Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/06155/2019**

THE IMMIGRATION ACTS

Heard at Manchester CJC (via Microsoft Teams)	**Decision & Reasons promulgated**
On 4 October 2021	**On 12 November 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ST
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms P Solanki instructed by Tamil Welfare Association (Romford Road).
For the Respondent: Mrs Aboni, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Griffith ('the Judge') promulgated on the 26 March 2021 in which the Judge dismissed the appellant's appeal on all grounds.

Background

2. The appellant is a citizen of Sri Lanka of Tamil ethnicity born on 3 February 1972. He has a partner who is also a Tamil from Sri Lanka and they have two children born on 9 September 2017 and 25 October 2018.

3. By letter dated 9 April 2019 the appellant's partner and two children were granted refugee status.

4. The decision under appeal is the respondent's refusal of the appellant's fresh claim for asylum, dated 14 June 2019.

5. Having considered the documentary and oral evidence, including medical evidence provided from a number of sources, the Judge sets out the findings of fact from [70] of the decision under challenge.

6. The Judge noted an earlier decisions of the Upper Tribunal dated 8 March 2016 which considered an earlier decision relating to a previous claim for international protection, but which dismissed that appeal.

7. The Judge confirms in [78] having had regard to the new evidence in the form of a report from a country expert. The Judge was prepared to accept the appellant could have been detained as claimed in his account for two years and three months between May 2009 and August 2011 on the basis this was not an unusual occurrence, although the Judge notes it does not appear that he was ill treated throughout the period of detention and that there appears to have been a case of mistaken identity as the Sri Lankan army believed him to be his brother. The Judge notes that the appellant's release from detention in August 2011 coincided with the death of his brother and that two events could have been connected.

8. The Judge did not find as credible the appellant's claim that despite his brother having died in 2011 and the appellant having been out of Sri Lanka for two years by 2013 the authorities visited his home looking for him. The Judge did not find as credible the claim the authorities would have been sufficiently interested in the appellant to have visited the family home given his lack of profile some two years after his exit from the country and four years after the end of the Civil War. The Judge also notes there is no evidence of any further visits to the family and finds a further lapse of eight years from the alleged visit in 2013 was not consistent with the claim the authorities had an ongoing interest in the appellant [79].

9. The Judge noted the Upper Tribunal in the earlier decision did not accept that an arrest warrant had been issued for the appellant as that tribunal had not seen the alleged arrest warrant and was not prepared to accept that one was issued in December 2011, some three months after he had left the country [80].

10. The Judge noted the opinion of the country expert that the appellant may be at risk of detention and mistreatment on return owing to his connection with his late brother and his previous detention and torture and his absence from Sri Lanka, but did not find that the appellant fell within the definition of those of ongoing interest to the authorities in Sri Lanka within the diaspora who are perceived to be a threat to the integrity of Sri Lanka as a single state or who are perceived to have a

significant role in relation to post-conflict Tamil separatism and/or a renewal of hostilities within the Sri Lanka, as identified in the country guidance case of GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) [81].

11. In relation to the claim the appellant will be on a 'stop list' in Sri Lanka, the Judge notes again that the Upper Tribunal did not accept an arrest warrant had been issued and finds no reason to depart from that finding.

12. The Judge notes the quote from the Human Rights Watch Report of 2014 that "Those who accepted the bribe are responsible for ensuring the reason for the suspect release is recorded. A person recorded as having escaped or being missing would be of significant adverse interest to the authorities". The Judge finds there was no information evidencing the reason for the appellant's release, and whilst the expert claimed it was plausible that the appellant might be subject to absconder action, the Judge finds this to be speculative. The Judge was therefore not satisfied that the appellant's name will appear on a computerised stop list and that he would be stopped at the airport and handed over to authorities on account of an outstanding arrest warrant, or any other court order [82].

13. The Judge does not find there was evidence to show the appellant presents a risk to the unity of the Sri Lankan state or Sri Lankan government [83], was not satisfied the appellant appears on an intelligence led watch list, was not satisfied he is a Tamil activist and never has been, nor is there any evidence he had worked to destabilise the state [84] leading to the conclusion the Judge was not satisfied the appellant met any of the criteria of a person at real risk of persecution or serious harm on return to Sri Lanka [85].

