



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

Appeal Number: PA/06544/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21 February 2020**

**Decision & Reasons Promulgated  
On 12 March 2020**

**Before**

**UPPER TRIBUNAL JUDGE BLUM**

**Between**

**TS  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms A Walker, Counsel, instructed by Kanaga Solicitors

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of Judge of the First-tier Tribunal Pears (the judge) who, in a decision promulgated on 12 November 2019, dismissed the appellant's asylum, humanitarian protection and human rights appeal against the respondent's decision of 22 June 2019 refusing his protection and human rights claim and his claim for humanitarian protection.

## **Background**

2. The appellant is a national of Sri Lanka, of Tamil ethnicity, born in 1976. He has a wife and 4 daughters in the country.
3. I summarise the appellant's protection claim. He had been a member of the LTTE from approximately 1996 and passed on information on the movements of the Sri Lankan army to the espionage wing whilst running a vegetable shop. In December 2013 he was visited by the CID who claimed they had information about his involvement with the LTTE. The CID officers indicated that they would be returning to see him.
4. The appellant fled Sri Lanka and made his way to Austria (although he planned to go to Canada) where he claimed asylum in 2014. This claim was refused (although in his oral evidence the appellant was unclear of the outcome). The appellant was detained in an open camp in Austria and was freed by an agent who provided him with a Malaysian passport and sent him to Malaysia. The appellant was detained in Malaysia and removed to Sri Lanka. He was detained by the Sri Lankan authorities and interrogated for 24 hours and then released. The appellant was able to continue with his life, including his political involvement, until August 2018 when he was abducted by men from the CID in a white van and detained and interrogated about his involvement with the LTTE. After approximately 40 days detention the appellant was released on payment of a bribe. The appellant left Sri Lanka using a fishing boat in 2018 and, after residing in India and then travelling through other countries, he claimed asylum in the UK on 1 February 2019.
5. In the UK the appellant joined the Transnational Government of Tamil Eelam (TGTE) and attended its annual sports day and protests outside the Sri Lankan Embassy and other events. He claimed that the Sri Lankan authorities visited his house, arrested his wife and showed her photographs of him at events and rallies in the UK. Reporting conditions had been imposed on her although the appellant had not had contact with his wife for some 2 months prior to the date of the First-tier Tribunal hearing.
6. The respondent did not accept that the appellant gave a credible account of events that caused him to leave Sri Lanka. This was based on inconsistencies and implausibilities within the appellant's account.
7. The appellant exercised his right of appeal under s.82 of the Nationality, Immigration and Asylum Act 2002.

## **The decision of the First-tier Tribunal**

8. The judge heard oral evidence from the appellant and considered a bundle of documents that included an 18-page statement from the

appellant, photographs of the appellant in Sri Lanka, photographs showing the appellant at a protest in London contained in Tamil language newspapers, a psychiatric report by Dr Saleh Dhumad, a letter from the TGTE dated 9 October 2019 and a TGTE membership card issued in June 2019 and expiring in June 2024. The appellant also produced a TGTE 'Ministry of Sports' card indicating he was a catering volunteer on 4 August 2019.

9. The judge dealt in detail with the evidence given by the appellant in his screening interview and his asylum interview, his statement, and his oral evidence. The judge made comments and factual findings as he went. The judge also considered and commented upon the psychiatric report and set out some of the background evidence before him. The judge recorded the submissions made by the representatives, referring specifically to the submission made by the appellant's representative inviting the First-tier Tribunal to give proper consideration to the issue of external consistency (i.e. the degree to which the appellant's claim was consistent with the background evidence).
10. In the section of his decision headed 'Observations, Findings and Conclusions' the judge indicated that the appeal proceeded on the basis that the appellant was a vulnerable individual. The judge was unable to find that the inconsistencies in the appellant's account could be explained by his vulnerability. The judge accepted that the appellant had connections with Tamils in the UK through the TGTE. The judge pointed out the absence of any statement from the appellant's brother (who was recognised as a refugee in the UK) or uncle and found that the confusion in the appellant's evidence was not the result of memory problems but of him lying [73]. At [74] the judge identified 6 elements that undermined the appellant's credibility including his evolving role within the LTTE, the implausibility of the appellant not being arrested when 1<sup>st</sup> approached by the CID in 2013, the appellant's ability to leave Sri Lanka using his own passport, and inconsistencies relating to the length and time of his detention in 2018. The judge additionally commented on the absence of evidence confirming his claimed scars.
11. The judge rejected the appellant's claim to have been detained and to have needed to exclude Sri Lanka and concluded that he would not be perceived as a risk to the unitary state in Sri Lanka based on his sur place activities.

