R (on the application of SS) v Secretary of State for the Home Department ("self-serving" statements) [2017] UKUT 00164 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

Between

THE QUEEN ON THE APPLICATION OF SS

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE PETER LANE

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Ms A Walker, instructed by Jein Solicitors, appeared on behalf of the applicant.

Mr J Anderson, instructed by the Government Legal Department, appeared on behalf of the respondent.

(1) The expression "self-serving" is, to a large extent, a protean one. The expression itself tells us little or nothing. What is needed is a reason, however brief, for that designation. For example, a letter written by a third party to an applicant for international protection may be "self-serving" because it bears the hallmarks of being written to order, in circumstances where the applicant's case is that the letter was a spontaneous warning.

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(2) Whilst a statement from a family member is capable of lending weight to a claim, the issue will be whether, looked at in the round, it does so in the particular case in question. Such a statement may, for instance, be incapable of saving a claim which, in all other respects, lacks credibility.

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JUDGMENT
(13 March 2017)

JUDGE PETER LANE:

1. The applicant, a citizen of Sri Lanka, who claims to be in need of international protection, challenges the respondent's decision of 18 September 2015, rejecting the applicant's further submissions and declining to treat them as a fresh asylum or human rights claim for the purposes of paragraph 353 of the Immigration Rules. Permission to bring the proceedings was granted by Upper Tribunal Judge Kopieczek, following a renewed permission hearing on 13 May 2016.

2. The applicant's immigration history is, in essence, as follows. He claims to have arrived in the United Kingdom on 11 November 2009. His asylum claim was refused by the respondent on 4 December 2009 and the subsequent appeal dismissed by an Immigration Judge on 18 February 2010. The applicant made further submissions on 6 May 2010, which the respondent rejected twelve days later. On 15 September 2015 the applicant made further submissions, which were rejected in the decision under challenge.

3. Immigration Judge Devittie promulgated his determination, dismissing the applicant's appeal, in February 2010, following a hearing at Taylor House. The applicant told the judge that he was a Tamil from the north of Sri Lanka, whose brother had been a fighter for the LTTE. The applicant had not been actively involved with that organisation, other than in minor capacities. Whilst attempting to leave by boat, the applicant had been arrested by the Sri Lankan Navy on suspicion of being an LTTE member. He was taken to an army camp and then handed to the police, before

being released. The applicant made his way to Vavuniya, where the applicant stayed with an uncle. Whilst there, the applicant was seized by the authorities, questioned and beaten on suspicion of being an LTTE member. The uncle paid a bribe to facilitate the applicant's release.

4. Before the judge, the applicant's credibility was challenged by the respondent, in the respondent's asylum refusal letter. The applicant answered questions about this at the hearing.

5. Having heard the applicant, the judge found that the applicant's account was consistent with the background evidence, as the refusal letter had, in fact, acknowledged. The judge found:-

> "The appellant has given a simple and straightforward account. His evidence does not suggest that he was prone to exaggeration as regards the core of his account. I accept the core of his account".

6. The judge, accordingly, made findings of fact that the applicant came from a former LTTE stronghold; that his father had assisted the LTTE in the past; that the applicant's brother had joined the LTTE and been killed in action in January 2009; and that the applicant's sister was recruited by the LTTE in February of that year. The judge believed the account of the applicant's leaving by boat and his subsequent detention. He also believed the applicant's account of his second detention, whilst in Vavuniya, finding that "on this occasion he was tortured".

7. On the basis of the relevant country guidance, including LP [2007] UKAIT 00076 and AN & AS [2008] UKIAT 00063, the judge concluded that the applicant was at real risk in his home area but that he would be able to relocate to Colombo, without undue difficulty.

8. Although Judge Devittie's determination had been made against the background of the ending of the long internal conflict between the LTTE and the Sri Lankan Government, a comprehensive judicial analysis of the post-war landscape was not undertaken by the Upper Tribunal until 2013. In GJ and Others [2013] UKUT 00319, the Tribunal issued comprehensive

country guidance, replacing relevant guidance in all earlier such decisions concerning Sri Lanka.

