Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05393/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 January 2020	**On 31 January 2020**

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE FINCH

Between

R N
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Wass, instructed by David Benson Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of a Judge of the First-tier Tribunal who dismissed his appeal against the respondent's decision of 8 May 2019 refusing his application for asylum and/or humanitarian protection in the United Kingdom.

2. The judge set out the appellant's immigration history. He has been in the United Kingdom since December 2001. He applied for asylum in January

2002. That application was refused in February 2002 and a subsequent appeal was dismissed in June of that year.

3. The judge in the appeal before us noted that the first judge (as we shall hereafter refer to the judge who heard the appeal in 2002) accepted that the appellant had been involved with both the army and the LTTE in the North and there was a real risk that if he was returned to his home area, one side or the other would be suspicious and would take steps to find out where he had been and that such enquiries might involve ill-treatment such as to be persecutory. The first judge, however, found that the appellant would not be at risk if he returned to Colombo. When released by the army he had not been made the subject of a reporting condition, which strongly suggested that they had no ongoing interest in him. His claim which had been accepted was that he had been forced to fight for the LTTE and had been wounded in action. When they asked him to serve with them again he left the area and went to live with his uncle. When he tried to obtain a pass to live in the area where his uncle lived he was arrested and tortured because the army believed that he was a member of the LTTE. He was released after five months when his uncle paid a bribe to a member of the EPDP. He described his release as “unofficial”. After his release he travelled to Colombo and left Sri Lanka on 24 November 2001.

4. The first judge did not accept the appellant’s claim that the LTTE had been to his home looking for him, nor did he accept that the scarring on the appellant’s body would cause the authorities to become suspicious that he had been involved in fighting on behalf of the LTTE. He also did not accept the appellant’s claim to have lost a finger as a result of a gunshot. He said that nothing about the appellant’s physical presentation suggested that his finger had been lost as a result of a gunshot wound and as he was a farmer and drove a tractor it was far more likely that he had lost a finger as a result of injuries sustained at work.

5. The first judge accepted that the appellant had subjective fears of return to Sri Lanka but concluded that his psychological state was not sufficiently serious to make relocation unduly harsh. There was a medical report which referred to some features of PTSD and moderate depression and anxiety.

6. The appellant became appeal rights exhausted on 31 July 2002. An application was made on his behalf in July 2009 for consideration under the Legacy Scheme. The application was refused in March 2011 and a subsequent application purporting to be a fresh claim was refused as not amounting to a fresh claim, in December 2012. Further representations were made subsequently and in a decision of 22 November 2017 further submissions made on 8 February 2012 were rejected on the basis that they did not amount to a fresh claim. A further application was made which led to the decision which is the subject of this appeal.

7. The judge accepted that Dr Sinha, who had provided a medical report on behalf of the appellant, had sufficient expertise to give an opinion on scarring and also on mental health issues. Dr Sinha had been provided with a medical report of Dr Taghipour which had been before the first judge. The judge, however, did not have a copy of Dr Taghipour's report. Dr Sinha also referred to the Rule 35 medical assessment which the appellant underwent in November 2017. The judge commented that he did not have that report either, although earlier in his decision he had noted the existence of that report as part of the documentary evidence before him.

8. The judge noted the findings of the First-tier Judge including that the appellant had been tortured by the army in Sri Lanka and would be at risk in his home area. He noted, however, that since that judge's decision the situation in Sri Lanka had changed and the LTTE had been defeated and would not pose a threat to the appellant, and risk had to be assessed on the basis of the country guidance in GJ [2013] UKUT 00319. The judge observed that individuals at risk were those whom the government considered to be a threat to the unity of the Sri Lankan state and that the appellant's low level involvement with the LTTE was not consistent with this categorisation and therefore not consistent with his claim to be of continuing interest to the authorities.

9. The appellant had provided a lot of photographs showing him engaged in TGRTE activities. The judge commented that it was not apparent from the photographs themselves when they were taken. According to the annotations next to them, the majority were taken in 2018 and 2019. There were, however, pictures said to have been taken at a protest in Chiswick in 2013, Remembrance Day events in 2014 and 2015, a TGTE sports day in 2015, other events in 2013 and 2015, a protest in front of the Australian High Commission in 2014 and another photograph where the appellant posed with a singer of the LTTE in 2015.

