



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: PA/03081/2020**

**THE IMMIGRATION ACTS**

**Heard at Cardiff Civil Justice Centre  
On the 28 April 2022 & 21 July 2022**      **Decision & Reasons Promulgated  
On the 05 October 2022**

**Before**

**MR C M G OCKELTON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SK**

Respondent

**Representation:**

For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer

For the Respondent: Mr A Joseph, instructed by Sutovic & Hartigan Solicitors.

**DECISION AND REASONS**

1. The appellant is the Secretary of State. She appeals, with permission, against the decision of the First-tier Tribunal allowing the appeal of the respondent, whom we shall call “the claimant”, against her decision refusing his application for recognition as a refugee on the ground that he is excluded by article 1F(a) from the protection of the Refugee Convention.
2. This appeal was listed for hearing on 28 April 2022. On that occasion we heard submissions from Ms Cunha. We were not persuaded that they gave

any good reason for displacing the First-tier Tribunal's decision on the ground of error of law. We did not need to hear from Mr Joseph. Without giving our decision at the hearing, we indicated that our decision would be that the Secretary of State's appeal would be dismissed. On further consideration, however, because of the number of features of the determination not mentioned either by the Secretary of State in her grounds of appeal nor by Mr Joseph in his full written response to them, we decided that, although we have no doubt about the appropriate outcome of the appeal, it would not be right to allow the judge's decision to stand as the determination of the appeal. We therefore concluded that the appropriate way forward was for us to set aside the decision for error of law and, subject to any further submission by the parties, redetermine the appeal in the same sense as that already apparent from the First-tier Tribunal's decision. We therefore arranged for the matter to be listed again, on 21 July 2022. We indicated the view we had reached. Both Ms Cunha and Mr Joseph indicated that they had no further submissions to make on the appeal.

3. We begin, therefore, with the aspects of the First-tier Tribunal's decision that have caused us concern.
4. First, it appears that the decision has been prepared by some sort of automatic means, perhaps using optical character recognition, and has certainly not been read through before being signed. One of the most striking effects of whatever process was used is the enormous variety of sigla used for the Liberation Tigers of Tamil Elam. As well as the usual LTTE, we have noted LTTE2, LTF, LTIE, LIIE, LI FE, LI lb, LI 1h, LI 1E, Lilt, Li lb, Li Li, Li 1E, L1 1 lt, L 11h, L11h, L7 lb, L7 IL, LI lt, and 141 1E. The Elam People's Democratic Party is called F.PDP and EPDPui as well as the conventional EPDP. For these two groups of typographical error it is usually apparent what is meant, although sometimes the reader may wonder whether, when a new abbreviation appears, a real change is intended. It is more troubling that the judge inserts the letters "LTTE" in other places, for example spelling "elite" as "eLTTE", and referring to the claimant's "Article 8 Private LTTE and Family LTTE" in three separate places (paragraphs 13, 21 and 75 (twice)), where the text is purportedly the judge's own, not a transcription of another document.
5. Secondly, there are other important errors in the narrative parts of the decision. The claimant's leave on his entry is incorrectly stated as extending from 5 June 2010 to 16 July 2021 (para 6), rather than 2021. The opinions of the expert witness Dr Smith are attributed at para 24 to the claimant. Paragraph 37 is incomplete, ending with the words "relied upon", with no full stop: evidently the judge intended to insert the name of the Country Guidance case whose headnote he then sets out in full, but he failed to do so. (The case is GJ and others (post-civil war: returnees) [2013] UKUT 319 (IAC)). Paragraph 67 begins with the words "despite the respondent note asserting", an apparent reference to a document: in fact "note" should read "not".

