



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

Appeal Number: PA/02722/2015

THE IMMIGRATION ACTS

**Heard at : Field House
On : 25 May 2017**

**Decision Promulgated
On: 05 June 2017**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RM

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer

For the Respondent: Mr P Haywood, instructed by Jein Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing RM's appeal against the decision to refuse her protection claim and granting her only restricted leave to remain.
2. For the purposes of this decision, I shall refer to the Secretary of State as the respondent and RM as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Sri Lanka born on 5 October 1986, of Tamil ethnicity. She arrived in the United Kingdom on 25 November 2012 and claimed asylum at the airport. On 3 November 2014 she was excluded under Article 1F(a) and 1F(c) of the Refugee Convention but was granted a six month period of restricted leave, valid until 2 May 2015. On 30 April 2015 the appellant submitted an in-time application for further leave. On 27 October 2015 the exclusion was maintained under Article 1F(a) only and the appellant was granted a further six month period of restricted leave until 27 April 2016.

4. The appellant appealed against that decision and her appeal was heard in the First-tier Tribunal on 8 and 16 March 2016 and was dismissed by Judge Beg in a decision promulgated on 1 April 2016. Judge Beg's decision was subsequently set aside in the Upper Tribunal on 25 July 2016 and was remitted to the First-tier Tribunal to be heard afresh by a different judge. The appeal was then heard by First-tier Tribunal Judge Talbot on 19 December 2016 and was allowed, in a decision promulgated on 11 January 2017. The Secretary of State sought, and was granted permission to appeal Judge Talbot's decision. Permission was granted on 8 March 2017.

The Appellant's Case

5. The appellant joined the LTTE in December 2002, after returning to her village in Trincomalee during the ceasefire. Between 2002 and 2004 she delivered letters and parcels for the LTTE, although she did not know the contents, and in 2004 she joined the intelligence wing of the LTTE and received special training which involved passing messages, contacting other members and using code words. Between 2004 and 2005 she passed information to the LTTE about army movements and Karuna group movements and passed on the names of people giving tips to the army. Some members of the Karuna group she had informed on were taken by the LTTE for punishment and were kept in LTTE custody for indefinite periods and put in dark cells. Those that had committed atrocities such as extortion, killings and rapes were given the death sentence. Some of the members of the public she informed on were put in jail. The appellant said that she was aware that some people were detained and some were executed but she did not know the details. She continued to work for the intelligence group of the LTTE after she became aware of the punishments they carried out, and until 2007, after which time she lost contact with the LTTE due to the eastern province falling into the hands of the army. Between 2007 and 2008 she worked for an NGO. On 4 April 2011 she was arrested at home by the army and held in detention in Colombo for 10 days, where she was questioned, ill-treated, physically and verbally abused and raped. She was released after her father sought help from a lawyer and an MP and reported weekly to the police. She applied for a student visa to come to the UK in August 2011 but was refused. Her father was beaten to death on 19 November 2011 and her mother sent her to live with her uncle in Trincomalee. Intelligence officers often came to her home and demanded that her mother disclose her whereabouts. On 10 July 2012 she received a call informing her that her mother and sister were dead. On 3 October 2012 the appellant was arrested again at her aunt's house and was again ill-treated in detention

including being raped and burned with cigarettes. Her uncle secured her release by paying a bribe and she was released on 19 November 2012, following which he arranged for her to leave the country. The appellant stated that she feared being arrested, detained, tortured and killed if she returned to Sri Lanka.