10. The judge commented that there was no photographic or other cogent evidence of activity between 2009 and 2014 and that the evidence of activity between 2014 and 2018 was very limited. He considered that the photographs of these activities did not in themselves provide cogent evidence that the appellant would have come to the attention of the authorities. The judge said that, however, he took into account that the appellant claimed these were just samples of his wider activities.

11. The judge observed that the appellant had provided a lot of photographic evidence showing he had attended numerous protests/events since 2018. He considered that this was consistent with the appellant only becoming very active since 2018, shortly after his removal from the UK was stayed and the respondent was reconsidering his application for asylum.

12. The judge accepted that the photographic evidence showed that the appellant had attended a number of events, particularly in the last two

years, but observed that he was just one of many attendees at these events and nothing in the photographs suggested that he in particular would come to the attention of the intelligence services of the Sri Lankan authorities. The judge noted what had been said by the Court of Appeal in KK [2019] EWCA Civ 55 that the activities of individuals participating in Tamil events and helping the TGTE by organising meetings, rallies and political campaigns and attending weekly meetings at the TGTE offices could not be considered significant enough to put them at risk on return to Sri Lanka because they did not play a "senior role" in the Tamil separatist diaspora. The judge took into account the fact that the Sri Lankan authorities use sophisticated surveillance techniques to monitor anti-government diaspora activity and that such groups were likely to be infiltrated by government agents and informants but that it was clear that the focus was on identifying leaders and not helpers or participants.

13. The judge noted also that although the appellant claimed to have been a TGTE activist since 2014 the TGTE membership card he produced was only issued in 2019. On balance, he found that the appellant had not shown that he was a leader or a senior figure in the TGTE or the Tamil diaspora. As a consequence, he did not find the appellant's attendance at protests and events would have resulted in the authorities in Sri Lanka identifying him as an individual likely to pose a threat to the unitary Sri Lankan state and that his anti-government activities in the United Kingdom would not have brought him to the adverse attention of the authorities in Sri Lanka.

14. The judge went on to note discrepancies in the appellant's evidence on such matters as whether he had attended two cricket matches to protest and whether he had joined the BTF. In the former case, he had at one stage said he attended protests at two matches but then said he only attended one protest, and as regards the latter, he had said he had not joined the BTF until 2009 but the letter from the BTF said he had joined in June 2014. The judge also noted that the appellant said he had always been a strong supporter of the Tamil cause, yet in his screening interview he said the LTTE had been harassing him to help them since 1994. Looking at the evidence as a whole, the judge did not find the appellant had shown his participation in anti-government activities in the United Kingdom had been due to a genuine belief in the Tamil cause rather than part of his overall strategy to avoid removal from the United Kingdom.

15. The judge went on to comment on the evidence of Dr Sinha, noting a confusion between scarring on the appellant's leg and his shoulder and the fact that part of one paragraph appeared to refer to a different appellant. The judge noted that Dr Sinha accepted the appellant's account that the finger he was missing had had to be amputated because of a bullet wound. The judge found that at any event the injury was not of itself likely to bring the appellant to the adverse attention of the authorities. Nor did he accept that the remainder of the appellant's scars would in themselves lead to his detention and mistreatment. Dr Sinha had said that some of the appellant's scarring was not covered in the report of

Dr Taghipour and disagreed with some of Dr Taghipour's conclusions but had not said which scars or what conclusions these were and the judge commented that it seemed unlikely that the scars that were not mentioned would be ones that resulted from the major injuries the appellant claimed to have suffered such as when he said he was shot. Also, Dr Sinha had not made clear whether the scars he said were highly consistent with being shot could also have been caused by shrapnel wounds and the appellant had referred in his screening interview to his village being frequently shelled and bombed. The judge commented that looking at the evidence overall, he did not find the appellant's scars would in themselves bring him to the adverse attention of the authorities. He accepted that the appellant was living with mental health problems related to his fear of return, his desire to remain in the United Kingdom and the repeated failure of his attempts to remain. He considered that the appellant would be able to be supported by his aunt in Sri Lanka with whom he was in touch.

