Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA-51297-2021**
UI-2021-001715; IA/03345/2021

THE IMMIGRATION ACTS

Heard at Field House
On the 8 August 2022

Decision & Reasons Promulgated
On the 28 November 2022

Before

UPPER TRIBUNAL JUDGE FRANCES
DEPUTY UPPER TRIBUNAL JUDGE JOLLIFFE

Between

DP
(ANONYMITY DIRECTION MADE)
Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:
For the Appellant: Ms Malhotra, counsel
For the Respondent: Ms Cunha, Home Office Presenting Officer

DECISION AND REASONS

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Introduction

1. The Appellant is a citizen of Sri Lanka born on 21 February 1984. His appeal against the refusal of his protection claim was dismissed by First-tier Tribunal Judge Moon on 23 August 2021. He has appealed to the Upper Tribunal.

2. Permission to appeal was granted by First-tier Tribunal Judge Dixon on 19 October 2021 for the following reasons:

> *"2. The appellant claimed asylum on the basis that he had worked for an investigator (Mr Silva, a CID officer) who had fled Sri Lanka and sought refuge in Switzerland. He claims the authorities has (sic) taken an adverse interest in him as well (arising from that association) and that he had been placed on a stop list.*
>
> *3. The grounds include an argument that the Judge misconstrued the evidence in that she concluded, at paragraph 69, that the country information relied on by the appellant does not state that those who assisted Mr Silva are on the stop list. The Judge understood the interest to relate only to police officers and not to extend in general to those who have assisted Mr Silva. This is said to be in contradiction to the country and information extract (cited at paragraph 26) which appears to suggest that the authorities are indeed interested in those who have helped Sri Lankans flee to Switzerland. On the face of it, that interest does not appear to be limited to police officers. I consider it is arguable that the Judge has erred in relation to this aspect, which is an important matter as it goes to whether or not the appellant is on a stop list.*
>
> *4. There is an arguable error of law. The other points taken in the grounds appear to be less strong but may be argued."*

The decision letter

3. The decision letter dated 5 March 2021 is at [25-32]. It accepted the Appellant's account that he had worked in Sri Lanka as a driver and tour operator for Mr Nisantha Silva, an officer in the CID, and that his account of how he got work and of the various trips he made were consistent and credible; for example, his account of having collected Mr Silva and another man on 21 October 2019 from the Cinnamon Grand Hotel and delivered them to the Swiss embassy was considered credible.

4. The decision considered the Appellant's account that he was of interest to the authorities at paragraphs 33-48 but did not accept it. It was considered that his account was unclear and inconsistent with other known information, and his account was rejected.

The judge's findings

5. The judge made the following findings at [52-73]:

   (a) The authorities did visit the Appellant's property at various times when he was not there and his case on this point was not implausible [52].

   (b) The Appellant was formally employed by Asia Pacific Lines, and that the authorities would have been aware of this [53-54].

   (c) The Appellant's account of being pursued on a motorcycle was not plausible [55-56].

   (d) The Appellant's boss at Asia Pacific Lines had been able to find out that the Appellant's name had been put on a stop list and so he was of interest to the authorities [57-58].

   (e) It was accepted that the Appellant's friends had written letters and made a complaint to the police, but it was considered that they were inconsistent and contradictory [59].

   (f) The Appellant's account of leaving the country through the airport was considered in light of the Upper Tribunal decision GJ and others v SSHD [2012] UKUT 319, and it was found that there was no evidence to suggest that a person blocked from leaving Sri Lanka could leave on their own passport without being detained [60-61].

   (g) The Tribunal considered the weight to be attached to the arrest warrant and found that in light of its translation and the fact that the translation had not been independently prepared and authenticated, the weight to be attached to it was reduced [62-66].

   (h) The judge considered whether the Appellant would be regarded as having assisted Mr Silva to flee Sri Lanka, noting that the COI did not say that those who had assisted Mr Silva were on a stop list, and concluded that he was not at risk of persecution or serious harm if returned to Sri Lanka [67-70].

   (i) The judge rejected the Appellant's claim to enjoy protected Article 8 family and private life with this sister, and concluded that Article 8 was not engaged [71-73].

Relevant authority

6. The Tribunal has reminded itself of the decision in GJ and others v SSHD [2012] UKUT 319. The head note conveniently summarises the case in the following terms:

   > *(2) The focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009. The LTTE in Sri Lanka itself is a spent force and there have been no terrorist incidents since the end of the civil war.*
   >
   > *(3) The government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism*

and to destabilise the unitary Sri Lankan state enshrined in Amendment 6(1) to the Sri Lankan Constitution in 1983, which prohibits the 'violation of territorial integrity' of Sri Lanka. Its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka.