6. The respondent, in refusing the appellant's claim, noted that the LTTE had been responsible for a wide range of war crimes and crimes against humanity and for the persecution of its opponents throughout Sri Lanka. The respondent had regard to Article 7 of the Rome Statute in regard to crimes against humanity and to Article 8 in regard to war crimes. The respondent set out the provisions of Article 1F(a) of the Refugee Convention and the relevant test in JS (Sri Lanka), R (on the application of) v Secretary of State for the Home Department (Rev 1) [2010] UKSC 15 and applied them to the appellant's case, considering that the appellant had knowledge of the crimes the LTTE were committing and that she intended to contribute to their commission. The respondent considered that the appellant had knowledge that the LTTE punished and indefinitely detained some of the people against whom she gathered information and reported and was aware that some people were executed. The respondent considered that the appellant intended to contribute to the commission of these crimes since she continued to work for the LTTE even after becoming aware of the punishments they carried out. The respondent therefore considered that the appellant acted with knowledge and intent and that she knowingly made a significant contribution both individually and as part of a joint criminal enterprise to various Article 7 crimes against humanity and Article 8 war crimes and thus met the test in JS and ought to be excluded under Article 1F(a) of the Refugee Convention. The respondent conceded that there were no grounds for her exclusion under Article 1F(c) as previously believed. The respondent considered that there were also reasonable grounds for considering that the appellant was a danger to the security of the UK and that Article 33(2) of the Refugee Convention was engaged. On the basis that Article 1F(a) and Article 33(2) were applicable to the appellant, the respondent issued a certificate that she was not entitled to the protection of Article 33(1) of the Refugee Convention and refused her asylum claim. The appellant was also excluded from being considered as eligible for humanitarian protection. It was considered, however, that the appellant was at risk of suffering treatment contrary to Article 3 of the ECHR and on that basis she was granted a period of restricted leave to remain.

7. The appellant appealed against that decision on the grounds that the respondent had failed to meet the burden of proving that there were serious grounds for considering that she had committed war crimes and crimes against humanity in the period during which she worked as an intelligence agent for the LTTE. It was asserted in the grounds that the appellant denied that she knowingly and intentionally participated in war crimes and/ or crimes against humanity. Whilst she was aware that those apprehended by the LTTE were subjected to punishment it was her understanding that that was after a formal hearing. It was asserted further that there was no evidential basis for the respondent's invocation of Article 33(2). The appellant maintained that the

removal of herself, her dependent son and his father would be in breach of Article 8 of the ECHR.

8. The appellant's appeal was initially heard by First-tier Tribunal Judge Beg. The appellant gave evidence that she did not attend the LTTE formal hearings but she had heard that the LTTE conducted enquiries and that there were court hearings. She believed that the hearings were fair hearings, to find out the truth. Her only direct knowledge about LTTE's legal avenues came from a land dispute concerning her uncle's land which had been fairly resolved by the LTTE. She did not know what happened to the people she informed on. Judge Beg did not accept the appellant's evidence, she did not find it credible that the appellant was unaware that war crimes were being committed by the LTTE and she did not accept the appellant's account of the LTTE conducting a fair legal system. She upheld the respondent's exclusion decision and dismissed the appeal.

9. Judge Beg's decision was set aside on the basis that she had reversed the burden of proof by expecting the appellant to prove her case.

10. The appellant's appeal then came before the First-tier Tribunal to be heard afresh. Judge Talbot heard the appeal on 19 December 2016. He heard from the appellant. The appellant's evidence before Judge Talbot was that she had never herself witnessed any atrocities or other abuses by the LTTE. She saw the LTTE as providing assistance to local civilians and was aware that they ran charities and orphanages. She said that they had set up a system of courts with appointed judges and had a police force and she gave as an example when her uncle went to court because of a land dispute. She believed that the courts operated fairly to establish someone's punishment if found guilty. She had only been 17 when she started helping the LTTE and she did not hold any rank in the intelligence wing but simply passed on information and delivered parcels and messages. She believed that members of the Karuna Group behaved badly and were responsible for sexual attacks and seizure of property and she was prepared to pass on intelligence about them because she believed their activities posed a threat to the LTTE and caused serious harm to civilians. She knew that members of the Karuna Group could be held for long periods in dark cells and she was aware that the death sentence could be carried out, but she did not know what happened to the particular people she informed on. She was not aware that the LTTE administered torture or that the people on whom she had informed would not be subject to proper court procedures. If she had known that the information she revealed would lead to the people being tortured or not being treated fairly by the court she would not have provided the information. It was only in 2009 towards the end of the war that she heard that the LTTE were accused of being a terrorist organisation.

