IN THE UPPER TRIBUNAL Case No: UI-2018-000001
IMMIGRATION AND ASYLUM CHAMBER First-tier Tribunal No: PA/04755/2018

THE IMMIGRATION ACTS

Decision & Reasons Issued:

13th February 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE BEN KEITH

Between

MRF
(ANONIMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Spurling, Counsel
For the Respondent: Mr Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 14 December 2023

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family, 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 or members of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal by Appellant against the decision of First-tier Tribunal Judge Hopkins ('the Judge") promulgated as long ago as 21 September 2018. The appeal was against the decision of the Secretary of State for the Home Department ("SSHD") to refuse his asylum and protection claim.

2. In between there have been other proceedings. In short after the FTT hearing before Judge Hopkins the Appellant appealed with permission of FTT Judge Bird (this appeal). The first appeal was listed on 20 December 2018, at Field House. Just before that On 10 October 2018, the Appellant was granted three years limited leave to remain in the UK, on the basis of the Article 3 ECHR findings by Judge Hopkins. His new residence permit was sent to his legal representatives under cover letter of 5 October 2018, but not received until 15 October 2018.

3. Then on 19 December 2018, the Appellant's legal representatives notified the Respondent that C wished to continue pursue the asylum element of his case, notwithstanding having been granted leave. C sought an extension of time to submit the notification under Rule 17A(3) of the Procedure Rules.

4. The Appellant's appeal was heard by DUTJ Shaerf on 20 December 2018. DUTJ Shaerf concluded the appeal had been abandoned because he had failed to give notice within the required 30-day period.

5. That decision was then subject to a judicial review. That resulted in the appeal being reinstated. Those proceedings explain much of the delay in this case and we now go on to consider the asylum element of the appeal.

6. The Appellant is a National of Sri Lanka and seeks international protection on the basis of what he says is past persecution at the hand of the Sri Lankan authorities for suspected involvement in the organisation the Liberation Tigers of Tamil Elam ("LTTE").

7. The judge sets out the facts and concluded the following:

   (a) At [70] That the Appellant was a credible witness.

   (b) At [71]

   > ...I am satisfied, looking at all the evidence in the round, that there is a reasonable likelihood that he was arrested [in Sri Lanka] on 4th May 2009 because he was suspected of supporting the LTTE, that the authorities found weapons in the house where he was staying, that he

was detained for 33 days and that during that time he was tortured as claimed, and that he was released as a result of his brother paying a bribe, making use of an influential person who was known to him. I accept he came to the UK with the assistance of an agent. I am satisfied there is a reasonable likelihood that the authorities have been to his parents' home in Sri Lanka enquiring about his whereabouts. I find that the letter from his brother can be relied upon. I accept the conclusions of the reports of Dr Callaway and Dr Thomas. I accept he is not currently in contact with family members in Sri Lanka.

(c) At [75]:

Another risk category mentioned in GJ is that of persons whose names appear on a computerised "stop" list accessible at the airport, comprising those against whom there is an extant court order or arrest warrant. There is no evidence that the authorities have obtained a warrant in respect of the Appellant. I appreciate that they have been making enquiries about him, but this may be simply because they were seeking to monitor him. If they had been in possession of a warrant for his arrest, I would have expected them to have informed his parents of this fact. It is stated in GJ that the authorities maintain a computerised intelligence-led "watch" list. A person on that 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 the 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 is not, in general, likely to be detained by the security forces. I am prepared to accept that the Appellant may be on such a watch list, given that he has previously been detained, but I am not satisfied that this would lead to him being detained and, in consequence, ill-treated. The expert's report suggests that, as he had been made to sign a document, which is probably a confession, a file must have been created for him and this would be noted in the authorities' records. But there is no reason to think that the confession he signed involved an admission of "more elaborate" links within the meaning of the UNHCR Guidelines or that the authorities suspected him of having links of that nature.

8. The judge concluded the asylum part of the judgment stating at [76]:

In the circumstances, whilst I accept that the Appellant has been ill treated by the Sri Lankan authorities in the past, I am not satisfied that he has established a real risk that he would be ill treated on

> return at this present time so as to amount to persecution or serious harm. I am not satisfied that he is entitled to protection on the basis that he is a refugee or that he would face treatment from the authorities which would lead to a breach of Article 3 of ECHR or which would justify a grant of humanitarian protection.

