Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10473/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 February 2020	**On 20 April 2020**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

TR (SRI LANKA)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Tobin, instructed by S Satha & Co Solicitors
For the Respondent: Mr S Whitwell, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Sri Lankan national who was born on 23 November 1993. He appeals, with permission granted by a Designated Judge of the First-tier Tribunal, against a decision which was issued by First-tier Tribunal Judge Kudhail, dismissing his appeal against the respondent's refusal of his protection and human rights claims.

2. The appellant entered the United Kingdom in July 2018 and claimed asylum on arrival. His application having been refused, he appealed to the First-tier Tribunal, which accepted the following aspects of his protection claim. He was

forcibly recruited by the LTTE in 2009, as the civil war was in its final phase: [42]-[43]. He was given weapons training for two weeks: [44]. He was then stationed at a checkpoint as a sentry: [45]. The appellant attended the LTTE 'Martyrs Day' event in 2017, and was arrested shortly thereafter: [54]. He was told by the Sri Lankan authorities that his arrest was due to his activities with the LTTE: [54]. He was held at Joseph Camp for three months, during which time he was tortured in various ways, including being whipped with electrical cables which left visible scarring on his back. That scarring was persuasively attributed to the type of ill-treatment alleged by the appellant in a report written by a consultant physician: [51]. The judge considered it likely that the appellant's time in detention in 2017 had led to him experiencing mental health issues, as described in a psychiatric report: [53]. The appellant was able to escape from the camp after his father paid a bribe: [55].

3. The judge did not accept that the appellant had surrendered to, or was arrested by, the Sri Lankan authorities at the end of the war in 2009 or that he was held at a camp named Manik in the aftermath of the war: [46]. The judge also noted that the appellant's family continued to live in Sri Lanka without being targeted by the SLA: [49]. If the CID had been visiting the family house, as claimed, the judge noted that the appellant's father had also attended Martyrs Day in 2017 and he had not faced any problems: [62]. The judge noted that the appellant had taken part in some diaspora activities in the UK, with the Transitional Government of Tamil Eelam, and that he had a limited and low-key profile in these activities: [56].

4. The judge observed that the situation in Sri Lanka had changed since the election of President Gotabaya Rajapaska who was 'part of a political family closely related to the many atrocities of the past in Sri Lanka.: [57]. The judge did not have evidence which indicated a crackdown on former LTTE members or supporters: [59]. The appellant's diaspora activities would not invoke the interest of the current regime because he was not a leader and did not have a significant role in post-conflict separatism: [60]. The judge had very little evidence of the appellant's role in the TGTE but his involvement was not 'significant enough' to give rise to a perception that he was a risk to the unitary Sri Lankan state: [61].

5. The judge resolved the appellant's separate claim under the ECHR at [65]-[67]. He accepted that the appellant suffered from PTSD, moderate depression and that he presented a moderate suicide risk. The judge noted, however, that there was some treatment available in Sri Lanka and that the respondent would take all reasonable steps to minimise the risk to the appellant.

6. The grounds of appeal, which were settled by Ms Bayati of counsel (who did not appear below) may be summarised as follows:

   (i) The judge failed to apply paragraph 339K of the Immigration Rules in assessing the risk to the appellant.

(ii) The judge had failed to make a finding on the appellant's claim that he had been placed on reporting conditions when he was released from Joseph Camp.
(iii) The judge had failed to assess the risk to the appellant holistically, and had failed in particular to consider the appellant's TGTE activities alongside his existing profile with the Sri Lankan authorities.
(iv) In respect of Article 3 ECHR, the judge failed to consider there would be a risk of suicide after the appellant returned and failed, in particular, to consider whether the appellant would be willing to obtain treatment.

7. Designated Judge Macdonald granted permission to appeal on each of these grounds.

8. At the outset of the hearing, I expressed my provisional view that there was merit in at least the first of the grounds of appeal which I have summarised above. Mr Whitwell accepted that there was no answer to this ground of appeal. That must be correct. The judge found that the appellant was arrested, detained and tortured for three months at Joseph Camp but he failed to turn his mind to Article 4(4) of the Qualification Directive, as transposed into domestic law by paragraph 339K of the Immigration Rules, which provides as follows:

> 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.

9. Submissions followed regarding the appropriate disposal of the appeal, it having been agreed on all sides that the judge's decision was erroneous in law on this account. Ms Tobin submitted that the findings I have summarised above, coupled with the correct application of paragraph 339K of the Immigration Rules, must result in a decision in her client's favour. There was therefore no need, in her submission, for there to be any further findings of fact made, whether in the Upper Tribunal or the FtT.