6. Thirdly, the structure of the decision is strangely inconsistent. Although at para 4 the judge sets out the structure he will follow, two sections, “the law and the legal position”, and “the appellant’s rebuttal” do not seem to feature in the decision itself, and the section on “discussion and findings” is replaced by one headed simply “discussion”. Indeed what is said at para 43 to be part of the basis upon which the judge has made the decision that article 1F does not apply is discussed, but fades out at para 56 with no clear finding. And while we would not say that a judge is required to set out every principle of law relevant to the decision, it is remarkable that in a long decision like this one that sets out evidence at length, there is no specific reference to the judge directly considering the Refugee Convention or the Rome Statute, which are cited only incidentally (and incompletely) from other sources; and so far as we can see the judge never clearly indicated the burden on the Secretary of State to establish exclusion.
7. Some of these features are merely unwise. If a decision has a lot of mistakes and surprising omissions, it may fail to persuade, and so may lead to challenges that are in substance unmerited. Thus time and resources may be wasted. There comes a point, however, when a decision may be so defective that it cannot stand. It is infected by error of law because it is, like other errors of law, an instance of the judicial function not being carried out properly.
8. Although, as we have previously indicated, we see no good reason to depart from the substantive result of the First-tier Tribunal decision in this case we set it aside for error of law for this reason. We remake the decision, adopting for the most part the judge’s findings of fact.
9. The claimant’s substantive claim is as follows. He was born in August 1980. His father was a supporter of the LTTE and was shot dead by the Sri Lankan army when the claimant was about 5. The claimant himself was recruited by the LTTE and trained in intelligence work. He was transferred to Sampur and was charged with obtaining details of a number of intelligence targets. His controller both gave him instructions and received whatever intelligence the claimant had to communicate. He was moved to Trincomalee to continue his surveillance on two individuals, who themselves were involved in telling the Sri Lankan authorities about LTTE members. The claimant said that it was in part at least as a result of the information he had given, that these two men were killed in 2003.
10. In 2005 he carried out surveillance on a person he called “Suriya”, an officer in the Elam People’s Democratic Party (EPDP). “Suriya” was shot dead in about 2005, according to the claimant in part at least as a result of information he had given.
11. The claimant was also active in recruiting members to the LTTE, but last had contact with that organisation in 2008. In 2009 he destroyed evidence of his involvement with the LTTE. In October of that year he was arrested by the Sri Lankan army, blindfolded, detained and tortured. He

was detained for about three months and released on payment of a bribe, subject to an undertaking to report every two weeks. He stopped reporting and absconded. He left Sri Lanka with the assistance of an agent.

12. The Secretary of State has challenged none of the claimant's claimed history, with the exception of his account of leaving Sri Lanka. The First-tier Tribunal Judge heard the appellant's evidence, when the Secretary of State's representative had the opportunity to cross-examine him. The First-tier Tribunal Judge accepted the claimant's account of the events leading up to his departure from Sri Lanka, and we see no reason to reach a different conclusion.
13. So far as the claimant's departure from Sri Lanka is concerned, the First-tier Tribunal Judge gave careful consideration both to the evidence before him and to the specific conclusions of Dr Smith on this very issue. He found that the appellant was telling the truth about his departure. Again, we see no reason to differ from the conclusions he reached after considering the evidence.
14. The claimant's history will mean that he is on a "stop" list at the airport. He is wanted by the Sri Lankan authorities. His previous ill-treatment, evidenced by his own account, supported by medical reports, give an indication of what may be expected to happen to him. He falls well within the risk categories identified by GJ and others, now endorsed by KK and RS (Sur place activities: risk) Sri Lanka CG [2021] UKUT 00130 (IAC). He has a well-founded fear of persecution in Sri Lanka.
15. The claimant is therefore entitled to be recognised as a refugee unless he is excluded from the protection of the Refugee Convention. The Secretary of State asserts that he is excluded, by reason of the provisions of article 1F(a), which provides that the provisions of the Convention:

"Shall not apply to any person with respect to whom there are serious reasons for considering that:

  - (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes."
16. It is for the Secretary of State to establish that the claimant is excluded.
17. The Secretary of State notes that the LTTE was involved in terrorist activities and was involved in violating civil and political rights. Although the claimant was originally conscripted, he continued his work for the LTTE apparently voluntarily, and was paid expenses. In particular, he was responsible in part for the death of "Suriya" who was a senior official of the EPDP. Suriya is formally known as Douglas Devananda, and was an elected Member of Parliament (although the Secretary of State's refusal letter describes him as Kingsely Weeraratne, "a senior member of the EPDP or potentially and EPDP district leader"). He was shot while riding

his bicycle, at a time when the internationally imposed ceasefire was in force in northern Sri Lanka.