11. Judge Talbot considered that the appellant had been clear and consistent in what she had said about her state of knowledge at the time she was helping the LTTE. He found her evidence of her belief that there was a proper legal system in place within the LTTE to be plausible in light of the documentary evidence produced and concluded that the respondent had been unable to

demonstrate that the appellant would have been aware of practices such as torture being carried out against the people she informed on or that the court process was carried out in an arbitrary or summary fashion. He found that the respondent had failed to discharge the burden of proof to show that there were serious grounds for considering that the appellant had the requisite knowledge and intention to establish her criminal liability for the crimes committed by the LTTE. The judge found further that the respondent had provided no evidence to support the view that there were reasonable grounds for regarding the appellant as a danger to the security of the UK. He concluded that the respondent was not entitled to exclude the appellant from the full protection of the Refugee Convention and that the appellant was at risk of persecution and entitled to the protection of the Refugee Convention. He allowed the appeal on asylum grounds.

12. The respondent sought permission to appeal Judge Talbot's decision on the basis that the judge had materially erred in law in finding that the appellant should not be excluded from the Refugee Convention. It was asserted in the grounds that the judge had failed to give adequate reasons for finding the appellant's role in the intelligence wing of the LTTE did not lead to crimes against humanity and that the judge had failed to consider the appellant's narrative against the backdrop of the background material. The fact that the appellant thought that there was a legal system in place did not provide a defence to a crime against humanity. What was relevant was that the appellant was aware that those she gave intelligence on could be subject to punishment and the judge had failed to consider that. The judge failed to make proper findings on what the appellant did or did not know in relation to how the LTTE treated those who were detained.

13. Permission to appeal was initially refused by the First-tier Tribunal, but was subsequently granted in the Upper Tribunal on 8 March 2017 on the grounds that the judge's assessment of exclusion was arguably inadequate.

Appeal hearing and submissions

14. The appeal came before me on 25 May 2017. Both parties made submissions. Mr Wilding objected to the admission by Mr Haywood of an unreported decision from the Upper Tribunal (AA/01049/2008). I noted that the decision had already been referred to by the First-tier Tribunal and therefore advised the parties that I was aware of its contents, but that I would not accord it any particular weight given its unreported status.

15. Mr Wilding submitted that the judge's decision was wholly inadequate and only dealt with the relevant issue in one paragraph, [17], with the rest of the decision simply setting out the background. He submitted that the appellant had passed on intelligence about those acting against the LTTE, namely members of the Karuna group and civilians, resulting in those people being detained and executed, and that it was no answer to say that the key question was whether it seemed plausible that the claims of a proper legal system would have been accepted by someone like the appellant. There had been no

consideration by the judge as to why a terrorist organisation had the standing to hand down judgment in a criminal matter. Mr Wilding submitted that there had been a complete disregard for the key question, the JS test, namely whether there were serious reasons for considering that the appellant had voluntarily contributed in a significant way to the prosecution of crimes against humanity. The judge had failed to make proper findings in that regard. It was not clear if he was saying that the appellant's explanation amounted to a defence, whereas it was no defence to say that she thought there was a legal process, since the LTTE was not the state.

16. Mr Haywood, in his submissions, said that the crucial question was whether the appellant had the required *mens rea* and the judge properly found that she did not. Whatever its international status, the LTTE was a quasi government entity administering significant areas of Sri Lanka and had an obligation to operate a legal system, which it did. The judge accepted that the appellant had no awareness that the LTTE tortured people and she regarded them as a legitimate entity. The judge directed himself appropriately in regard to *actus rea* and *mens rea* and the burden and standard of proof. His findings of fact were not challenged. He found the appellant's evidence consistent and found that what she believed to be the case was plausible in the context of the background material. Mr Haywood relied on the unreported case of Sinnathamby Sivanantharajan (AA/01049/2008). He submitted that there was neither the *actus rea* nor the *mens rea* and the judge was entitled to conclude as he did.

