Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/06239/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th November 2021	**On 19th November 2021**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

S A

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

(ANONYMITY DIRECTION MADE)

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. I find that it is appropriate to continue the order. 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.

Representation:

For the appellant: Mr G. Dolan, instructed by ASK solicitors
For the respondent: Ms Z. Ahmad, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant's account of past persecution and ill-treatment in Sri Lanka was accepted by a previous First-tier Tribunal albeit the judge went on to find that there was no reasonable degree of likelihood that the appellant would continue to be at risk on return to Sri Lanka on the evidence as it stood in 2011.

2. The appellant appealed the respondent's decision dated 29 June 2019 to refuse a fresh protection and human rights claim. First-tier Tribunal Judge Dunipace considered evidence relating to the appellant's activities with the TGTE in the UK and found that it showed his attendance at events but did not demonstrate 'that he has any significant level of authority within that organisation' [58]. He dismissed the appeal on the basis of the then current country guidance in *GJ and Others (post civil war: returnees) Sri Lanka* CG [2013] UKUT 00319 on the ground that the appellant did not have a significant role in diaspora activity.

3. In a decision promulgated on 14 May 2020, the Upper Tribunal found that the First-tier Tribunal decision involved the making of an error of law (annexed). Further directions were made inviting submissions on whether it would be appropriate to delay the remaking of the decision until after the promulgation of an anticipated country guidance decision on Sri Lanka, and the risk to TGTE activists in particular, given the appellant's particular vulnerabilities. Although the Upper Tribunal published the country guidance in *KK and RS (Sur place activities: risk) Sri Lanka* CG [2021] UKUT 00130 (IAC) on 27 May 2021 it is unclear why it took so long to relist this case for hearing.

4. In the end, the delay to await the country guidance decision has benefited the appellant. At the hearing today the parties were in agreement as to the appropriate outcome. Ms Ahmad said that she did not contest the appeal. She took into account the fact that the appellant does not have a passport and the previous findings made by the First-tier Tribunal. In light of the latest country guidance, she conceded that there was a reasonable degree of likelihood that the appellant had a well-founded fear of persecution for a Convention reason if returned to Sri Lanka at the date of the hearing. I am satisfied that the concession was properly made on the facts of this case and in light of the current country guidance.

5. Although there was a brief discussion as to whether it was necessary for Mr Dolan to make submissions on Article 3 medical issues, that aspect of the claim would make no difference to the outcome. The appellant gains a better form of status from the concession relating to the Refugee

Convention claim. Having had that discussion Mr Dolan did not pursue the issue.

6. The Secretary of State has a continuing duty in relation to her obligations under the Refugee Convention. It is only necessary for the Upper Tribunal to give detailed reasons in a contested appeal. In light of the concession that removal would breach the respondent's obligations under the Refugee Convention, it suffices to summarise the discussion that took place at the hearing for the purpose of this notice of decision. The parties consented to the Upper Tribunal not giving detailed reasons: see rule 40(3) of The Tribunal Procedure (Upper Tribunal) Rules 2008.

7. I conclude that removal of the appellant would breach the United Kingdom's obligations under the Refugee Convention and would be unlawful under section 6 of the Human Rights Act 1998 with reference to Article 3 (risk on return).

DECISION

The appeal is ALLOWED on Refugee Convention and Human Rights grounds

Signed M. Canavan Date 09 November 2021
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06239/2019

THE IMMIGRATION ACTS

Heard at Field House
On 11 March 2020

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

S A

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Representation:

For the appellant: Mr G. Dolan, instructed by ASK Solicitors

For the respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 24 June 2019 to refuse a fresh protection and human rights claim.

2. First-tier Tribunal Judge C. Dunipace ("the judge") dismissed the appeal in a lengthy decision promulgated on 28 October 2019.

3. The appellant's grounds of appeal were also lengthy and not clearly particularised, but the following broad grounds could be discerned.

   (i) The judge erred in rejecting the documentary evidence largely on the ground that it was photocopied and failed to consider relevant evidence.

   (ii) The judge failed to take into account the positive credibility findings made by a previous judge when assessing the credibility of the appellant's account of recent events.

   (iii) The judge failed to consider the fact that the TGTE is a proscribed organisation and how that fact might affect the potential risk on return.

   (iv) The judge failed to consider up to date background evidence.

   (v) The judge failed to follow the six-stage approach relating to the assessment of suicide risk outlined by the Court of Appeal in *J v SSHD* [2005] EWCA Civ 1238 and *Y (Sri Lanka) v SSHD* [2009] EWCA Civ 362.

Decision and reasons

4. Ms Isherwood did not launch any serious defence of the First-tier Tribunal decision but did not go so far as to formally concede that the decision involved the making of errors of law. She accepted that there was some difficulty in the way in which the judge rejected the evidence largely on the ground that it was photocopied. She noted that the judge considered the evidence relating to the appellant's claimed activities for the TGTE and had considered medical evidence relating to the appellant's health but did not develop these observations into any meaningful argument in response to the points made in the grounds of appeal.