### **The challenge to the judge's decision**

12. The written grounds of appeal, as amplified by Ms Walker at the hearing, are threefold. The 1<sup>st</sup> ground contends that the judge failed to make relevant findings and failed to take into account relevant matters when assessing the appellant's credibility. Ground 1(a) contends that the judge failed to make a finding as to whether the

appellant was suffering from depression and PTSD and that, if there was such a finding, the judge failed to take this into account and failed to apply the Joint Presidential Guidance Note when making his credibility findings. Ground 1(b) contends that the judge failed to consider the issue of external consistency when assessing the appellant's overall credibility and failed to engage with the 7 examples given of the appellant's consistency with **GJ (post-civil war: returnees) Sri Lanka CG** [2013] UKUT 00319 (IAC).

13. The 2<sup>nd</sup> ground contends that the judge failed to properly consider the appellant's sur place claim. The judge failed to give anxious scrutiny to the material and country information and failed to reach reasoned findings on whether the appellant's activities were already likely to be known to the Sri Lankan authorities or whether, when asked about his activities if returned as forced returnee, he would come to the adverse attention of the authorities at that time. The judge's errors were particularly serious given that the appellant had been pictured in Sri Lankan newspapers which highlighted the risk of identification and therefore the risk and return.
14. The 3<sup>rd</sup> ground contends that the judge failed to determine risk arising as a result of the appellant's illegal exit.

## Discussion

15. The judge's decision is long and detailed (it runs to 29 pages), although the judge's findings and conclusions covers only 2 pages. When reciting the evidence before him the judge makes numerous asides and comments, sometimes criticising the quality of the evidence, sometimes pointing out deficiencies from which he draws adverse inferences, and sometimes making factual findings relating to elements of the appellant's claim. Adopting this structure does not constitute a legal error, but it does make the decision both difficult to follow and difficult to identify the material findings and the reasoning supporting those findings.
16. I do not find any merit in the challenge to the judge's approach to the medical evidence (ground 1(a)). It is irresistibly implicit in the judge's findings that he accepted that the appellant was suffering from a moderate depressive episode and from PTSD. This is clear from the reference to the acceptance by the respondent that the appellant was a vulnerable witness [25], and from [26]. The judge considered the psychiatric report in detail ([17] to [26]) and was aware that the appellant had been prescribed antidepressants and had been referred to 'talking therapies' [20]. The judge was entitled to conclude, in light of the psychiatrist's phraseology (that the appellant's presentation was "compatible with the experience of the intense fear of expected threat to life") that other events such as the appellant's claimed departure from Sri Lanka by boat and his hazardous journey across Europe, and the Sri Lankan civil war itself, could have accounted for

the diagnosis. The judge was additionally entitled to find that the detail provided by the appellant in his 18-page witness statement undermined his claim to be losing his memory [44]. The judge was aware of the psychiatric evidence that the appellant's concentration may be poor, particularly under cross examination [23], but he was rationally entitled to find that the appellant nevertheless had the ability to convey detail (e.g. [33]) and to take this into consideration when assessing the appellant's veracity.

17. The decision, read holistically, indicates that the judge did apply the Joint Presidential Guidance Note No. 2 of 2010 throughout his decision. At [45], [50] and [69] the judge demonstrably applied the requirements of the Guidance Note when the appellant was giving his oral evidence. At [62] the judge expressly stated that he had considered the credibility issues in light of the medical evidence and as part of a holistic assessment. Then at [70] the judge specifically said he had borne in mind the views of the psychiatrist's report and whether any of the inconsistencies in the appellant's account could be explained by the appellant being a vulnerable person. I am not persuaded that the judge erred in law in his approach to the medical evidence or by failing to apply the Joint Presidential Guidance Note.
18. I now consider ground 1(b). At [64] the judge referred to "7 examples" contained in his legal representative skeleton argument of a high level of consistency between the appellant's account and what was said in **GJ (post-civil war: returnees) Sri Lanka CG** [2013] UKUT 00319 (IAC). I accept that some of the examples demonstrate consistency between the appellant's account and the evidence considered in **GJ**. In particular, the appellant's claim to have undertaken 3 months of training with the LTTE is consistent with the factual accounts in **GJ**. The appellant's claim to have been abducted by people in a white van is also consistent with the broader country information. The appellant's claim to have been released on payment of a bribe is consistent with **GJ** (at [170] and [275]), as is his claim to have been able to leave Sri Lanka through the airport in 2013 with the assistance of an agent, notwithstanding that he may have been a person of interest. The appellant's account of his wife having been questioned and shown photographs of his attendance at demonstrations is consistent with the CIG of June 2017. I note that the judge did not make any factual finding in respect of this particular element of the appellant's claim. At no stage does the judge identify or engage with the examples of external consistency.
19. In **KB & AH (credibility-structured approach) Pakistan** [2017] UKUT 00491 (IAC) the Tribunal emphasised the benefits of judges adopting a structured approach to credibility, which includes an assessment of external consistency. The Tribunal was at pains to point out however that the suggested framework should not be regarded as necessary conditions and were not an exhaustive list. I note that the judge made a significant number of adverse credibility