10. For the respondent, Mr Whitwell submitted that there needed to be additional findings of fact, particularly with respect to the question of whether the appellant had been required to report to the Sri Lankan authorities upon his release from Joseph Camp. Nor, he noted, had there been any real findings on the extent of the appellant's participation in the TGTE, which was said on his membership card to be limited to voluntary activities for the cricket team. Mr Whitwell did not accept that the findings of fact summarised above were necessarily dispositive of the appeal in the appellant's favour.

11. Both representatives made reference to GJ (Sri Lanka) [2013] UKUT 319 (IAC), ME (Sri Lanka) [2018] EWCA Civ 1486 and the recent report by the Home Office following a fact finding mission to Sri Lanka which took place between 28 September and 5 October ("the FFM report"). Having considered the authorities

and the FFM report with care, I do not consider it necessary for there to be a further hearing in this case, whether before the Upper Tribunal or the FtT. The proper course, in my judgment, is as suggested by Ms Tobin. On the basis of the existing findings of fact, and in light of the background situation which I will set out, the appropriate course is to set aside the decision of the FtT and to remake the decision on the appeal, allowing the appeal on protection grounds.

12. It is appropriate to start with GJ (Sri Lanka). Although the background situation in Sri Lanka has changed to an extent over the ensuing seven years, neither advocate attempted to submit that I should depart from that country guidance decision. Their focus was, instead, on the question posed by (7)(a) of the headnote to that decision, which is whether the appellant is or is perceived to be, a threat to the integrity of Sri Lanka as a single state because he is, or is 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. In considering that decision, I obviously recall what was subsequently emphasised by the Court of Appeal (Underhill LJ in particular) in MP & NT (Sri Lanka) [2014] EWCA Civ 829: that there may "be other cases … where the evidence shows particular grounds for concluding that the Government might regard the applicant as posing a current threat to the integrity of Sri Lanka as a single state even in the absence of evidence that he or she has been involved in diaspora activism."

13. In her cogent submissions, Ms Tobin placed particular reliance on the judgment of Lewison LJ (with whom Flaux LJ agreed) in ME (Sri Lanka) [2018] EWCA Civ 1486. In that case, it had been accepted by the FtT that the appellant had become involved with the LTTE in 2005. Amongst other things, he worked as a driver for the LTTE and was aware of the location of arms caches as a result of his role. He had been in the UK between 2014 and 2014, at which point he returned to Sri Lanka. He had been arrested and ill-treated shortly after arrival, and had agreed to show officers the location of one cache of weapons. He was then released without charge or reporting conditions and was thought by the FtT to be no longer of interest. He then left Sri Lanka without difficulty and arrived again in the UK, whereupon he did not claim asylum immediately but did so after his arrest. There had been two visits by the SLA to the family home, both of which were in 2015, although no arrest warrant had been issued. The judge in the FtT had taken careful account of the appellant's treatment in detention and her focus had been on whether there was a real risk of the recurrence of that treatment. In answering that question, the court considered there to have been a 'serious gap in the FtT's chain of reasoning'. Lewison LJ explained at [16]-[17] what he considered that gap to be:

> [16] The following are, in my judgment, the pertinent points. ME's arrest took place long after the cessation of the conflict in Sri Lanka. That led (or ought to have led) to the conclusion that he was perceived at that time as being of significant interest to the authorities. He was therefore a person who had fallen into category (a) of the risk categories identified in *GJ* . It would have needed an exceptionally strong case to persuade the FTT that he had now ceased to be at risk. The mere fact that he was released without charge and

> without reporting restrictions was not enough, because the authorities not only made two subsequent visits to his home; but they also searched it. The conclusion that should be drawn from that is that ME was still a person of significant interest; and moreover, that the authorities perceived that he might have more to tell them. Mr Jolliffe, in support of the FTT's decision, submitted that ME was no longer a person of interest because the authorities had got what they wanted from him. But that does not explain why, having obtained the information from ME about the location of one arms cache, the authorities nevertheless twice visited his home and searched it. Thus, the FTT was right to proceed on the basis that there was a real risk that the authorities would wish to question him further.
>
> [17] What, then, persuaded the FTT that there was no real risk of the questioning taking place in detention? It seems to me that the FTT's conclusion is founded on its perception that ME had passed on the information that he had; and that if he had any more he would be willing to give it over. The parenthesis in [39] is not a finding that ME had no more information. Rather it is a finding that he is willing to give over such information as he has. ME may be truthful in saying that if he has any further information he will hand it over; and the FTT was no doubt justified in believing him. But that is not, in my judgment, a complete answer. The real question is whether the Sri Lankan authorities would believe him; or perhaps to put it more accurately whether there was a real risk that they would not. The FTT's finding could only be a complete answer if the FTT could have been satisfied that the Sri Lankan authorities would accept at face value, and without further beating or detention, the completeness of any further revelation that ME might make. The FTT does not confront that question. As Ms Jegarajah submitted, those who torture others do so for a variety of reasons, not all of them rational. The authorities had already had some success in extracting information from ME after beating him; which shows that at least at that time they did not accept his account at face value. What had changed in the conduct of the Sri Lankan authorities? The FTT did not explain this. Where, as here, a person has been tortured for alleged participation in political crimes a heightened degree of scrutiny is required: *R (Sivakumar) v Secretary of State for the Home Department [2003] UKHL 14, [2003] 1 WLR 840* at [16].