14. The Judge does not limit consideration of risk to this point only however and goes on to consider whether there are other reasons why the appellant might be questioned on return, namely that he is a failed asylum seeker who has been absent from the country for ten years.

15. The Judge refers to the CPIN on Tamil separatism dated May 2020 and concludes that although paragraph 2.4.15 suggests the appellant might be questioned at the airport that is unlikely to excite the interest of the authorities sufficient for him to be questioned by the security service. At [91] the Judge writes:

> 91. There is a likelihood, therefore, that the appellant will be questioned on arrival. It is possible that his earlier detention will have been recorded but, given that the LTTE is a spent force and the focus of the authorities is on activists in the diaspora, I am satisfied that the likelihood of his being referred to the CID is remote and even if he were questioned by the CID, it is unlikely that he would be detained for any length of time sufficient to give rise to a real risk of ill-treatment.

16. The Judge was therefore not satisfied the appellant had discharged the burden on him to show he will be at real risk of persecution for a Convention reason on return and deserving of international protection for that reason.

17. The Judge then went on to consider the issue of the appellant's mental health and whether that entitled him to grant of leave to remain pursuant to article 3 ECHR from [93]. Having undertaken a detailed analysis of the evidence and the country information the Judge writes at [108]:

> 108. To answer the question posed in AM, I am satisfied that substantial grounds have been shown that this appellant, although not at imminent risk of dying, will face a serious, rapid and reversible decline in his state of health on account of the absence of appropriate treatment or the lack of access to it and succeeds on his Article 3 medical claim.

18. Thereafter, the Judge considers article 8 ECHR and for the reasons stated, finds that there are exceptional circumstances in this case such that the proportionality balancing exercise falls in the favour of the appellant outweighing the public interest in maintaining effective immigration control [109 – 115].

19. The appellant's application for permission to appeal was initially refused by another judge of the First-tier Tribunal but granted by another judge of the Upper Tribunal on 12 July 2021, the operative part of the grant being in the following terms:

> 2. The renewed grounds challenge the judge's finding that the appellant has not established, based upon his past activity in Sri Lanka, that he would be at risk on return from the Sri Lankan authorities.
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> 3. It is arguable, on the basis of the grounds (paras 10-12), that the judge failed properly to consider whether the appellant will be at risk on return as a result of an arrest warrant being issued following his "escape" and as a result of being on a 'stop list'. It is arguable that the judge failed to deal with the decision in RS (Sri Lanka) v SSHD [2019] EWCA Civ 1796, especially at [25].
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> 4. All grounds may be argued, although the strength of the challenge lies in the ground I have identified. Of course, if a material error of law is found in the decision has to be remade, at that stage, the recent CG decision in KK and RS (Sur place activities: risk) Sri Lanka CG [2021] UKUT 130 (IAC) will apply.
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> 5. These reasons, permission to appeal is granted.

Error of law

20. Paragraphs 10 to 12 of the renewed grounds seeking permission to appeal are in the following terms:

> Failure to Consider *RS (Sri Lanka) v SSHD* [2019] EWCA Civ 1796
>
> 10. The IJ was specifically asked to assess the risk to Appellant with reference to *RS (Sri Lanka) v SSHD* [2019] EWCA Civ 1796. Here the Court of Appeal found that individuals who were detained but escaped are at risk of persecution in Sri Lanka. They said that this decision was supported by a wealth of country information and expert evidence to confirm that, just as in the UK, if someone escapes from custody in Sri Lanka a warrant will be issued for their arrest and they will be arrested when they re-enter the country. The Home Office's own country information report from Sri Lanka, published in March 2012, which states: if an individual has jumped bail/escaped from custody. The senior intelligence official said that the person would be produced at Court. The Superintendent Police, Criminal Investigation Department (CID) agreed (see [10]). The representative from Centre for Policy Alternatives said that the

individual would definitely be stopped. Lord Justice Floyd said as follows at [25],

> In looking for positive reasons to find that an arrest warrant had been issued, the judge has, in my judgement, completely overlooked the inherent probabilities of the case. RS had been arrested after the end of the war (although I would accept only shortly after) and remained a sufficient interest to the authorities to be detained for some eighteen months thereafter during which time he was tortured. This period extended up to and beyond the commencement of the release of LTTE detainees. He had not been released but had escaped from custody. With the help of a visiting contractor. It seems to me, based on those facts, to be inherently likely that the authorities would seek to recapture him and do so by issuing an arrest warrant.