(4) If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.

(5) Internal relocation is not an option within Sri Lanka for a person at real risk from the Sri Lankan authorities, since the government now controls the whole of Sri Lanka and Tamils are required to return to a named address after passing through the airport.

(6) There are no detention facilities at the airport. Only those whose names appear on a "stop" list will be detained from the airport. Any risk for those in whom the Sri Lankan authorities are or become interested exists not at the airport, but after arrival in their home area, where their arrival will be verified by the CID or police within a few days.

(7) The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, are:

> *(a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka.*
>
> *(b) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government.*
>
> *(c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.*

> *(d) A person whose name appears on a computerised "stop" list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.*

> *(8) The Sri Lankan authorities' approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war. In post-conflict Sri Lanka, an individual's past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government.*

> *(9) The authorities maintain a computerised intelligence-led "watch" list. A person whose name appears on a "watch" list is not reasonably likely to be detained at the airport but will be monitored by the security services after his or her return. If that monitoring does not indicate that such a person is a Tamil activist working to destabilise the unitary Sri Lankan state or revive the internal armed conflict, the individual in question is not, in general, reasonably likely to be detained by the security forces. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual.*

> *(10) Consideration must always be given to whether, in the light of an individual's activities and responsibilities during the civil war, the exclusion clauses are engaged (Article 1F of the Refugee Convention and Article 12(2) of the Qualification Directive). Regard should be had to the categories for exclusion set out in the "Eligibility Guidelines For Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", published by UNHCR on 21 December 2012.*

7. Miss Cunha for the Secretary of State cited the authority of TK (Burundi) v SSHD [2009] EWCA Civ 40, which concerns credibility and independent corroborating evidence. It is authority for the proposition that where an immigration judge in assessing the credibility of an asylum seeker relied on the fact that there was no independent supporting evidence, where there should be supporting evidence and no credible account for its absence, he committed no error of law when he relied on those facts in rejecting the asylum seeker's account.

8. The Tribunal has also taken account of the COI evidence relied on by the Appellant; Country of Origin Sri Lanka Fact Finding Mission Report;

Tamils January 2020 ('COI') and Country Policy and Information Note Sri Lanka: Tamil Separatism (CPIN'). It was stated in para 3.3.5 of the CPIN that *"on 29 November 2019 The New York Times reported that: 'Fears of a potential crackdown on critics of the newly returned Rajapaksa political dynasty in Sri Lanka are rising just days after the election, as officials and journalists who investigated the Rajapaksa's for human rights abuses and corruption began trying to flee the country, officials said 'In a case that raised particular alarm, a Sri Lankan employee of the Swiss Embassy in Colombo was abducted on Monday by unidentified men and forced to hand over sensitive embassy information, Switzerland's foreign ministry said. Officials in Colombo said the men forced her to unlock her cell phone data, which contained information about Sri Lankans who have recently sought asylum in Switzerland, and the names of Sri Lankans who aided them as they fled the country because they feared for their safety after Gotabaya Rajapaksa won the presidency in elections this month."*

9. At 6.7.1 the COI report went on to state that *"the 2019 DFAT report, stated: 'Systematic abductions using white vans, often leading to enforced disappearances, occurred during the war and in the period after. The term "white van abductions" describes instances where individuals were abducted by unknown perpetrators in unmarked vehicles and were mostly never seen again."*

Appellant's submissions

10. On behalf of the Appellant, Ms Malhotra emphasised the point identified by Judge Dixon in granting permission to appeal, i.e. that the evidence about people at risk went further than had been set out in paragraph 69 of the decision, and that the people who might be on a stop list could include those who, like the Appellant, had provided assistance to Sri Lankans who had fled to Switzerland. Paragraph 69 of Judge Moon's decision stated that it was police officers who were of interest to the authorities and that there had been an alert to stop them leaving the country, but Ms Malhotra said that that was to take too narrow a view of the evidence, and that it was not just police officers who the authorities were interested in but also people in the Appellant's position.

11. Ms Malhotra relied on the fact that the judge had found parts of the Appellant's account to be credible. The judge had accepted that the Appellant was working for Asia Pacific and was also working part time as a tour guide, and had also accepted that his boss had "pulled strings" to help his exit.

12. The error of law was that the decision needed to give reasons why the Appellant was not at risk, and it failed to do so. If the Appellant was of interest to the authorities, he would come within the GJ risk categories, and accordingly the appeal should be allowed.