17. Mr Wilding, in response, submitted that there was no challenge to the judge's findings of fact because no findings had actually been made. The judge had simply found the appellant's evidence to be consistent, but had made no findings on credibility and no findings on the background material. The judge made no finding on *actus rea* and in any event the appellant could not succeed on that basis. With regard to *mens rea*, the judge did not answer the questions forming the test in JS. Mr Hawood responded by submitting that the judge had made clear findings and had clearly accepted the appellant's evidence.

Legislative Framework

18. Article 1F of the Refugee Convention states as follows:

"The provisions of this 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;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations"

19. The relevant legislative framework in Article 7 of the Rome Statute of the International Criminal Court, which defines crimes of humanity, and Article 8 of

the Rome Statute which defines war crimes, is set out at [16] to [20] of the refusal decision.

20. Article 30 of the Rome Statute sets out the Mental element as follows:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."

21. The Supreme Court in JS, when focussing on the mental element, held as follows:

36. "Of course, criminal responsibility would only attach to those with the necessary *mens rea* (mental element). But, as article 30 of the ICC Statute makes plain, if a person is aware that in the ordinary course of events a particular consequence will follow from his actions, he is taken to have acted with both knowledge and intent. (I would for this reason reject the respondent's criticism of the omission from paragraph 21 of the German court's judgment of any separate reference to intent; that ingredient of criminal responsibility is already encompassed within the Court's existing formulation).

37. Similarly, and I think consistently with this, the ICTY Chamber in *Tadic* defines *mens rea* in a way which recognises that, when the accused is participating in (in the sense of assisting in or contributing to) a common plan or purpose, not necessarily to commit any specific or identifiable crime but to further the organisation's aims by committing article 1F crimes generally, no more need be established than that the accused had personal knowledge of such aims and intended to contribute to their commission.

38. Returning to the judgment below with these considerations in mind, I have to say that paragraph 119 does seem to me too narrowly drawn, appearing to confine article 1F liability essentially to just the same sort of joint criminal enterprises as would result in convictions under domestic law. Certainly para 119 is all too easily read as being directed to specific identifiable crimes rather than, as to my mind it should be, wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever means are necessary including the commission of war crimes. **Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose.** "

22. The last section, which I have highlighted, is considered as the JS test.

Consideration and findings.

23. It seems to me that a significant part of the criticism levelled at the judge's decision is its brevity. There is, indeed, some justification in such a criticism, particularly as exclusion cases such as this are difficult and involve complex legal principles, and the judge's actual findings were restricted to a limited number of paragraphs. However the issues in the appellant's case were in fact fairly narrow, in that they largely consisted of an assessment of the appellant's credibility and thus the focus of the judge's findings, and the basis of his decision, was the question of her knowledge and intent.

24. Whilst Mr Haywood sought briefly to raise the issue of *actus reus* as an alternative, there was little attraction in that argument, and it is clear that the judge's decision turned on the question of *mens rea*, the appellant's knowledge and intent, and that that was the determinative issue in her case.

25. The question for me, therefore, is whether the judge's findings on the appellant's knowledge and intent were properly made. The starting point is the findings of fact made by the judge on the appellant's claimed knowledge and intent. Whilst Mr Haywood submitted that the Secretary of State had not challenged the judge's positive credibility findings, it is Mr Wilding's submission that the judge actually made no findings of fact on the appellant's evidence and the background evidence. I am not in agreement with Mr Wilding on that matter, although I can see why he makes such an argument, given that the judge did not specifically state that he accepted the appellant's evidence. Nevertheless, having referred at [14] to the relevant credibility issue it is clear that the judge went on to consider credibility in the following paragraphs, having regard at [15] to [17] to the appellant's claimed knowledge of the LTTE's activities and the existence of a functioning and fair legal system, referring at [15] to the consistency of her evidence and at [17] to the plausibility of that evidence in the context of the overall circumstances and the background information. A plain reading of the judge's findings at [14] to [17] is that he did indeed accept her evidence and found her to be a credible witness.