9. The judge then dismissed the asylum and Humanitarian protection claim and allowed the Appeal on Article 3 grounds.

Grounds of appeal

10. The Appellant appeals against the dismissal of his asylum appeal on three grounds:

> **Ground 1:** The FtT failed to give any consideration to the presumption set out **at para 339k of the Immigration Rules that past persecution or serious harm, or** direct threats of the same, is a serious indication of A's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons based on cogent evidence that such persecution or serious harm will not be repeated.
>
> **Ground 2:** The FtT failed to assess the facts and evidence including material parts of the expert evidence [with] anxious scrutiny. It failed to engage with relevant country evidence (schedule of relevant passages also attached here) demonstrating that A would be at real risk of future harm.
>
> **Ground 3:** The FtT failed to approach and answer the risk question by reference to perception of association with the LTTE in the diaspora and/or as someone on the "watch list" in the correct way per *ME (Sri Lanka) v SSHD* [2018] EWCA Civ 1486 at [16] and [17].

GROUND 1: Rule 339K

11. The Appellant argued that in the context of a finding of torture there needed to be some reasoning as to whether 339K had been applied and whether it had been expressly applied or discarded.

12. In response the SSHD submitted that the failure was not material to the overall outcome of the case.

13. Rule 339K states as follows:

> 339K. The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm,

> will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

14. The application of rule 339K might be thought of a mere formality but it is a proposition that has been put into the immigration rules as where it is not followed it can result in serious consequences, as it always relates to individuals who have been persecuted previously or subject to serious harm, in this case the Appellant has been subjected to torture. Rule 339K in this form reflects the wording of Article 4(4) of Directive 2004/83/EC, known as the Qualification Directive, which was in force and binding on the Judge at the time of the decision. Both rule 339K and Article 4(4) are based on the principle that past mistreatment is a serious indication of future risk. Where an asylum claimant is able to demonstrate such past mistreatment or persecution, any prospective risk assessment concerning their return to the country or territory responsible for that mistreatment or persecution must be conducted against that background.

15. This case is about deliberate torture within that definition rather than broader allegations of mistreatment. So the gravity of the mistreatment and the risks are of the highest importance and require the most anxious scrutiny.

16. We accept that the extant country guidance in force at the time of the judge's decision, *GJ and Others* [2013] UKUT 319 (IAC), concluded that only those with certain profiles or roles were at a real risk of serious harm or persecution upon their return. However, nothing in *GJ* sought to detract from the principle which underpins rule 339K and Article 4(4). Indeed, the Panel in *GJ* referred to the principle at para. 428, stating that such past mistreatment "is to be regarded as predictive of future persecution or serious harm." The guidance given in *GJ* was to be applied consistently with the principles underlying the application of the Refugee Convention and the Qualification Directive.

17. The Judge found that the Appellant had been previously tortured and that torture in Sri Lanka was endemic. However, the judge explained that the real issue was the risk of detention rather that torture *per se*. The judge's positive findings concerning the appellant's detention and torture meant that at least two consequences followed. First, it was incumbent upon the judge expressly to address why those findings did not amount to a serious indication of the appellant's future risk. Secondly, the judge should have addressed whether the appellant's prior detention and torture meant that it was reasonably likely that his name would be on the "stop" or "watch"

lists, referred to in the operative country guidance given in *GJ*. While the judge accepted at para. 75 that the appellant may well be on a "watch list", we respectfully consider that he failed to address the implications of *this appellant*'s presence on such a list, in light of the findings of his past mistreatment. Those findings were, in the words of rule 339K and Article 4(4), a "serious indication" of future mistreatment. The judge did not address that issue, whether through the lens of rule 339K, Article 4(4) or any other risk matrix. In our judgment, that was an error of law.

18. As a result Ground 1 is successful and we find a material error of law.

Ground 2: Failure to assess the facts

19. As a result of the findings in Ground 1 we also find an error of law in Ground 2. The failure to assess 339K means that the factors must be re-examined.

Ground 3:

20. Ground 3 changed slightly during the hearing. We asked about whether the Country Guidance now in force: *KK and RS* [2021] UKUT 130 IAC changed anything in the law since *GJ* [2013] UKUT 319 (IAC) which was in force at the time of the judgment. It was submitted that there have been material changes that impact upon this case. In particular paragraphs [13], [14], [19], [27] and [28]. We must apply the law as it stands today. Therefore an assessment of the risks of the Appellant being on the "watch list" must be examined through the prism of *KK and RS*.

21. We therefore find there were material errors of law in relation to all three grounds, and set the decision aside, subject to the findings of fact preserved as set out below.

22. We indicated to the parties at the hearing that we were minded to proceed to remake the decision there and then, on submissions only, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

23. As there was no additional evidence to be placed before us we considered that was is in the interests of justice and expedition to re-make the decision.

24. We preserve the findings of fact in particular:

(a) The Appellant was a credible witness

(b) He had been detained and tortured

(c) There was evidence of intimidation of his family.