16. The judge did not consider that the appellant would be unfit to answer questions if questioned at the airport. If he were questioned it was likely he would be asked if he had engaged in anti-government activities in the United Kingdom. The judge noted that he had not found that the appellant's diaspora activities, whether organised by the BTF, TGTE or otherwise were motivated by political convictions or anything other than a desire to remain in the United Kingdom or perhaps socialise with his fellow countrymen. He did not consider that the appeal should be allowed on the basis of membership of the TGTE or because he would have to lie about his membership of that organisation and/or the BTF and/or diaspora activities if questioned by the authorities on return. The authorities in Sri Lanka were only interested in those who were genuinely committed to the Tamil separatist cause and it was reasonable to imply the word "genuine" into any question asked by the Sri Lankan authorities about an individual's involvement in Tamil separatist affiliations and/or activities. The judge found that non-disclosure of attendance at Tamil diaspora events or TGTE membership for what were really non-political purposes would amount to a lie. On return to Sri Lanka the appellant would not have any moral or other obligation to disclose to the authorities details of what were effectively non-political activities and it was reasonable to expect him not to feel obliged to disclose details of activities that were not undertaken for genuine motives. Thus, he had not shown that he was at any real risk of mistreatment or harm on return to Sri Lanka. The appeal was dismissed on asylum and humanitarian protection grounds and also in respect of Article 8 of the Human Rights Convention.

17. The appellant sought and was granted permission to appeal on the basis first that the judge had erred in his consideration of the evidence, in that in fact the Rule 35 report of Dr Sinha had been before him and Dr Sinha's evidence had not been given the weight it deserved. Secondly, it was argued that the judge had reached irrational conclusions with regard to the appellant's disclosure obligations on return and thirdly that he had

erred in his consideration of risk on return. Permission was granted on all grounds.

18. Ms Wass developed the points made in the grounds in oral submissions.

19. First, there was the point concerning the Rule 35 report. The judge's error in this regard was relevant because he had gone on to critique Dr Sinha's findings, finding that the scars would not lead to detention and mistreatment. This referred back to the critique concerning the consistency of the scars that was relevant to the Rule 35 report. It was relevant to the issue of looking at the evidence as a whole. There were the previous credibility findings by the first judge, but other findings also with regard to the diaspora and findings predicated upon what was said to be missing from Dr Sinha's report.

20. The second element of the first ground was with regard to the evidence about diaspora activities and what the judge said at paragraph 59 of his decision where he listed the photographs produced and the dates where they were said to have been taken based on the annotations next to them but at paragraph 50 made inconsistent findings with what had been said at paragraph 59. What was said at paragraph 75 about the motives for the appellant's participation in anti-government activities was based on the inconsistent involvement over time of the appellant and was predicated on the errors set out at paragraph 60, which undermined the judge's findings. He had not said that the weight to be given to the photographs was to be qualified in any way and did not say that he did not accept that they were taken when they were said to have been taken.

21. Ground 2 concerned the findings with regard to disclosure of activities when returning to Sri Lanka. Paragraphs 94 and 95 were relevant in this regard. The judge concluded that the appellant would be able to lie and there was no duty to disclose to the Sri Lankan authorities if he was questioned on return. Whether or not his political beliefs were genuine, he might still be at risk on return. The problem was that the judge defined his activities as non-political and this was an error as clearly he had attended political events, and whatever the judge or the Secretary of State's view might be on their genuineness it did not mean they were not political events. The risk element was, therefore, not removed. There was a suggestion that he could lie to the Sri Lankan authorities but he had an obligation to answer their questions and there was risk of being found to be deceiving the authorities. The judge had erred with regard to genuine political belief but that did not mean that there was no risk on the basis of an actual threat or significant role but there was perception also. The judge said that the appellant did not have a genuine belief but could lie, so there was no problem. There was the question of what the result of any questions or risk on lying would be.

