



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/04061/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 9 October 2014**

**Determination Sent
On 24 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

**S K
ANONYMITY DIRECTION MADE**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Lewis, Counsel, instructed by Theva, Solicitors.
For the Respondent: Mr S Kandola, Home Office Presenting Officer.

DETERMINATION AND REASONS

Introduction

1. The Appellant, a citizen of Sri Lanka, whose date of birth is 26 April 1984, appeals against the decision of First-tier Tribunal Judge Warner regarding the decision of the Respondent to remove him to Sri Lanka after refusing refugee status, humanitarian protection and leave to remain in the UK on human rights grounds. Judge Warner dismissed the Appellant's appeal on refugee grounds but allowed it under Article 3 ECHR. Unless otherwise stated, all paragraph references in my determination relate to the determination of Judge Warner, promulgated on 10 October 2013.
2. In the grounds of application it is stated that the Judge found the following: the Appellant's account was credible (that is that he had been forcibly

recruited to the LTTE in May 2007, that he went to the front line and there managed the kitchen at the camp and supplied food to the fighters, that he was part of the patrol team, that his brother and sister were recruited to the LTTE in December 2008, that following surrender in April 2009 he was identified as an LTTE member and detained and severely tortured until his escape was staged and he was recorded as an escapee). The Appellant's evidence at the oral hearing was that the authorities had harassed his parents, because they were looking for him and his brother, who was detained by the authorities in November 2011, had fled to France and was granted refugee status. It is submitted that in the context of these findings, the Judge erred:

- a. In rejecting the Appellant's uncle's evidence that the Appellant's parents still faced problems with the authorities because (i) it was inconsistent with the findings in **GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)** which suggested that the authorities would not be interested in the Appellant because of a history of involvement with the LTTE; and (ii) it was implausible that the CID would continue to invest resources in visiting and questioning the Appellant's parents. It is submitted that this conclusion 'reveals a complete failure to have regard to the Appellant's history when assessing credibility', and failed to take into account that he was identified as an LTTE member, detained and identified for rehabilitation but had escaped before rehabilitation. His uncle's account was therefore consistent with the Appellant's history;
 - b. In failing to assess risk on return with reference to the Appellant's history and the demonstrations which he attended in the UK (the Judge only assessed it in the context of the demonstrations that he had attended);
 - c. In failing to apply **GJ**, which provided for an assessment of risk based on "more elaborate links with the LTTE," in the context of the particular circumstances of the Appellant; and
 - d. In failing to apply paragraph 339K, which provides that evidence of past persecution 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 is good reason to consider such persecution or serious harm will not be repeated. As it was accepted that the Appellant had suffered past persecution, in the absence of good reason that such harm would not be repeated, his appeal should have been allowed.
3. Permission was granted by Upper Tribunal Judge McGeachy on the basis that the grounds referred to the grant of permission by the court of Appeal in **MP and NT (Sri Lanka)** and because of the positive findings of fact of Judge Warner.
 4. The Respondent submitted a Rule 24 response opposing the appeal.

Submissions

5. Mr Lewis amplified the grounds, stating that when the Appellant was tortured, the authorities were of the view that he was operating at a higher level within the LTTE than he had admitted to and had been spying for them. He was perceived to be a threat because he was perceived to have a significant role within the LTTE and it was the perception that resulted in continued interest. Given this perception, it would be surprising if he were not of continuing interest to the authorities. The Judge had failed to give clear reasons for rejecting the account of continuing harassment of the Appellant's parents, failed to consider the evidence with anxious scrutiny, failed to give adequate reasons for rejecting the evidence that the Appellant was of continuing interest and had misapplied **GJ**. He submitted that it was accepted that the Appellant had escaped and would be logged as an escapee, which would ensure continuing interest; he would therefore be re-arrested and killed. The Appellant had not exaggerated his role in the LTTE.
6. Mr Kandola, relying on the Rule 24 response, submitted that the 'inadequate reasons' challenge was not made out. The Judge had directed himself properly, had considered **GJ** [67] and applied it to the facts at [68 - 69]. Past persecution was not determinative of future persecution, as confirmed in **GJ**, which provided that the concentration of the Sri Lankan authorities was on activities which undermined Sri Lanka as a unitary state. The Appellant's uncle's evidence was rejected and adequate reasons were given at [68]. The reason given by the Judge for rejecting the Appellant's uncle's evidence was not simply that it was inconsistent with **GJ**; it was because it was implausible that time and resources would be invested in visiting and questioning the Appellant's parents three years after the event. **GJ**, when applied to the appellants in that case, was case specific but the first appellant had been involved with the LTTE and had close connections with Prabhakaran. His appeal was allowed. As to the second appellant in **GJ**, he also had a history of involvement with the LTTE, he was found to be credible and released on payment of a bribe and this Appellant was similar to the second appellant in **GJ**. There is no evidence that the Appellant went through rehabilitation and therefore that he would be of further interest to the authorities.
7. As to the Appellant's evidence that he would be re-arrested, Mr Kandola submitted that the risk of arrest is based on current activities in the diaspora; the Appellant was not a current threat. He would not be on a watch list. As stated in the Rule 24 response, due to his mental health condition, the authorities would recognise that he was not a threat.
8. In response, Mr Lewis submitted that the Appellant, in his witness statement, confirmed that the CID officer who had arranged his escape had told him that he would be likely to be on a stop list as an escapee. The reasonable inference, therefore, would be that he would continue to be of interest. The Appellant had not been subject to rehabilitation because he had not got to that stage; he was being tortured in detention. He was in the 'perceived to be' risk category and this would lead to rehabilitation. Following the confession by his parents, he and his brother had escaped and his parents were subject to reporting conditions. His appeal should have been allowed on asylum and Article 3 grounds.