26. Accordingly the judge accepted that, whilst the appellant was aware that people on whom she had informed could be liable to severe punishment including imprisonment in harsh conditions and even execution, it was her understanding that such punishments was meted out only after a formal and fair legal process in which there was proper legal representation and properly appointed judges and only after they had been found guilty. He also accepted the appellant's claim to have no knowledge of people being tortured whilst in LTTE custody and that if she had known that the information she gave would have led to torture or unfair treatment by the court she would not have provided the information.

27. The respondent's grounds assert that the judge failed to give proper reasons for coming to such a conclusion and that such a narrative was not considered against the backdrop of the background material relied upon in the refusal decision. However the judge plainly did consider the country evidence and he referred to it at [17], albeit not in any great detail. He provided reasons

why he considered that the appellant could plausibly have held the beliefs that she did, accepting Mr Haywood's submission that she would have had a very polarised view of the conflict given her youth and the perceptions of people in the village. Mr Haywood's submissions, as recorded by the judge at [11], referred to the perceived status of the LTTE in villages such as the appellant's where they were regarded as the liberators and legitimate representatives of the Tamil people and as a de facto state controlling that part of the country. The judge clearly accepted that to be the case on the basis of the country evidence before him, as he said at [17], and thus found plausibility in the appellant's claim as regards her knowledge and intent.

28. Criticism is made of the judge's reliance at [17] upon partisan evidence emanating from the LTTE about their legal system. It was Mr Wilding's submission that the appellant's belief about a legal system being in place did not provide a defence against crimes of humanity, particularly when that legal system was not one set up and recognised by the state. However the point being made by the judge was not that there was necessarily legitimacy in the LTTE's legal system but that the appellant's perception of a fair legal process was a credible one and was a relevant consideration in assessing her knowledge. He noted that she had had some experience of the court system as a result of a land dispute in which her uncle was involved and accepted that that may have reinforced her belief in the legal system administered by the LTTE. It was the judge's conclusion, therefore, that this further lent plausibility to the appellant's claim as regards her knowledge and intent in relation to the punishments meted out to those on whom she had informed. I see no reason why the judge was not entitled to reach such a conclusion.

29. Mr Wilding submitted further that the judge had not applied the relevant test in JS, but I do not agree. Although the judge produced a long extract from the case without any apparent analysis at [13], it is clear from [14] that he was aware of the relevant considerations in that case, he identified that the burden of proof lay upon the respondent and he set out the correct test for considering exclusion under Article 1(F) and then went on to apply that to the evidence, giving his conclusion at the end of [17].

30. Accordingly, whilst the judge's conclusions are brief it seems to me that he took account of all relevant matters and provided clear findings on why he reached the conclusions that he did. The conclusions that he reached were, in my view, reasonably and properly open to him on the evidence before him.

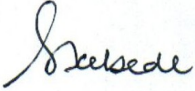
31. For all of these reasons I conclude that the grounds of appeal do not disclose any errors of law in the First-tier Tribunal's decision. The sole challenge in the grounds is to the judge's findings on exclusion under Article 1F(a) of the Refugee Convention. There is no challenge to his decision neither under Article 33(2) nor on his finding as to the appellant's entitlement to protection under the Refugee Convention. Accordingly the judge's decision to allow the appellant's appeal on asylum grounds is upheld.

DECISION

32. The Secretary of State's appeal is accordingly dismissed. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to allow the appellant's appeal therefore stands.

Anonymity

The First-tier Tribunal made an order for anonymity. I maintain that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed 
Upper Tribunal Judge Kebede
2017

Dated: 2 June