Re-making

25. We therefore examine the case with the factual finds of the FTT but applying both rule 339K and *KK and RS*.

26. In *KK and RS* there are a number of relevant paragraphs that cause us serious concern about the risks posed to the Appellant if returned, the headnote states (emphasis added):

> ***COUNTRY GUIDANCE***
>
> *In broad terms, GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC) still accurately reflects the situation facing returnees to Sri Lanka. However, in material respects, it is appropriate to clarify and supplement the existing guidance, with particular reference to sur place activities.*
>
> *The country guidance is restated as follows:*
>
> *(1) The current Government of Sri Lanka ("GoSL") is an authoritarian regime whose core focus is to prevent any potential resurgence of a separatist movement within Sri Lanka which has as its ultimate goal the establishment of Tamil Eelam.*
>
> *(2) GoSL draws no material distinction between, on the one hand, the avowedly violent means of the LTTE in furtherance of Tamil Eelam, and non-violent political advocacy for that result on the other. It is the underlying aim which is crucial to GoSL's perception. To this extent, GoSL's interpretation of separatism is not limited to the pursuance thereof by violent means alone; it encompasses the political sphere as well.*
>
> *(3) Whilst there is limited space for pro-Tamil political organisations to operate within Sri Lanka, there is no tolerance of the expression of avowedly separatist or perceived separatist beliefs.*
>
> *(4) GoSL views the Tamil diaspora with a generally adverse mindset, but does not regard the entire cohort as either holding separatist views or being politically active in any meaningful way.*
>
> *(5) Sur place activities on behalf of an organisation proscribed under the 2012 UN Regulations is a relatively significant risk factor in the assessment of an individual's profile, although its existence or absence is not determinative of risk. Proscription will entail a higher*

degree of adverse interest in an organisation and, by extension, in individuals known or perceived to be associated with it. In respect of organisations which have never been proscribed and the organisation that remains de-proscribed, it is reasonably likely that there will, depending on whether the organisation in question has, or is perceived to have, a separatist agenda, be an adverse interest on the part of GoSL, albeit not at the level applicable to proscribed groups.

(6) The Transnational Government of Tamil Eelam ("TGTE") is an avowedly separatist organisation which is currently proscribed. It is viewed by GoSL with a significant degree of hostility and is perceived as a "front" for the LTTE. Global Tamil Forum ("GTF") and British Tamil Forum ("BTF") are also currently proscribed and whilst only the former is perceived as a "front" for the LTTE, GoSL now views both with a significant degree of hostility.

(7) Other non-proscribed diaspora organisations which pursue a separatist agenda, such as Tamil Solidarity ("TS"), are viewed with hostility, although they are not regarded as "fronts" for the LTTE.

(8) GoSL continues to operate an extensive intelligence-gathering regime in the United Kingdom which utilises information acquired through the infiltration of diaspora organisations, the photographing and videoing of demonstrations, and the monitoring of the Internet and unencrypted social media. At the initial stage of monitoring and information gathering, it is reasonably likely that the Sri Lankan authorities will wish to gather more rather than less information on organisations in which there is an adverse interest and individuals connected thereto. Information gathering has, so far as possible, kept pace with developments in communication technology.

(9) Interviews at the Sri Lankan High Commission in London ("SLHC") continue to take place for those requiring a Temporary Travel Document ("TTD").

(10) Prior to the return of an individual traveling on a TTD, GoSL is reasonably likely to have obtained information on the following matters:

i. whether the individual is associated in any way with a particular diaspora organisation;

ii. whether they have attended meetings and/or demonstrations and if so, at least approximately how frequently this has occurred;

iii. the nature of involvement in these events, such as, for example, whether they played a prominent part or have been holding flags or banners displaying the LTTE emblem;

iv. any organisational and/or promotional roles (formal or otherwise) undertaken on behalf of a diaspora organisation;

v. attendance at commemorative events such as Heroes Day;

vi. meaningful fundraising on behalf of or the provision of such funding to an organisation;

vii. authorship of, or appearance in, articles, whether published in print or online;

viii. any presence on social media;

ix. any political lobbying on behalf of an organisation;

x. the signing of petitions perceived as being anti-government.

(11) Those in possession of a valid passport are not interviewed at the SLHC. The absence of an interview at SLHC does not, however, discount the ability of GoSL to obtain information on the matters set out in (10), above, in respect of an individual with a valid passport using other methods employed as part of its intelligence-gathering regime, as described in (8). When considering the case of an individual in possession of a valid passport, a judge must assess the range of matters listed in (10), above, and the extent of the authorities' knowledge reasonably likely to exist in the context of a more restricted information-gathering apparatus. This may have a bearing on, for example, the question of whether it is reasonably likely that attendance at one or two demonstrations or minimal fundraising activities will have come to the attention of the authorities at all.

(12) Whichever form of documentation is in place, it will be for the judge in any given case to determine what activities the individual has actually undertaken and make clear findings on what the authorities are reasonably likely to have become aware of prior to return.