11. It is clear that had the IJ considered risk against this authority and evidence, she would have arguably come to a very different conclusion.

12. At paragraph 6 of the refusal, the IJ says that *RS (Sri Lanka)* has no bearing on the particular circumstances of the Applicant. This ignores that the Applicant, like RS, was detained towards the end of 2009, this was for a period in excess of the period that RS was detained (here twenty-seven months), that he escaped like RS (here on payment of a bribe). It is not clear how the IJ has concluded that *RS (Sri Lanka)* is not of relevance on the accepted facts. The Court of Appeal determined that an individual, such as the Appellant is a real risk of been stopped/arrested.

21. The remaining grounds assert a failure to consider risk on return with regard to relevant evidence and case law, failure to properly consider and weigh the country expert evidence, a failure to consider risk against the UNHCR guidelines, the failure to consider risk against evidence concerning the current regime, a failure to assist risk against country guidance case of GJ and others with specific reference to whether the appellant would be perceived to be a threat, and any rational approach to risk of detention on the basis of the failure to consider GJ and others.

22. The appellant in RS escaped from detention by concealing himself in a removable cesspit with the aid of those responsible for emptying it. The appellant's claim in the appeal under consideration is that a Major came into his cell, ordered soldiers to remove his handcuffs, told him he was going to a different camp for investigation, but took the appellant to his office and gave him a good pair of trousers and a shirt, after which he was taken to a restaurant where he met a man called Bobby, and that the Major had come to release him after the appellant's aunt paid him a bribe of 10 Lakhs. The appellant's account is therefore that rather than a worker responsible for emptying a cesspit helping him get out of the detention facility he was assisted by a ranking officer of the Sri Lankan army.

23. It is a logical finding that if a person jumps bail or escapes from lawful custody they will be subject to efforts made by the relevant authorities to re-detain them which will involve taking them before a Court. In RS the appellant was himself suspected of being a threat to the authorities in Sri Lanka and detained and tortured in his own right, rather than the appellant in this appeal appearing to be the victim of mistaken identity, which would have resulted in a perception as to his role and justification for his continued detention until the error was discovered. The finding of the Judge that when his brother died the appellant was able to leave detention when, logically, any mistake as to his identity would have been realised and it be known there was no

ongoing need for his continued incarceration, has not been shown to be an illogical or irrational conclusion.

24. In relation to the consequence of escape by payment of a bribe in Sri Lanka, in GJ there was evidence before the tribunal from Professor Good that release on payment of a bribe was extremely common. The Tribunal effectively accepted that assertion at paragraph 262.

25. In R (on the application of PR(Sri Lanka)) v SSHD [2017] EWCA Civ 1946 there is reference to evidence is to be found in Appendices I, J and K to the decision in GJ.

26. The passage from Professor Good's evidence was in paragraph 4(g) and (h) of Appendix I as follows:

"(g) Corruption and bribery are widespread in Sri Lanka, and includes those at the top of the political system and the police. Release through payment of a bribe is 'extremely common';

(h) The release of a detainee does not of itself indicate that the authorities have no continuing interest in that person. Release without charge or without the payment of a bribe does not preclude subsequent detention. There is evidence of re-arrest and abduction of former LTTE cadres on the East Coast and in the Northern Province in 2011 and 2012;"

27. Dr Smith's evidence included this (at paragraph 13 of Appendix J):

"… If someone of adverse interest is released upon payment of a bribe, those who accepted the bribe will be responsible for ensuring there is a record of why the suspect was released; a note indicating that a person was released because they were a person of no further interest, being one option. If the person who accepted the bribe could not acquire access to the records, it is more likely that they would report the 'release' as an escape which would lead to an arrest warrant being issued. Someone who is recorded as escaped or missing would be of significant adverse interest to the authorities."