9. For present purposes, the core of the country guidance in GJ can be stated as follows. Leaving aside certain specialised categories, individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka because they have, or are 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, are in general at real risk of persecution or other serious harm, upon return. The Tribunal found that the authorities in Sri Lanka based their approach on "sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora". Those authorities are aware that many Sri Lankan Tamils travelled abroad as economic migrants and that "everyone in the northern province had some level of involvement with the LTTE during the civil war". An individual's past history, the Tribunal found, would 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".

10. Having set out the background, I turn to the further submissions of the applicant. In the applicant's witness statement of 4 August 2015, he said that he had learned from an acquaintance at a diaspora rally in May 2012 that his elder brother had risen within the ranks of the LTTE and, at the time of his death, had been the personal bodyguard of the LTTE leader, Pirabhakran. The applicant had heard from his parents in 2010 after they had been released from a camp for internally displaced persons. The applicant's father told the applicant that the authorities had been enquiring after the applicant and paying visits to the family home searching for the applicant in April 2011 and February 2012. In June 2013, two officers had appeared at the family home with a photograph of the applicant at a rally in London. The father was arrested for lying to them and was severely beaten. In December 2014, the applicant's parents received a letter from the GOSL Intelligence Department, requiring them to surrender the applicant. The family then made a complaint to the

Human Rights Commission of Sri Lanka but did not mention all of the incidents of relevance, owing to a fear of repercussions.

11. The applicant said that his United Kingdom diaspora activities involved lifetime membership of the British Tamil Forum, with attendance at meetings and workshops; participating annually in the Mullivaikkal remembrance event on 18 May and the event for LTTE heroes on 27 November; participating in a process organised by the Tamil Co-ordinating Committee UK; attending rallies, calling for a change of venue from Sri Lanka for the then upcoming Commonwealth Heads of Government meeting and for the suspension of Sri Lanka from the Commonwealth; speaking to a conference organised by the British Tamil Forum and the All Party Parliamentary Group for Tamils; attending a meeting organised by the Tamil National Alliance, when the applicant met TNA MPs; participating in an open discussion organised by the People's Democratic Forum; and participating in a torch relay from 10 Downing Street to Geneva in support of "Justice for Tamils".

12. Along with the applicant's witness statement, the submissions contained a letter from Mr Anton Punethanayagam, a lawyer in Sri Lanka, dated 23 July 2015. The letter states that the lawyer had known the applicant's father and his family as clients, since March 2010. The applicant's parents had first sought Mr Punethanayagam's advice regarding their daughter, who had been arrested as an LTTE member. On 12 May 2011, the parents had come to him to say that the Sri Lankan authorities had come to the family home just under three weeks earlier, looking for the applicant. The lawyer said that if the officers came again, a complaint needed to be made to the local MP or the Human Rights Commission. The applicant's father told the lawyer that the applicant was living in the United Kingdom.

13. Mr Punethanayagam's letter continued by stating that he could see from his file that he received a telephone call from the applicant's father on 17 April 2012, stating that the authorities had come again to the family home in February of that year, telling the father that the applicant should

"surrender to them". Mr Punethanayagam gave the father the same advice as before.

14. In June 2013, the parents visited Mr Punethanayagam again. Officers had come to their house five days earlier and this time had arrested the father and taken him to a military camp where he had been interrogated for three days. The father told the lawyer that the authorities had shown the father photographs of the applicant and said they believed the applicant was working for the LTTE in the United Kingdom "and against the Sri Lankan Government". The authorities told the father that he should advise the applicant to "come and surrender himself in Sri Lanka". The father had been beaten whilst in this detention.

15. On 23 December 2014, the parents came once more, this time to show Mr Punethanayagam a letter addressed to the father from the Sri Lankan Intelligence Department in Kilinochchi, requiring the surrender of the applicant.

16. The submissions included the original of the letter from the office in Kilinochchi, with an English translation. There was also a letter from the applicant's father. This essentially deposed to the events described in the lawyer's letter. Finally, the applicant submitted an original letter from the British Tamil Forum, confirming his membership, and an original card from the NLP, confirming membership of that organisation, together with a number of internet articles regarding the situation in Sri Lanka.

