



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

Appeal Number: AA/05749/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 28th November 2014**

**Decision & Reasons
Promulgated
On 5th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

**SR
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P Young, Counsel instructed by Polpitiya & Co Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Sri Lanka born on 5th October 1970. He first came to the UK illegally on 28th July 2013 on a German passport in the name of SA. He claimed asylum at the Asylum Screening Unit in Croydon on 13th August 2013. His application was refused on 22nd July 2014. He appealed on 12th August 2014. His appeal was dismissed in a

determination of Judge of the First-tier Tribunal Gibbs promulgated on 1st October 2014.

2. On 29th October 2014 Designated Judge of the First-tier Tribunal French found that there was an arguable error of law in the First-tier Tribunal determination because Judge Gibbs had not had regard to paragraph 339K of the Immigration Rules, having accepted that the appellant had been detained and tortured for a week in 2013 and that this had followed him being identified at a check-point. It was also arguable that Judge Gibbs had failed to properly apply the guidance in the case of GJ & Others (post civil war: returnees) Sri Lanka CG [2013] UKUT 00319.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions

4. Ms Young relied upon her grounds of appeal. In summary these say as follows. That the First-tier Tribunal had found the appellant to be a credible witness and that he was a Sri Lankan national. It was accepted that he had worked as a van driver for the LTTE until 2009. It was also accepted that he had been detained in 2013 at a check-point where he was identified, arrested, detained and then severely tortured. He was released on payment of a bribe.
5. During his detention the appellant was shown photos to identify and asked where the LTTE hid their arms. He could not answer these questions and was tortured as a result. The facts of the detention were noted to be consistent with the respondents OGN at paragraph 3.9.15. However despite these findings Judge Gibbs found that the appellant would not be at risk on return to Sri Lanka.
6. Judge Gibbs ought to have applied paragraph 229K of the Immigration Rules in these circumstances as clearly the appellant had already been subject to persecution. The role of the Tribunal thereafter was to look for good reasons why such persecution would not be repeated. As no material changes in the situation in Sri Lanka had been identified since that time the First-tier Tribunal had materially erred in law.
7. The country guidance case of GJ should have led the appeal to be allowed as there was clear evidence of the appellant being identified and targeted. Saying that there was no risk as the appellant was only persecuted due to “wrong time wrong place” is inconsistent with the evidence accepted that he had been identified by his persecutors. In the circumstances Judge Gibbs ought to have considered whether the appellant was on stop list or watch list post-conflict, and therefore at risk.
8. Mr Bramble accepted that there had been no application of paragraph 339K of the Immigration Rules but said this was not a material error of law. Judge Gibbs had set out GJ and also taken into account of KK

(application of GJ) Sri Lanka [2013] UKUT 00512 at paragraphs 39 and 40 of her determination. She had dealt with the argument that the appellant could be caught by the risk category (7a) at paragraph 41 of her determination.

9. Ms Young argued in reply that as the appellant's parents were dead and his wife was in India that there was no one in Sri Lanka to inform him if there was an arrest warrant so it was possible in the circumstances of the case that the appellant fell within the (7d) risk category, in any case the appellant should be seen as someone perceived as a threat to the integrity of Sri Lanka under (7a).
10. I informed the parties that I found that Judge Gibbs had materially erred in law for the reasons argued by Ms Young, and set out below. I therefore set aside the findings of the First-tier Tribunal that the appellant was not at future risk of persecution if returned to Sri Lanka and the decision dismissing the appeal. The findings of Judge Gibb with respect to the appellant's past persecution and nationality, which were not said by either party to be unsound, were preserved.

Conclusions - Error of Law

11. At no point in her determination did Judge Gibbs refer to paragraph 339K of the Immigration Rules despite making clear findings that the appellant had been detained and tortured for one week in 2013 at paragraph 38 of her determination. This was a material misdirection of law as she did not point to any change in the situation in Sri Lanka since 2013 and because the dismissal of future risk on the basis that the appellant's persecution was explained as a chance mistake or "wrong place wrong time" (paragraph 41 of her determination) is at variance with her finding at paragraph 35 of her determination that he had suffered detention and torture due to being "identified at a checkpoint."