Decision and reasons

9. It cannot be said that the Judge did not apply anxious scrutiny to the evidence supplied by the Appellant. He set out the immigration and appeal history, the medical evidence and the evidence of the Appellant's witnesses at [1 - 49], and referred to the Appellant's own witness statements at [56]. He accepted the core elements of the Appellant's claim. Having considered the evidence, he found that the Appellant would not be on a "stop" or "watch" list [76], inclusion on which is triggered by a court order or an arrest warrant. This conclusion was open to him on the basis of background evidence and lack of evidence from the Appellant as to any court order or arrest warrant.

10. The guidance in **GJ** confirms that the current focus of the authorities is on those who seek to undermine Sri Lanka as a unitary authority. The Judge directed himself properly at [43] setting out the head note in full. In particular, it is noted that the LTTE is a spent force and

"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....Its focus is on preventing both (a) the resurgence of the LTTE or any similar separatist organisation and (b) the revival of the civil war in Sri Lanka" (head note 3); and

"The Sri Lankan authorities' approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. ...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" (head note 9).

11. The Judge reminded himself of the relevant standard of proof at [17] - [21], and his assessment was made in light of it. With full knowledge of the Appellant's past activities, detention and torture, the Judge gave adequate reasons for his findings as to why the Appellant would not be of continuing interest to the authorities; it was contrary to country guidance and it was implausible that time and funds would be invested in continued visits [69]. The Judge was aware of the Appellant's having attended some demonstrations in London along with "thousands of other Tamils" and his activities were not such as to lead to the conclusion that he was a threat to the Sri Lankan authorities. The Judge also found that if the Appellant were monitored on return the Appellant's "...mental state was such that it will rapidly become apparent to the CID or police that he poses no risk to the unitary Sri Lankan state or the Sri Lankan government." These conclusions were open to the Judge on the evidence before him. He had significant evidence on the mental health of the Appellant and its effect on him on a day to day basis; the Appellant's mental health was well documented.

12. It is not made out that the Judge did not have regard to the Appellant's past activities, family connections or his witness statement evidence in reaching his conclusions. He scrutinised the evidence

carefully, in view of which it is also not made out that the Judge did not have regard to the Appellant's "more elaborate links" to the LTTE.

13. Mr Lewis submitted that the Appellant would have to be rehabilitated on return because he had not yet gone through the rehabilitation process. However, there is no evidence to indicate that someone who has been absent from Sri Lanka for four years (as at the date of hearing before the Judge) will be rehabilitated because of a past history of LTTE connections. **GJ** confirms that the individuals who are selected for detention and rehabilitation are "...those within Sri Lanka who undertake high profile separatist activity (such as Jaffna students trying to celebrate Maaveerar Naal I November 2011) or who are known or perceived (while still in Sri Lanka) to be seeking contact with the leaders or activists of the resurgence movement in the diaspora hotspots...." (**GJ** paragraph 318). The Appellant does not belong to such groups.
14. Mr Lewis also submitted that the Appellant was perceived by the authorities to be operating at a higher level than he in fact was and he would be at risk on return because of this perception. However, there is nothing to suggest that he was perceived to be an activist or leader of the LTTE, or will be perceived to have been involved in diaspora activity (except as stated by the Judge at [67]) which is the present focus of the Sri Lankan authorities.
15. As to failing to consider the provisions of paragraph 339K, whilst this is not expressly mentioned by the Judge, it is clear that he found there to have been past persecution and that there was good reason (the end of the civil war and the current focus of the Sri Lankan authorities) that this would not be repeated.
16. The Judge made findings of fact that were open to him on the evidence before him. He did not err in law in setting out the legal thresholds to be met and he applied the law to the facts as found by him. Read as a whole, the determination discloses no material errors of law.

Decision

17. The determination of Judge Warner contains no material errors of law and his decision must therefore stand.
18. Anonymity was granted by the First-tier Tribunal. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I direct anonymity. Unless and until a tribunal or court directs otherwise, 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 the Respondent. Failure to comply with this direction could lead to contempt of Court proceedings.

Signed

Date 23/10/2014

M Robertson
Sitting as Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

No fee has been paid or is payable and no fee award is made.

Signed

Date 23/10/2014

M Robertson
Sitting as Deputy Judge of the Upper Tribunal