17. After the respondent's decision rejecting the submissions as a fresh claim, the applicant submitted further material. Amongst other things, this material sought to address in more detail matters in the decision letter that had concerned the respondent, such as the fact that the lawyer's letter "is of poor quality [and] appears to be a copy". There was considerable discussion at the hearing on 25 January as to the admissibility of this new material in the context of the present proceedings. Mr Anderson, for the respondent, prayed in aid the Upper Tribunal's decision in <u>R (Naziri & Others)</u> [2015] UKUT 00437, in which the

President emphasised the undesirability of judicial review proceedings being transacted "in circumstances where material evidence on which the applicant seeks to rely has not been considered by the primary decision maker". The President made it plain that there "is a strong general prohibition in contemporary litigation against rolling review by the Upper Tribunal in judicial review proceedings".

18. For her part, Ms Walker cited the judgment of the Court of Appeal in AK (Afghanistan) [2007] EWCA Civ 535, where such post-decision material had been taken into account. I agree with Mr Anderson that there are features in AK which do not arise in the present case. In that case, the post-decision materials had, it seems, received consideration by the respondent, who had made supplementary decisions in respect of them. That is not the position here. Furthermore, the court in AK was troubled by "what I am afraid can only be described as the abysmal way in which the bundle has been prepared for this appeal", which made it "difficult to follow the correspondence in any sort of chronological order" (Toulson LJ).

19. In the circumstances, I declined to have regard to the post-decision materials. No doubt anticipating such a response, Ms Walker concentrated her oral and written submissions on alleged deficiencies in the letter of 18 September 2015. Notwithstanding Mr Anderson's able attempts to defend the letter, I am entirely satisfied that Ms Walker's criticisms are sound. For the reasons I shall give, the letter fails to apply the requisite anxious scrutiny and the decision it contains must be quashed.

20. I agree with Ms Walker that the basic failing of the decision letter is that it does not recognise and address the significance of the positive credibility findings made by Immigration Judge Devittie in 2010. In this regard, the respondent fell into precisely the same kind of error as was identified by the Court of Appeal in AK at paragraphs 27 to 40: the new materials required to be looked at in the important context of positive credibility findings by a judge.

21. Instead of this, the letter of 18 September 2015 did no more than draw upon Immigration Judge Devittie's finding that the applicant would not be at real risk on return to Sri Lanka. As we have seen, however, those findings were rooted in the then current country guidance, subsequently superseded by that in GJ. Following GJ, the focus is on the perception taken by the Sri Lankan authorities of a returning Tamil.

22. Strikingly, the respondent's letter fails to engage at all with the issue of the United Kingdom diaspora activities described by the applicant in his witness statement. The respondent merely looked at the letter and card from, respectively, the BTF and the NLP, together with some photographs of the applicant attending demonstrations and rallies. Counsel were in agreement that the respondent's letter had, of necessity, to address *seriatim* the various documents and so forth, comprising the submissions; but Ms Walker is right to say that consideration must be given to the various elements "in the round". One searches in vain for any indication in the decision letter that the membership documents were considered in the light of and by reference to the very full description by the applicant in his statement of his diaspora activities.

23. It was also a manifest failure on the part of the respondent to connect that description of the diaspora activities with the evidence emanating from Sri Lanka, which was that the authorities there are aware of those activities and are sufficiently concerned by them to harass the applicant's parents.

24. The treatment in the respondent's decision of the letter from the lawyer, Mr Anton Punethanayagam, is factually incorrect in saying that the letter "does not refer to [the applicant] personally but your parents". As can be seen from my description of it, the lawyer's letter most certainly does refer to the applicant.

25. There was disagreement before me as to the obligations of the respondent concerning the country guidance decision of GJ. Ms Walker pointed out that this particular lawyer had been identified by the Tribunal in GJ in positive terms:

> "143. Mr Anton Punethanayagam is a barrister who has practised at the Sri Lankan Bar in both Colombo and Vavuniya and has represented about 3,000 persons detained under the PTA over the last two decades. His standing in the legal community in Sri Lanka is high."

26. A footnote to paragraph 143 states that Mr Punethanayagam is, amongst other things, President of the Vavuniya Bar Association and a member of the Bar Council and the Legal Aid Committee of the Sri Lankan Bar Association. He is also a Magistrate and Justice of the Peace.

27. Mr Anderson submitted that the respondent's caseworkers cannot be expected to know such details in a country guidance decision. It is, however, in my view reasonable to expect the respondent's caseworkers to have read not just the country guidance findings but also the actual decision of the Tribunal giving the country guidance. Apart from anything else, reading the decision itself will often reveal valuable insights, such as how to apply the country guidance to the applicant or applicants in question.