Submissions - Re-making

12. Mr Bramble submitted that as there was no evidence the appellant was on a stop or watch list that he did not come within any of the categories set out in GJ. I should dismiss the appeal.
13. Ms Young submitted that there had been no change of circumstances in Sri Lanka since the appellant was detained and tortured in 2013. He had been forced to flee Sri Lanka and come to the UK which was a place of diaspora activity. In such circumstances there was a real risk he would again be identified and tortured, particularly as he has prominent scars from his last torture which would indicate that he is an opponent of the regime. This was realistic given the paranoid state of the Sri Lankan authorities which is the evidence of the Swiss Refugee Council which is set out in the respondent's own Operational Guidance Note at paragraph 3.9.15 and cited in the determination of Judge Gibbs at paragraph 39.

14. At the end of the hearing I informed the parties I would be allowing the appeal on asylum and human rights grounds. My reasons are set out below.

Conclusions - Re-making

15. As set out above the appellant had been previously identified by the Sri Lankan authorities at a check-point and detained and tortured in 2013 as a result of his LTTE involvement prior to 2009. He paid a bribe and escaped to the UK where he claimed asylum. He has significant scarring on his body from torture.
16. I therefore find that the appellant has previously suffered persecution as he was tortured by the Sri Lankan authorities due to his actual and imputed political opinions. In accordance with paragraph 339K of the Immigration Rules I must therefore find that he has a well-founded fear of future persecution unless there are good reasons which show it will not be repeated. There is no evidence before me that the situation in Sri Lanka has changed in any material respect since 2013 when the appellant was tortured.
17. If the Sri Lankan authorities had in some way acknowledged that the appellant was not a political opponent and had been detained in error then it would have been possible to conclude, as Judge Gibbs did, that this was a "chance incident" and a case of "wrong time, wrong place". However there is no evidence of this: he was not released after a week at the instigation of the authorities because he was of no interest to them, but only escaped unlawfully through payment of a bribe from his uncle in Canada.
18. If the appellant were returned to Sri Lanka it would appear that there would be exactly the same reasons that he might be identified and detained again, along with potential additional interest in him generated by the fact that he has been in a centre of diaspora interest (London) and due to his unlawful escape from detention. As GJ identifies the focus of the Sri Lankan government is currently on preventing diaspora Tamil separatist destabilising the Sri Lankan states (see (3) of the headnote). I appreciate however that the Tribunal also found that the Sri Lankan authorities had sophisticated intelligence to identify those who were intent on reviving Tamil separatism and the appellant has made no case that he is involved in any such activities. As Ms Young has argued it is hard to tell if the appellant is on a "watch list". The evidence of GJ is that he would only be on a watch list if an arrest warrant had been issued (see paragraph 16). As the appellant has no close family in Sri Lanka he is unlikely to get to know if this was the result of his absconding from detention or not. The country guidance (at (9) of the headnote) suggests that generally the appellant would only be detained if on such a watch list if surveillance suggested he was involved with Tamil activism.

19. The appellant has credibly set out that he has only a historic low-level involvement with the LTTE prior to 2009. The country of origin materials reviewed in GJ find that such a person does not have a real risk of serious harm in Sri Lanka today. However this appellant was persecuted, as he was detained and horribly tortured for his imputed political opinions in 2013 and only escaped by use of a bribe. This leads me to conclude that he must have been perceived as someone who has a significant role in relation to post-conflict Tamil separatism by the authorities (risk factor 7(a) in GJ). This would be an erroneous view but even the most sophisticated intelligence machines make mistakes, and there is no evidence that the Sri Lankan authorities have acknowledged their error. The appellant's absconding from detention; spending time in London (a known diaspora centre); and having clear scarring from torture (still an issue potentially arousing greater suspicion with suspects if they are detained - see evidence in GJ at paragraph 126) are factors which are more likely to confirm rather than undermine this mistaken view. I find that the appellant is at real risk of being detained for reason of his imputed political opinions on return to Sri Lanka as a result.
20. GJ finds that if a person is detained by the Sri Lankan security services that they remain at real risk of ill-treatment and harm, and that internal relocation is not an option for a person at real risk (see paragraphs (4) and (5) of the headnote).
21. I find, applying the lower civil level of proof applicable in asylum cases, that the appellant therefore has a well-founded fear of persecution in accordance with 7(a) of the country guidance set out in GJ. His appeal is allowed in accordance with the UK's obligations under Article 3 ECHR on the same grounds.

Decision

1. The First-tier Tribunal erred in law.
2. The decision of the First-tier Tribunal is set aside.
3. The appeal is remade allowing the appeal on asylum grounds and in accordance with Article 3 ECHR.

Direction Regarding Anonymity

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.

Signed

Date 3rd December 2014

Judge Lindsley
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date 3rd December 2014

Judge Lindsley
Deputy Upper Tribunal Judge