14. Mr Whitwell emphasised that the facts of ME (Sri Lanka) were not on all fours with the facts in this appeal. He drew attention, in particular, to the fact that the interest in ME (Sri Lanka) had an entirely different origin than the interest in this appellant. ME (Sri Lanka) was a person with proven information about LTTE arms caches whereas this appellant had nothing approaching that profile.

15. Mr Whitwell is undoubtedly correct in that submission but the logic of Lewsion LJ's approach in [16] nevertheless applies. This appellant was arrested long after the civil war came to an end. He was held and tortured for a long time. Just as in

ME (Sri Lanka), therefore, he must have been a person who fell into the GJ (Sri Lanka) risk category to which I have already referred. He fell into that category not at some long-forgotten point in history but in late 2017 and early 2018. He was only released on payment of a bribe (which is not indicative of an absence of risk: GJ (Sri Lanka) refers, at [275]) and it was accepted by the judge in the FtT that there have been subsequent visits to the family home.

16. Applying the approach mandated by Article 4(4) QD and ME (Sri Lanka), I must ask myself whether there are good reasons to believe that the harm which befell the appellant around two years ago will not happen again if he returns to Sri Lanka. As submitted by Ms Tobin, there is nothing in the appellant's personal profile or in the background evidence which begins to provide such a reason. On the contrary, the actions of the Sri Lankan authorities indicate an ongoing interest in the appellant, given that they have continued to visit the family home and have taken no action against the appellant's family members. The appellant's father states in terms that the authorities came to the family home 'in search of my son': [55] of his statement refers. And the background situation has not improved, whether as regards the human rights situation generally or those suspected of LTTE association, since GJ (Sri Lanka) was decided.

17. The procedure for the reception of failed asylum seekers at Bandranaike Airport has been reasonably well documented for some time. At [20] of KK (Sri Lanka) [2019] EWCA Civ 172, Sir Stephen Richards (with whom Floyd LJ agreed) cited a 2014 letter from the British High Commission in Colombo:

> 6.10.3 … The spokesperson from the DIE [Department of Immigration and Emigration] stated that returnees may be questioned on arrival by immigration, CID, SIS and TID. They may be questioned about what they have been doing whilst out of Sri Lanka, including whether they have been involved with one of the Tamil Diaspora groups. He said that it was normal practice for returnees to be asked about their activities in the country they were returning from.

18. The FFM report is to the same effect, at [4.1.1], and it is stated that those with links to the LTTE would likely face further questioning. I accept Ms Tobin's submission about what is reasonably likely to be revealed during that questioning. (It is to be recalled that the appellant cannot be expected to lie during the questioning.) The appellant's profile, as summarised at [2] above will be revealed. It is reasonably likely that the ongoing interest will be known to the Sri Lankan authorities. The appellant's activities for the proscribed TGTE will also become known. Even accepting, as I do, Mr Whitwell's submission that the appellant's TGTE activities are likely to be of the most limited kind, the fact remains that he is a man with a recent history of detention and ill-treatment who has continued, in the United Kingdom, to involve himself with pro-Tamil diaspora activities. The FFM report does not suggest that this would be viewed as a matter of no significance and, at [3.1.6], it is said that 'action would be taken' against those who were active in a proscribed group.

19. Drawing the threads together, I consider it reasonably likely that the questioning to which the appellant would be subjected at the airport would result in further questioning with the associated risk of ill treatment which is documented in GJ (Sri Lanka). That risk stems from his recent difficulties with the Sri Lankan authorities; the ongoing interest which they have shown by visiting the family home; and, to a lesser extent, the appellant's limited activities with the TGTE. In the circumstances, I do not consider it necessary for there to be a further fact-finding exercise in this case, directed to the question of whether the appellant was released on reporting conditions and to his precise role in the TGTE. As Ms Tobin submitted, the findings made by the FtT must result in the appeal being allowed on protection grounds.

Notice of Decision

The First-tier Tribunal erred materially in law in dismissing the appellant's appeal. I set aside that decision and remake the decision on the appeal by allowing it on protection grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

24 March 2020