



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

**Appeal Number: UI-2021-001666
On Appeal from PA/50066/2020
LP/00097/2021**

THE IMMIGRATION ACTS

**Heard at Field House
On the 9 June 2022**

**Decision & Reasons Promulgated
On the 18 July 2022**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**G R (SRI LANKA)
[NO ANONYMITY ORDER]**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Philip Nathan of Counsel, instructed by Birnberg Peirce Solicitors

For the respondent: Mr Tony Melvin, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 21 January 2020 to refuse him international protection or leave to remain on human rights grounds. The appellant is a citizen of Sri Lanka.
2. **Anonymity order.** Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant 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.

Failure to comply with this order could amount to a contempt of court.

3. **Vulnerable appellant.** The appellant is a vulnerable person and is entitled to be treated appropriately, in accordance with the Joint Presidential Guidance No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance. By reason of his mental health problems, set out in psychiatric reports from Dr Saleh Dhumad in August 2020 and April 2021, he was not fit to give evidence and the appeal proceeded before the First-tier Tribunal on the written evidence alone.
4. **Mode of hearing.** The hearing today took place face to face.

Background

5. The appellant came to the UK as a student in August 2008 and had valid leave until 23 May 2015. He made a number of applications thereafter, all unsuccessful, and on 19 March 2019, he was encountered working illegally, and claimed asylum.
6. The basis of the appellant's claim was that he was detained and ill-treated for LTTE sympathies while in Sri Lanka, that his father had been detained and asked about him in February 2020 after he left, and that he has been active with the TGTE in the UK.

First-tier Tribunal decision

7. The First-tier Judge did not accept much of the appellant's account as credible, but he did accept that the appellant may have attended a number of TGTE rallies, and that the photographic evidence supported such attendance. The appellant could be seen holding a megaphone in one of the photographs, while in others, he was among a small crowd of demonstrators. At [26] the judge summarised his findings thus:

"I have to consider how the appellant would be viewed if returned to Sri Lanka. I do not accept that the appellant's father was arrested or detained in 2014 or 2020 and nor do I accept that the Sri Lankan authorities have shown any interest in the appellant since 2008. There is nothing in the appellant's evidence to show that he is anything other than a member of the TGTE who has attended a number of rallies. There is no evidence that he has holds [sic] or has held a senior role in that organisation or has made any public statements against the Sri Lankan authorities. Even if the Sri Lankan authorities were aware of his membership of the TGTE whilst in the UK, there is no evidence that he would be seen as anything other than a low-level member and there is no evidence to suggest they would view him as someone senior enough to represent a threat to the destabilisation of Sri Lanka. Although it is accepted that he was detained in 2008, he was released without further interest being shown against him and that detention, combined with his membership of the TGTE, would not, in my view, raise his level of significance such that he would become a person of interest to the Sri Lankan authorities on return. "

[*Emphasis added*]

8. On that factual basis, the First-tier Judge dismissed the international protection appeal and also the human rights appeals.
9. The appellant appealed to the Upper Tribunal.

Permission to appeal

10. On 24 August 2021, First-tier Judge O'Brien granted permission to appeal on the basis that the First-tier Judge had failed, properly or at all, to apply the latest country guidance given by the Upper Tribunal in *KK and RS (sur place activities, risk) Sri Lanka CG* [2021] UKUT 130 (IAC), handed down on 27 May 2021 and upheld in the Court of Appeal on 19 January 2022 (*KK and RS (Sri Lanka) v Secretary of State for the Home Department* [2022] EWCA Civ 119).
11. The country guidance decision in *KK and RS* came out just a week before the decision in the present appeal was promulgated by the First-tier Judge and he is therefore taken to be aware of it.
12. Judge Obrien also considered that it was arguable that the First-tier Judge had failed to make an holistic assessment of the appellant's Article 8 ECHR rights, limiting himself to Article 8 within, but not outwith, the Immigration Rules HC 395 (as amended).

Rule 24 Reply

13. In a Rule 24 Reply dated 7 September 2021, the respondent opposed the appeal, arguing that the evidence before the First-tier Judge entitled him to consider that there was no real evidence of interest after 2008 in him. The findings of fact made by the judge were open to him.
14. In relation to the TGTE sur place activity, the respondent relied on the summary of the evidence at [20]-[26] of the decision, arguing that even though there was no reference to *KK and RS* in the judge's decision 'it will be for the appellant to show that in light of the findings of fact made, the [judge's] assessment is erroneous'.
15. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

16. In oral submissions, Mr Nathan relied on *NA (Libya) v Secretary of State for the Home Department* [2017] EWCA Civ 143 at [28]-[33] in the judgment of Lord Justice Flaux, with whom Lord Justices McFarlane and McCombe agreed, that in the interests of fairness and consistency, a country guidance case promulgated after the hearing but before the promulgation of the First-tier Tribunal decision binds the First-tier Judge.

17. The appellant was still too unwell to give oral evidence, although his wife would do so. The Article 8 ECHR arguments, both within and outwith the Rules, were strong on the facts. The appellant's wife had an income of £25000 and her own house, and the judge had made no decision on Article 8 ECHR outside the Rules.
18. Mr Melvin argued that the grounds of appeal were really no more than an attempt to reargue the appeal, and that the sur place activities were fully and properly considered. The psychiatric evidence had also been adequately assessed and Article 8 ECHR properly applied.

Analysis

19. As stated by Mr Nathan, there is a plain error of law in this decision, both in the failure to consider Article 8 ECHR outside the Rules, and the failure to apply new country guidance regarding the risk on return to Sri Lanka for persons involved with the TGTE.
20. There have been further changes in the situation in Sri Lanka such that it is appropriate for the decision in this appeal to be remade there, with the findings of fact set out above preserved.
21. The appeal will be allowed on that basis.

DECISION

22. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. The decision in this appeal will be remade in the First-tier Tribunal on a date to be fixed.

Signed [Judith AJC Gleeson](#)
Upper Tribunal Judge Gleeson

Date: 27 June 2022