previous point about the seriousness of the adverse interest in the appellant demonstrated by his past persecution is factored in.

37. It is not necessary to consider the other three grounds raised by Ms Tobin.

38. Having decided to set aside the appeal, I see no reason to deprive the appellant of any of the positive findings made by Judge Courtney and I shall re-make the decision accordingly.

39. It follows from the preceding discussion that I regard the fact that the appellant was detained when he was and for how long he was as being a strong indicator of significant adverse interest which is reasonably likely to have remained notwithstanding the change of focus since the end of the conflict. As late as 2016 the appellant was regarded as a threat to security.

40. Furthermore, the fact the appellant's release would be recorded as an escape is at least a matter which is going to lead to his name being on the watch-list. This, according to *GJ & Ors*, would not lead to his detention at the airport but he would be subjected to monitoring on return to his home area. Whether monitoring by the security services will lead to his detention will depend on any diaspora activities he has undertaken.

41. In this case it has been found that the appellant is a member of the TGTE.

42. In *UB (Sri Lanka) v SSHD* [2017] EWCA Civ 85 the Court of Appeal considered the duty of the respondent to have disclosed to the tribunal her own policy guidance document (a COI report entitled *Tamil Separatism*, issued on 28 August 2014), to which were annexed letters from the British High Commission in Sri Lanka. Those letters stated that the TGTE was a proscribed organisation and that government sources had stated that individuals belonging to that organisation would face arrest under anti-terrorism laws. There had been no arrests to date but returnees may be questioned on arrival about involvement with such diaspora

groups. This was "normal practice". A returnee may be detained after questioning.

43. The issue in this appeal is the consequence for the appellant of being questioned about his diaspora activities and, specifically, his activities with a proscribed organisation which expressly seeks Tamil independence. He could not be expected to lie when questioned (*RT (Zimbabwe)* [2012] UKSC 38).

44. On my reading of the case, it is plain that the court indicated that mere membership of the TGTE was not always enough to show a real risk on return, despite the fact one would imagine that membership of a proscribed organisation would ordinarily lead to prosecution.

45. I find that the appellant's past experiences of detention point strongly towards the authorities maintaining an interest in him which would only be heightened as a result of his being recorded as an escapee and by any admissions he makes about joining the TGTE in the UK. The appellant has established substantial grounds showing he is at a real risk of further ill-treatment on return to Sri Lanka.

46. The appellant's appeal is allowed on protection grounds. I do not need to consider the article 3 ground separately.

47. The anonymity direction made by the First-tier Tribunal is continued.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and her decision dismissing the appeal is set aside. The following decision is substituted:

The appeal is allowed on protection grounds.

Signed Date 8 May 2019

Deputy Upper Tribunal Judge Froom