28. The passage from Mr Punethanayagam's evidence relied upon appears at paragraphs 15 to Appendix K, with comment by the Tribunal in paragraph 16, as follows:

"15. In his report, Mr Punethanayagam gave evidence from his own client database in relation to the effect of bribery as a method of release from detention or to enable a person to leave the country. Bribery and corruption is pervasive, especially among the security forces, and well documented: …

…

27. The bribery is very common in the IDP camps as well as the detention centers [sic] 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.

...

16. The reference to the actions of the person obtaining the release of a detainee is speculation. The witness does not suggest that he has any direct knowledge on that point. He is however in a position to confirm that approximately 30 of his 3000 clients left Sri Lanka while of interest using bribery: unfortunately, he does not say when this was in relation to the end of the civil war."

29. The reference by the appellant to have been released by a Major who accepted the bribe is of importance as it is more than likely that a ranking officer within the Sri Lankan army in the detention facility will have access to the appellant's records and will have been able to enter on those records that the appellant had been released as he was a person who was no longer of any interest to the authorities. That is a plausible conclusion and underpins the Judge's findings in light of the mistaken identity issue and the death of his brother and lack of credible evidence of ongoing interest.

30. It was not made out before the Judge that the appellant will be treated as a person who had escaped from detention and therefore a person against whom enforcement action by way of a warrant for his arrest will have been commenced.

31. The Judge specifically comments on the lack of evidence of an arrest warrant having been issued despite a considerable volume of other evidence having been produced for the purposes of the appeal.

32. Although not decided at the date of this appeal, the more recent country guidance case of KK and RS (sur place activities: risk) Sri Lanka [2021] UKUT 130 (IAC) found that the existing country guidance GJ & Others (post –civil war: returnees Sri Lanka CG [2013] UKUT 00319 (IAC) (5 July 2013) (heard on 5-8 and 11-12 February 2013, 15 March 2013 and 19 April 2013) is still broadly accurate in reflecting the situation facing returnees to Sri Lanka (paragraph 535). The case of GJ & Others was restated in its entirety in the judgment. The Upper Tribunal held, however, that it was necessary to tweak, 'clarify and supplement the existing guidance, with particular reference to sur place activities' (paragraph 535).

33. The report of a Home Office fact-finding mission to Sri Lanka conducted between 28 September and 5 October 2019, published on 20 January 2020 at section 7.6 reads:

7.6 Stop/watch Lists and list of wanted people

7.6.1 According to CID a watch list exists and is maintained by the police. Where someone returns to Sri Lanka and is on a watchlist they would be arrested if there were outstanding criminal offences against them. SIS have their own watchlist and will screen returning passengers against this list, where a person is of interest they

would be interviewed and handed to CID if further action was needed. A human rights activist told the FFT that he was not aware of anyone on the watchlist being stopped when they returned but had heard anecdotally that this does happen.

7.6.2 A travel ban to prevent someone leaving the country can be obtained by a court order and the person's name will then be added to a 'stop list'. This stop list is not maintained by the police. According to Representatives from Immigration and Emigration this list is confidential and consists mostly of foreign passport holders although it can also include criminals who have been banned from travelling abroad. Where someone is the subject of a travel ban and attempts to leave the country it will be flagged up by immigration pre-departure checks and the person will be passed to CID for further investigation.

7.6.3 A list of wanted persons is published in 'Police Gazette 3' and contains a list of anyone wanted by the police. Border checks at the airport are linked to Interpol to help identify internationally wanted persons.

34. As there was insufficient credible evidence before the Judge that the appellant is of interest to the authorities the finding he will not be a 'stop list' has not been shown to be a finding outside the range of those reasonably available to the Judge.

35. Ms Solanki referred in her submission the appellants mental health needs and how they may factor into his presentation if questioned on arrival (this is a hypothetical question in reality as the appellant is not going to be retuned and his appeal has been allowed pursuant to article 3 ECHR).