Respondent's submissions

13. For the Secretary of State, Ms Cunha submitted in relation to the translation evidence that the judge was entitled not to attach weight to a translation done by a legal representative. This, she said, was the crux of the Appellant's case – that he was on the stop list, and the judge had found that he wasn't. In the analysis at paragraph 69 the judge had dealt with the question adequately, and the Appellant's appeal was just a disagreement with that factual finding. It was apparent that the judge intended to find that the Appellant was not on the stop list and did make such a finding, and that is because the only evidence to contradict that was the document translated by counsel.

14. Ms Cunha cited TK Burundi at [19-21] regarding plausibility and consistency and submitted that the judge does not have to suspend belief, and that it had been open to the judge to disbelieve the Appellant's account of the car chase, and to disbelieve that he was wanted by the Sri Lankan authorities.

Conclusions and reasons

15. The issue in this appeal is whether the judge correctly construed the evidence, specifically the COI and CPIN evidence, regarding the risk to people returning to Sri Lanka. The particular issue was whether that evidence should be understood as applying solely to police officers, as per paragraph 69 of the decision, or more broadly. There was also an issue about whether the judge properly connected this evidence with the analysis of the known relationship between the Appellant and Mr Silva.

16. Paragraph 69 of the judgment stated as follows:

> *"A newspaper article provided by the appellant is produced at page 70 of the respondents bundle. This states that authorities have been put on high alert to stop more than 700 police officers from leaving the country. This state of affairs is also set out in a different article at page 78 of the respondents bundle, which states that the Sri Lankan government has put airports on alert to stop police detectives from leaving the country after Mr Silva, who had received death threats, fled. The article confirms that the names of 704 CID officers have been sent to immigration authorities to ensure that no officer leaves the country without proper permission. The evidence is that the authorities are interested in police officers. I have considered the extract from the COI that the appellant relies on but this does not state that those who assisted Mr Silva are on the stop list."*

17. It should be recalled that the decision letter found that the Appellant had worked for Mr Silva as a driver and tour operator, and that his account of his work was consistent and credible. The judge had accepted that the Appellant was of interest to the authorities and that they had visited his house, and had also accepted that the Appellant

worked for Asia Pacific Lines and the authorities would have been aware of this.

18. The analysis at paragraph 69 must be read in light of those findings and in light of the country guidance case of GJ. In our judgement, it is unrealistic to expect, as the judge appears to have done in the final paragraph of the decision, that the COI would specify in terms that there was a category of persons at risk which comprised those who had assisted Mr Silva; that kind of granular detail is only rarely encountered in COI documents, and it would normally concern very prominent political figures. In this respect, therefore, the judge imposed too high a burden of proof on the Appellant.

19. The inference from paragraph 69 is that the authorities are only interested in police officers. In light of GJ, this is a misdirection in law. We find the judge has approached the issue of risk in too narrow a manner. In particular, paragraph 7(d) of the GJ headnote cited above makes it clear that anyone on a stop list would be at risk. There is a contradiction, as identified by Judge Dixon in granting permission, between on the one hand the judge's finding that the authorities would only be interested in police officers and not in someone like the Appellant who had assisted Mr Silva, and on the other hand the COI which states that the authorities are interested in those who have helped Sri Lankans to flee to Switzerland. In light of the Appellant's known association with Mr Silva and the fact that Mr Silva had fled the country, and in light of the COI evidence, we agree with Judge Dixon's analysis. Judge Moon made a misdirection in respect of the COI and it follows that there was an error of law in the judge's findings in relation to this issue.

20. In coming to this conclusion, we have considered Ms Cunha's submissions about the correct weight to be attached to different pieces of evidence and what she said in reliance on TK (Burundi). That case is good authority regarding the right approach to credibility and corroborating evidence, but it does not assist the Respondent in arguing that the judge's analysis of risk was correct.

21. We find the judge erred in law and we set aside the decision of 23 August 2021. We remit the matter to the First-tier Tribunal for hearing *de novo*. None of the judge's findings are preserved. The appeal is to be listed before a First-tier Tribunal Judge other than Judge Moon.

22. The First-tier Tribunal may be assisted by the parties coming to some agreement on the issues to be determined either in writing or at a Case Management Review Hearing.

Notice of Decision

Appeal allowed.

<u>Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008</u>

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

J Jolliffe

Signed Date: 17 October 2022
Deputy Upper Tribunal Judge Jolliffe