28. In any event, the treatment of the lawyer's letter in the impugned decision is, in its own terms, legally deficient. Quite apart from the error to which I have made reference, the writer contends that the lawyer's letter "is not sufficient enough to undermine the opinions of your previous refusal letter and the findings of the Immigration Judge". The implication regarding the judge's findings is perverse, given that the judge had found the applicant to be a witness of truth and that the determination of risk on return was now materially different.

29. By the same token, the treatment of the letter from the authorities in Kilinochchi is legally inadequate. The writer says that this document "does not explain why [the authorities] will want you now after releasing you on both occasions". But if the writer had connected this document, as he or she should, with the applicant's witness statement, the lawyer's letter and the statement of the applicant's father, then a reason would have presented itself.

30. The decision letter criticised the letter from the applicant's father as being "self-serving". The expression "self-serving" is, to a large extent, a protean one. The expression itself tells us little or nothing. What is needed is a reason, however brief, for that designation. For example, a letter from a third party may be "self-serving" because it bears the hallmarks of being written to order, in circumstances where the applicant's case is that the letter was a spontaneous warning.

31. In the present case, the reasons given in the decision letter for the father's letter being regarded as self-serving are because "it is from your father and does not demonstrate how you as an individual will face fear or persecution upon your return to Sri Lanka". The first reason falls foul of the point made at paragraph 28 of AK, where the Court of Appeal criticised the respondent for stating that "an affidavit from a family member cannot add probative or corroborative weight to your client's claim". A statement from a family member is, of course, capable of bearing weight. The issue is whether, looked at in the round, it does so in the particular case in question. For instance, a statement from a family member may be incapable of saving a claim which, in all other respects, lacks credibility. Whilst the pressure on the respondent's caseworkers can be great and their decision letters are not in any sense to be construed as if they were carefully-crafted pieces of legislation, I consider that this reason for the rejection of the father's letter displays a lack of anxious scrutiny.

32. The second reason for rejecting the letter is equally ill-founded. On its face, the father was describing events in which the Sri Lankan authorities were raiding the family home in order to find the applicant or to put pressure on his family to persuade the applicant to return to Sri Lanka. Assuming for the moment (as one must for this purpose) that the letter is taken at face value, it must be obvious that the Sri Lankan authorities' reasons for wishing the applicant to come back are anything but benign.

33. The respondent's own COI Report on Sri Lanka of August 2014 notes at paragraph 2.2.2 that the "supply of intelligence to the security forces and

immigration department may extend to the Tamil diaspora given allegations that members of the Karuna faction, and Embassy employees in the European Union continue to supply photographic and video evidence of Sri Lankans engaging in protest action". At 2.2.3 we see that "The state machine of Sri Lanka is extremely paranoid and is trying to contain any resurgence of [the LTTE] ... The authorities also extend their suspicions to acquaintances and relatives of former members of the LTTE. According to several reports, people who return from abroad are often suspected of maintaining links with the LTTE and are particularly threatened". None of this features in the decision letter.

34. Drawing the threads together, I find that not only is the decision letter materially flawed for the reasons I have given, it is also not possible to conclude that, absent those flaws, the respondent's decision would have been bound (or even likely) to have been the same. A hypothetical judge who accepted the applicant's account (and the Sri Lankan evidence) as credible may well conclude that the applicant is at real risk, applying the current country guidance.

35. My conclusions mean that the respondent's decision falls to be quashed. It is, in these circumstances, immaterial whether there are discrete legal errors in the respondent's handling of the mental health issues raised by the applicant. I do not, however, consider that the recent Grand Chamber case of Paposhvili v Belgium (App No 41738/10, ECTHR 31/12/16) would itself cause any relevant part of the respondent's decision to be treated as invalid. To the extent that Paposhvili runs counter to binding domestic case law, the latter must, of course, prevail at Tribunal level. In particular, the respondent properly addressed the applicant's risk of suicide, by reference to the judgments in J [2005] EWCA Civ 629.

36. The respondent's decision of 18 September 2015 is quashed. I shall hear Counsel on the issue of costs, in the absence of agreement. ~~~~*0*~~~~