36. The first issue is the finding that if any questions are asked of the appellant which may focus on what he has been doing in the UK no issues will arise, is important. There was insufficient evidence that questioning by immigration officers at this point entitles a person to international protection. The Judge was aware of the mental health evidence but did not find this meant the appeal should be allowed on protection grounds.

37. Although a single brief period of detention and mistreatment is unlikely to amount to persecution as it lacked the pervasive element commonly said to be a feature of persecution it is accepted that an act can qualify if by reason of its intensity or duration the person persecuted cannot reasonably be expected to tolerate it. A person with mental health needs may have a much lower threshold of tolerance that a person without, but that is a question of fact based upon the evidence in each case.

38. In relation to the mental health issues the Judge records at [94-96]:

94. For the purposes of this appeal, I have set out above a summary of the medical evidence contained in the appellant's documentation, some of which is new and post-dates the date of the UT decision. I refer in particular to the report of Dr Dhumad and Dr Obuaya. Whilst Dr Obuaya considered the diagnosis of PTSD and severe Depressive Episode with psychotic features were reasonable, he was unable to confirm or refute them as he could not obtain a reliable history from the appellant. During the course of the interview with Dr Obuaya, the appellant could not remember his date of birth, he could not recall how long he had been in a relationship with his partner, nor how long he had been living with a friend in North Wales. He could not recall when his mental health symptoms began and gave contradictory information about whether the

medication was helping him to sleep. He could not remember whether he drinks. It was reported that his memory for recent and remote events was extremely poor; he described his mood as low and it was reported that he stated that he feels like killing himself but would not do so for the sake of the children. He said his brother had accompanied him to the UK and then said is (sic) brother had been killed.

95. It is difficult to reconcile Dr Obuaya's description of the appellant and the extent of his mental health issues with the evidence of Ms Watkin and Ms Phoenix, the evidence of the health visitor dated 9 May 2018, the Home Start letter dated 25 February 2020 and the letter from the University Heath Board dated 27 February 2020. None of those statements or letters describe any debilitating consequences of the appellants mental health on his ability to parent and have sole charge of the children on occasions when his partner is not at home. The letter from the University Health Board confirmed that he played a very active role in the day-to-day care of their children and had excellent parenting skills and is "knowledgeable about his children's health and development". This does not suggest someone with memory problems or having low mood. I have note above his claim that's he did not know why he was present at the hearing. He may have been exaggerating for the benefit of the Tribunal but I am not in a position to make a finding to that effect.

96. However, the credentials of Dr Dhumad and Dr Obuaya are impressive and I attach weight to them: neither considered the appellant was feigning his symptoms. It is also the case that the appellant has a history of attempting suicide and it is significant that his medication is still prescribed daily in case his decides to overdose. He told Dr Obuaya, however, that he would not commit suicide because of the children.

39. The reason the appeal was allowed on article 3 grounds was because the relative who had provided care in the past, an aunt, had died and the Judge accepted there was no family in Sri Lanka. The Judge also accepted there was a realistic prospect of the appellant not receiving the treatment he required in Sri Lanka.

40. Of particular note is the following finding by the Judge at [107]:

107 … Furthermore, whilst I have not found that he is able to succeed in his asylum claim, I have not lost sight of the fact that there is a causal link between the ill-treatment he received in Sri Lanka at the end of the civil war and his mental health issues and I accept that he will retain a subjective fear of ill-treatment, even though I have found it is not objectively well founded, which could act as a further impediment to his ability to obtain and secure any treatment that might be available.

41. The Judge was clearly aware of the inter-relationship between the issues raised but does not find any enhanced risk based upon the appellants health needs. The grounds do not show this is not a finding with the range of those available to the Judge on the evidence.

42. The other grounds of challenge have been considered but fail to establish legal error material to the decision to dismiss the appeal. The Judge has clearly considered the evidence with the required degree of anxious scrutiny, the findings made are clear and adequately reasoned and have not been shown to be outside those reasonably available to the Judge on the evidence.

Decision

43. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

44. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Upper Tribunal Judge Hanson

Dated 11 October 2021