(13) GoSL operates a general electronic database which stores all relevant information held on an individual, whether this has been obtained from the United Kingdom or from within Sri Lanka itself. This database is accessible at the SLHC, BIA

and anywhere else within Sri Lanka. Its contents will in general determine the immediate or short-term consequences for a returnee.

(14)A stop list and watch list are still in use. These are derived from the general electronic database.

(15) Those being returned on a TTD will be questioned on arrival at BIA. Additional questioning over and above the confirmation of identity is only reasonably likely to occur where the individual is already on either the stop list or the watch list.

(16) Those in possession of a valid passport will only be questioned on arrival if they appear on either the stop list or the watch list.

(17) Returnees who have no entry on the general database, or whose entry is not such as to have placed them on either the stop list or the watch list, will in general be able to pass through the airport unhindered and return to the home area without being subject to any further action by the authorities (subject to an application of the HJ (Iran) principle).

(18) Only those against whom there is an extant arrest warrant and/or a court order will appear on the stop list. Returnees falling within this category will be detained at the airport.

(19)Returnees who appear on the watch list will fall into one of two sub-categories: (i) those who, because of their existing profile, are deemed to be of sufficiently strong adverse interest to warrant detention once the individual has travelled back to their home area or some other place of resettlement; and (ii) those who are of interest, not at a level sufficient to justify detention at that point in time, but will be monitored by the authorities in their home area or wherever else they may be able to resettle.

(20) In respect of those falling within sub-category (i), the question of whether an individual has, or is perceived to have, undertaken a "significant role" in Tamil separatism remains the appropriate touchstone. In making this evaluative judgment, GoSL will seek to identify those whom it perceives as constituting a threat to the integrity of the Sri Lankan state by reason of their committed activism in furtherance of the establishment of Tamil Eelam.

(21) The term "significant role" does not require an individual to show that they have held a formal position in an organisation, are a member of such, or that their activities have been "high profile" or "prominent". The assessment of their profile will always be fact-specific, but will be informed by an indicator-based approach, taking into account the following non-exhaustive factors, none of which will in general be determinative:

i. the nature of any diaspora organisation on behalf of which an individual has been active. That an organisation has been proscribed under the 2012 UN Regulations will be relatively significant in terms of the level of adverse interest reasonably likely to be attributed to an individual associated with it;

ii. the type of activities undertaken;

iii. the extent of any activities;

iv. the duration of any activities;

v. any relevant history in Sri Lanka;

vi. any relevant familial connections.

(22) The monitoring undertaken by the authorities in respect of returnees in sub-category (ii) in (19), above, will not, in general, amount to persecution or ill-treatment contrary to Article 3 ECHR.

(23) It is not reasonably likely that a returnee subject to monitoring will be sent for "rehabilitation".

(24) In general, it is not reasonably likely that a returnee subject to monitoring will be recruited as an informant or prosecuted for a refusal to undertake such a role.

(25) 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 are associated with publications critical of the government, face a reasonable likelihood of being detained after return, whether or not they continue with their activities.

(26) Individuals who have given evidence to the LLRC implicating the Sri Lankan security forces, armed forces, or the Sri Lankan authorities in alleged war crimes, also face a reasonable likelihood of being

detained after their return. It is for the individual concerned to establish that GoSL will be aware of the provision of such evidence.

(27) There is a reasonable likelihood that those detained by the Sri Lankan authorities will be subjected to persecutory treatment within the meaning of the Refugee Convention and ill-treatment contrary to Article 3 ECHR.

(28) Internal relocation is not an option within Sri Lanka for a person at risk from the authorities.

(29) In appropriate cases, consideration must be given to whether the exclusion clauses under Article 1F of the Refugee Convention are applicable.

27. Therefore, the question remains a risk of detention given the fact that the Appellant has previously been detained and tortured. It is clear that the Appellant who has been previously detained will be on the database see [13] and [14]. We therefore find that he is likely to be stopped. The statement at [19] of the headnote deals with those on the watch list which the judge found that he was.

28. The Appellant because of his previous detention, being on the watch list and torture is in a higher risk category because of it. He must fall squarely within [19] (i) – he was previously of sufficient interest to the authorities to detain and torture him. On the evidence, that previous detention, will be contained on electronic records meaning the most likely outcome is that he is detained on arrival, that detention means that he faces a real risk of torture given the additional factors of being on the watch list and previous torture. Therefore, applying rule 339K we see no good reason that he will not face a real risk of torture and persecution. In fact in our judgment that is the likely outcome.

29. For all the above reasons we allow the appeal on asylum grounds.

Notice of decision

1. The decision of Judge Hopkins involved the making of an error of law and is set aside

2. We remake the decision, allowing the appeal on asylum grounds

Ben Keith

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 February 2024