5. Bearing in mind the need for anxious scrutiny of a protection and human rights claim, I am satisfied the grounds raised sufficient concerns about

the way in which the judge approached the assessment of the case to demonstrate that the First-tier Tribunal decision involved the making of errors of law.

6. The judge noted the findings made by a previous judge relating to the credibility of the appellant's account of past events but failed to take this fact into account when considering whether he was a credible witness in relation to more recent events. Despite stating at [56] that he considered the background evidence, there is nothing in the decision to suggest that the judge considered the plausibility of the appellant's account or risk on return within the context of up to date background evidence. He relied solely on the country guidance decision in *GJ and Others (post civil war: returnees) Sri Lanka* CG [2013] UKUT 000319, which was decided seven years ago. It is trite law that the assessment of risk on return must be done with anxious scrutiny of the evidence at the date of the hearing.

7. At [58] the judge considered the evidence relating to the appellant's activities for the TGTE and appeared to accept that he was a volunteer steward. The country guidance decision in *GJ* did not consider risk on return to those who are involved in activities for proscribed organisations. It is arguable that the authorities might view a person's activities for such an organisation differently to those involved in other diaspora activities in the UK by the mere fact of proscription. In applying the sole criteria of whether the appellant held a prominent position in the organisation, the judge failed to take into account a relevant consideration in assessing the potential risk on return to a person who is active with a proscribed organisation.

8. The judge considered the medical evidence relating to the appellant's mental health and accepted that the appellant was at risk of suicide [68]. Dr Goldwyn assessed him to pose a "serious suicide risk" and said that he was at "great risk of self harm or suicide". It is correct to say that the judge did not direct himself to the relevant six-stage approach outlined by the Court of Appeal in *J* and *Y (Sri Lanka)*. Instead, he referred to the high threshold required to show a breach of Article 3 of the European Convention in health cases with reference to the House of Lords decision in *N v SSHD* [2005] UKHL 31 [73].

9. The Court of Appeal decisions in *J* and *Y (Sri Lanka)* govern a discrete area of assessment under Article 3 relating to suicide risk. The decisions in *J* and *N* were heard at around the same time in May 2005. By the time the Court of Appeal in *J* handed down its decision, it had the benefit of the House of Lords decision in *N*. The nature of the potential harm in a suicide risk case is sufficiently serious to engage the operation of Article 3 within the meaning of the *N* paradigm. If a person can show that there is a real risk that they will commit suicide on return to the receiving state, the feared harm clearly meets the minimum level of severity required i.e. intense mental suffering leading to their imminent death.

10. The reason why this is a discrete area of assessment is because of the specific issues relating to suicide risk, which were outlined in *J* and *Y (Sri Lanka)*. It is necessary to go through the process of assessing whether the facilities available upon removal and upon return are sufficient to ameliorate the risk of suicide, which is why the structured approach outlined by the Court of Appeal should be followed. The judge considered the evidence relating to availability of psychiatric treatment in Sri Lanka, but because he did not direct himself to the relevant six-stage test his approach focussed on the wrong issue. At [73] he appeared to require evidence of a "complete absence" of psychiatric treatment before Article 3 could be engaged. What he failed to do was to consider whether, even with family support, the appellant was likely to be able to access sufficient psychiatric treatment to reduce the risk of suicide to the extent that there was no real risk given that the medical evidence suggested that he was likely to make a determined attempt to kill himself if he was threatened with removal from the UK.

11. For these reasons I conclude that the First-tier Tribunal decision involved the making of errors of law and must be set aside. The decision will be remade in the Upper Tribunal.

DIRECTIONS

12. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules, I have considered the best approach to remaking the decision. My provisional view is that the issues are too serious and complex to be dealt with by way of written submissions on the papers. I also considered whether it might be appropriate to list the case for a remote hearing by video conference. I note that the hearing was going to proceed by way of submissions only and that there appeared to be no intention to call the appellant or any other person to give evidence. However, I have decided that it is not appropriate to list the case for a remote hearing at the moment because (i) at present the Upper Tribunal has limited capacity to hear cases remotely; and (ii) the Upper Tribunal is likely to hear a country guidance case involving consideration of the risk to TGTE members within the next few weeks, which may assist the Upper Tribunal in remaking the decision in this case.

Review

13. Subject to any further representations, the Upper Tribunal proposes to review the case **eight weeks** after the date this decision and directions are sent (the date of sending is on the covering letter or covering email) to ascertain whether, by that date, it might be possible to list the case for a hearing (either remotely or face to face).

Liberty to apply

14. I am conscious of the fact that the appellant is a vulnerable person with mental health issues who has been assessed to be at risk of suicide. No doubt he will be anxious to resolve his immigration status. A further delay in deciding his case is not likely to be in his interests. For this reason, the parties are at liberty to apply, giving reasons, within **14 days** of the date these directions are sent for the appeal to be determined by way of a remote hearing or written submissions if they consider that it could be determined fairly.

DECISION

The First-tier Tribunal decision involved the making of an error of law

The decision will be remade in the Upper Tribunal at a resumed hearing in due course

Signed M.Canavan Date 12 May 2020
Upper Tribunal Judge Canavan