18. It is clear from the letter of refusal, and from Ms Cunha's submissions, that the Secretary of State's case on article 1F is based in particular on the claimant's part in the death of "Suriya". It is also clear, however, that if the evidence demonstrates that the claimant falls for some other reason within article 1F(a), he would in any event be excluded from the Convention.
19. It is well-established that, in order to justify exclusion, it is not sufficient merely to show that the claimant has been a member of a terrorist organisation: R (JS (Sri Lanka)) v SSHD [2010] UKSC 15 at [33] ff. The general activities of the claimant during his membership of the LTTE have been subject to no detailed examination by the Secretary of State at all, and she cannot show that the claimant is excluded from the protection of the Refugee Convention simply by his membership of the LTTE. Indeed, she has not attempted to do so. As we have indicated, her argument rests on the killing of the three people mentioned by the claimant in his claim, in particular "Suriya".
20. It must be noted, however, that the Secretary of State does not say that the killing of any of these individuals was "a serious non-political crime" such as would exclude the claimant by virtue of article 1F(b). She relies on article 1F(a). She needs, therefore, to show, not merely that the claimant participated in the killings, but that they were (or one of them was) an act within the scope of that article. An isolated killing is not a crime against peace or a crime against humanity as defined in any international instrument to which the Secretary of State has pointed. Instead, the Secretary of State asserts that the killing of "Suriya" was a war crime. The Secretary of State concedes that even after the ceasefire there was a state of internal armed conflict in Sri Lanka between Tamil separatists (including the LTTE) and the government. The evidence for the judge, and before us, was summarised by the judge as that the EPDP "were little more than an armed thuggery, called upon to do the murderous bidding of the regime". We see no reason to differ from that assessment. An aggressive act between a member of the LTTE and a member of the EPDP is accordingly likely to be an act attributable to the internal armed conflict, that is to say an act of war, not a war crime.
21. The Secretary of State's position is that the killing of "Suriya" was an act contrary to article 8(2)(c) of the Rome Statute of the International Criminal Court. Despite the importance of that instrument, it was not set out either by the Secretary of State or by the Judge. The relevant part of it reads as follows:

"In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who

have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause:

- (i) violence to life and person in particular murder of all kinds, mutilation, cruel treatment and torture.”

22. Despite its having taken place during a period of armed conflict, therefore, the killing of “Suriya” would be a war crime if he was “taking no active part in the hostilities”. The Secretary of State argues that “Suriya” was an elected member of the Sri Lankan Parliament and for that reason was taking no active part in the hostilities. That we regard as a non sequitur. At the hearing before the First-tier Tribunal, and again before us, Ms Cunha relied on parallels with certain aspects of the position in Northern Ireland during the Troubles. Such a parallel shows that it may be that a person elected as a member of parliament is not taking an active part in hostilities. There is no basis, however, for saying that a person who is elected as a member of a parliament *thereby* ceases to be a person who can be regarded as taking an active part in hostilities. Indeed, in many countries, the Commander-in-Chief of the armed forces acquires that status by election to a particular position within the government of the country. In order to demonstrate that the killing of “Suriya” was a war crime, the Secretary of State needs to show more than that he was a politically elected leader. There is no evidence at all that “Suriya” a member of the EPDP, was not involved in the “thuggery” for which that organisation was responsible. It follows that the Secretary of State fails to establish that he was not a legitimate target during the internal armed conflict.
23. We should add that, if the Secretary of State had established that point, she would still have needed to show that the claimant was genuinely responsible in some part for the killing of “Suriya”. It is not said that he pulled the trigger himself. He says that his intelligence contributed to the killing of “Suriya”, and there is no reason to suppose that he does not genuinely think that: but whether he is right in saying that his own information was what enabled the killing to take place, or even that it contributed in any way to the killing, is largely a matter of speculation. For this reason too, therefore, the Secretary of State would be in considerable difficulty in establishing the claimant’s responsibility for the killing of “Suriya”, even if that killing had been a war crime.
24. For these reasons we reject the Secretary of State’s assertion that the claimant is excluded from the Refugee Convention by article 1F(a). As he has a well-founded fear of persecution in Sri Lanka, arising from his political opinion and activities, and is not excluded, he is a refugee within the meaning of the Refugee Convention. Like the First-tier Tribunal, therefore, we allow his appeal.

C.M.G. Ockelton

C. M. G. OCKELTON  
VICE PRESIDENT OF THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM CHAMBER  
Date: 26 September 2022