22. With regard to ground 3, reliance was placed on the written grounds. It was accepted that there was reference at paragraph 63 to surveillance

techniques, so the matter had been given some credence. Issue was taken with the fact that in looking at the first judge's decision the error was in not reconsidering those findings in light of GJ. Reference was made to paragraph 12 of the grounds in this regard. The decision of the Court of Appeal in RS had come after the grounds and it properly applied the GJ findings. Reference was made to the factual circumstances set out at paragraph 12 of the grounds. The appellant had been detained for five months and ill-treated previously, so that was significant, as considered in RS. Diaspora activity was to be considered with that. It was necessary to consider the earlier findings in the context of the country guidance.

23. In her submissions, Ms Isherwood argued that it was clear from what was said in GJ that there had to be a significant role played by a person as part of diaspora activities to be of interest and as a consequence at risk. A person would only be at risk at the airport if their name were on a stop list and otherwise there was potential risk in their home area. It was stated that the appellant had been detained and released and had not had to report and there was no interest in him. The judge's decision had to be considered as a whole.

24. The Rule 35 report was brief and given the findings of the first judge, it was not material. The judge had given full consideration to the evidence. The earlier judge's findings were accepted. The judge had acknowledged the photographs but found they were not cogent evidence: they were not enough to bring the appellant to the attention of the authorities. The judge accepted recent activity but there was the question of the significance of his role. The findings were open to the judge. Paragraph 96 could not be got round, given what the case law said but the judge had found the appellant would not be at risk as he would not be of interest and it would be necessary to look at the decision as a whole.

25. By way of reply, Ms Wass argued that GJ could not just be applied on an isolated factual basis and it was a question of the perception of a significant role or threat on that basis, so the past and profile had to be taken into account. The record of previous detention would lead to risk. It was true there was no reporting condition as he had been released on payment of a bribe, but it was clear from GJ that release on payment of a bribe was not necessarily significant with regard to lack of interest. It was not the case that no weight should be attached to the period of detention. The judge had erred with regard to perception of the appellant's role. Photographs had been provided and the judge had erred in respect of them. This undermined the finding in respect of risk.

26. With regard to the materiality of the lack of evidence in respect of the Rule 35 report, there was criticism as to whether it was consistent with being shot but there was the background of not seeing the report. The scar was clearly detailed in the report. As regards Dr Sinha's evidence and the failure to say whether the scar could be caused by shrapnel, the report was very clear in saying it was highly consistent and it did deal with

alternative causes. Paragraph 94 dealt with an injury specifically said to be shrapnel-caused.

27. We reserved our decision.

28. The judge set out at paragraph 4 of his decision the conclusions of the first judge in 2002. He noted at paragraph 52 that his starting point must be those findings. It is clear from the first judge's findings that he accepted the truth of the account given by the appellant except with regard to the claim that the LTTE had been to his house and asked after him and not accepting that his finger had been shot off, in light of the medical evidence before him. He had said among other things that he had sustained gunshot wounds to his left thigh and shoulder and it seems clear that the judge accepted the credibility of that evidence. Hence, his history was accepted that, as he put it, the appellant was involved with both the army and the LTTE in the North and had been released after detention and severe torture for a period of five months when his uncle paid a bribe to a member of the EPDP.

29. The judge at paragraph 55 concluded that there was no new evidence provided that undermined the first judge's conclusion that the authorities had no continuing interest in the appellant and that even on his own account, his involvement with the LTTE was at a very low level.

30. The judge went on then to note that since the First-tier Judge's decision risk on returnees to Sri Lanka was restricted to the classes of people identified in the Upper country guidance decision in GJ. The judge noted that the appellant's low level involvement with the LTTE was not consistent with this categorisation and therefore not consistent with his claim to be of continuing interest to the authorities.