findings. The judge found there were inconsistencies between the account given by the appellant in his screening interview, where he only mentioned being detained for a few days in 2016, and his account in his substantive asylum interview where he claimed to have been detained for 40 days in 2018 ([27], [28] & [49]), and omissions relating to the appellant's claimed involvement in intelligence work ([29], [36]) and whether he mentioned his detention on return to Sri Lanka in 2014 during his screening interview [33]. The judge found the appellant was evasive, particularly in relation to his passport [30], and that he gave different reasons for not claiming asylum in France. The judge drew other adverse inferences based on discrepancies in the appellant's account and these can be located in between [27] and [59]. The judge was unarguably entitled to draw the adverse inferences he did and for the reasons he gave. I must nevertheless determine whether the failure by the judge to engage with those aspects of the appellant's evidence that were externally consistent could have made any material difference to his factual conclusions. Although finely balanced, I cannot say that the judge's adverse credibility findings could not have been different had he properly considered those aspects of the claim that were externally consistent.

20. I am persuaded, for the following reasons, that the judge did err on a point of law in his approach to the appellant's sur place activities. The judge referred to a letter from the TGT dated 9 October 2019 [56]. This letter identified some events in which the appellant had a "key role", but this role was not specified. So far as the judge was concerned the appellant's involvement appeared to be no more than attending meetings and public demonstrations. The judge however appeared to accept that the appellant had been involved with the TGTE and that he had been photographed at several events, and that one photograph appeared in a Sri Lankan newspaper, although the judge expressed concerns about the circulation and reputation of the newspaper [57]. Although the judge sets out an extract from the CIG dated from June 2017 relating to 'proscribed organisations', the TGTE does not appear in the extract and it is not otherwise apparent from the decision that the judge was aware that the TGTE is a proscribed organisation.
21. At [76] the judge quotes from **GJ** in respect of the knowledge held by the Sri Lankan authorities that many Tamils travelled abroad as economic migrants and that the Sri Lankan authorities' approach was based on sophisticated intelligence both within Sri Lanka and in the diaspora. Crucially however the judge fails to make any reference to the TGTE being a proscribed organisation when assessing whether the Sri Lankan authorities were likely to hold details of the appellant's involvement with the organisation. The Sri Lankan authorities regard to the TGTE as a terrorist organisation. There may therefore be a real risk that, due to their sophisticated intelligence, the Sri Lankan authorities may hold or have access to TGTE membership lists or details of the members. Nor did the judge consider what was likely to

happen to the appellant at the airport in Sri Lanka as someone forcibly returned without a valid passport. If the appellant is questioned by the authorities he must be expected to tell the truth. If his involvement with the TGTE was simply a ruse to enable him to remain in the UK then he would be expected to say so if asked. There was however no assessment by the judge of the likelihood of the appellant are being questioned about any political involvement in the UK or the reaction by the Sri Lankan authorities if the appellant told the truth. I'm consequently satisfied that the judge did her in his approach when determining whether there was a risk to the appellant based on his sur place activities.

22. Given my findings in respect of ground 1(b) and 2, I am satisfied that the decision as a whole is unsafe, and that the matter must be considered a fresh. It is therefore unnecessary for me to determine the 3<sup>rd</sup> ground.

### **Remittal to First-Tier Tribunal**

23. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

24. I have determined that the judge's adverse credibility conclusions are unsafe. The appeal will be remitted to the First-tier Tribunal so that a new fact-finding exercise can be undertaken.

### **Notice of Decision**

**The making of the First-tier Tribunal's decision involved the making of errors on points of law and is set aside.**

**The case is remitted back to the First-tier Tribunal to be decided afresh by a judge other than judge of the First-tier Tribunal Pears.**

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal 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.

**D.Blum**

10 March 2020

Signed  
Upper Tribunal Judge Blum

Date