31. As regards the issue of the photographs provided showing the appellant engaged in pro-Tamil activities, we have set out above in summary what the judge said at paragraphs 59 and 60 of his decision. We also note the criticism of those findings made by Ms Wass in the grounds and in her oral submissions. As regards the point that the judge was wrong to say there was no photographic or other cogent evidence of activity between 2009 and 2014 in light of the noting of the pictures said to have been taken at a protest in Chiswick in 2013 and a "Maaveerar Naal" event in 2013, it is clear that there is some inconsistency, but the fact of the matter is that what was recorded in that year were the pictures said to have been taken at two events in 2013 with regard to the 2009 to 2014 period. We see no material error of law in that regard. Nor do we consider that the judge was not entitled to consider the evidence of activity between 2014 and 2018 to be very limited. He also noted the photographic evidence since 2018, but the judge observed the appellant was just one of many attendees at those events and nothing in the photographs suggested he in particular would come to the attention of the intelligence services of the Sri Lankan authorities. This finding again was open to him, and we consider his

findings were entirely consistent with what was said by the Court of Appeal in KK, to which we have referred above.

32. Accordingly, we do not think the judge erred in his evaluation of the sur place activities. It was unarguably fully open to him to conclude as he did that they were essentially such as not to bring the appellant to the adverse attention of the authorities in Sri Lanka, even bearing in mind the use of sophisticated surveillance techniques, given that the focus is, as the judge noted, on identifying leaders and not helpers or participants, and the appellant clearly, on the judge's proper findings, came into the latter category.

33. We also consider that it was open to the judge to find as he did at paragraph 75 that the appellant had not shown his participation in anti-government activities was due to a genuine belief in the Tamil cause. The judge observed the inconsistent involvement over time and the timing of his attendance and it was open to him to find that the commitment to Tamil separatism was the product of his wish to remain in the United Kingdom rather than vice versa.

34. The judge's findings are consistent, as a consequence, with the risk categories identified in GJ. The appellant has a history but was released a long time ago and there is no evidence of ongoing interest in him or demonstrated observation of his low level activities which could give rise to any arguable risk on return.

35. The judge went on to consider the issue of questioning at the airport. In our view, this point is essentially academic in light of the proper findings in respect of adverse interest on the basis of the appellant's history and his sur place activities. There is no reason on the country guidance authority to suppose that there would be any interest in him at the airport, in particular since there is no evidence that he is on a stop list. The discussion by the judge of the kind of answers he might be expected or could be expected to give, at paragraphs 93 to 96 of the judgment, is essentially by the way, in our view. The issue does not arise, in light of the judge's proper findings about risk on return in the context of the country guidance.

36. We should say that in this regard we also see no materiality to the issues concerning the medical evidence. Again, this has to be seen in the context of the proper findings about risk on return in light of the appellant's history in Sri Lanka and in the United Kingdom in the context of the country guidance. Although the judge clearly erred in forgetting, as he seems to have done, that he had the Rule 35 report before him, it is, as Ms Isherwood argued, brief and of no real materiality to the essential issues before the judge. It was in any event in our view open to the judge to note the points which he did at paragraph 76 of the decision concerning apparent lack of care in preparing the report, and the absence of any clarification as to whether the scars were consistent with being shot or

whether they could have been equally caused by shrapnel wounds. In any event, in light of the judge's endorsement of the findings of the first judge, the matters appear to us to be without materiality. The essential scar is that of the absent thumb, and that, as the judge concluded in light of the first judge's decision, was not a matter that would place the appellant at risk. It does not seem to us that there is any materiality to the contention that the judge erred in respect of the evaluation of the medical evidence. The findings in GJ about scarring, summarised at paragraph 77 of the judge's decision, are of clear relevance.

37. Bringing these matters together, we consider that it has not been shown that the judge erred in law in his evaluation of risk on return to the appellant. It was properly open to him, having endorsed the findings of the first judge, to consider those as essentially he did, in the context of the country guidance in GJ in light of the profile of the appellant arising from his history, and also as a consequence of the careful evaluation of the sur place activities. It follows that in light of our findings no error of law is identified in his decision and the judge's decision dismissing the appeal is maintained.

Notice of Decision

The appeal is dismissed.

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 24 January 2020

Upper Tribunal Judge Allen