Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/15471/2010

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7th January 2014	**On 14th April 2014**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

R V
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Chirico of Counsel instructed by Theva Solicitors
For the Respondent: Mr I Jarvis, a Senior Home Office Presenting Officer

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant has been granted anonymity throughout these proceedings and after their conclusion, absent any order to the contrary by the Upper Tribunal or any other Court seised of relevant proceedings. No report of these proceedings, in whatever form, either during the proceedings or thereafter, shall directly or indirectly identify the appellant. Failure to comply with this order could lead to a contempt of court.

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of Designated Judge Digney on August 2011, set aside by the Court of Appeal on 30 January 2012 remitting the appeal to the Upper Tribunal for the determination to be remade. He is an asylum seeker from Sri Lanka whose appeal is against the removal directions set to Sri Lanka after the respondent's refusal of refugee status, humanitarian protection, or leave to remain in the United Kingdom on human rights grounds in a refusal letter dated 27 October 2010.

2. The Court of Appeal's reasons for remitting the appeal to the Upper Tribunal to remake were as follows:

> "3. … on the basis that ostensibly Immigration Judge Glossop had erred in relation to the application of the country guidance case of *TK* [2009] UKAIT 00049 and had failed to properly identify the reasoning for his assertion that there had been a change in the country situation in Sri Lanka.
> 4. The parties agree that the First-tier Tribunal erred in its consideration.
> 5. In the light of the above the parties agree that the First-tier Tribunal erred in the manner alleged as regards the claimant's risk on return to Sri Lanka. Given that the appellant's appeal contains no important issue of principle the parties considered that the most expedient course would be for the matter to be remitted to the Immigration and Asylum Chamber of the Upper Tribunal to carry out a full reconsideration of the question of risk on return on the basis of the undisturbed positive credibility findings of IJ Glossop."

3. It was agreed at the Upper Tribunal hearing on 7 January 2013 that the undisturbed findings in the determination of IJ Glossop should also include his negative findings in relation to the part of the appellant's account which relates to what happened to him in 2000.

The accepted facts

4. Immigration Judge Glossop accepted the following facts and matters:

   (1) The appellant is a Sri Lankan Tamil. He was a business man and entrepreneur and as such, likely to be targeted as a source of funds, not only by criminals but by the political protagonists in Sri Lanka. He lived in Jaffna, where he ran a photography studio. The LTTE required him to take photos of them and their meetings, and to pay them money. In 1995, the Sri Lankan army took over Jaffna and the appellant removed to Pallai, returning to Jaffna in March 1996. In 1998, he married, and had a son, who was born with congenital heart disease.

   (2) Because of his son's health, the Sri Lankan authorities allowed the appellant to travel to Colombo for treatment. He and his family settled in Colombo and developed a thriving business there, recruiting

more staff. The LTTE intruded, harassing Tamil businessmen for money. He was forced to pay, but he refused to employ any LTTE undercover members. Unfortunately, one of his employees did become involved with the LTTE.

(3) In 2006, the appellant was abducted in a white van by LTTE Karuna faction men. He had to pay 20 lakhs Sri Lankan rupees to be released.

(4) In August 2007, the appellant travelled to India for his son to have a heart operation. He returned in September, to discover that his employee had been arrested for involvement with the LTTE. The appellant was also arrested. He was ill-treated and tortured in a particularly severe and humiliating manner, resulting in his needing new front teeth and in intimate scarring and pain, which persists today.

(5) On 28 May 2008, the appellant's son was kidnapped and the appellant had to pay a ransom of 10 lakhs rupees. The appellant was in London at the time. His wife and son had left Sri Lanka and since June 2010 were in India, staying with friends. They had been told not to mention paying the ransom.

Procedural matters

5. On 7 January 2013 I heard the appeal and gave an oral determination, which, due to an administrative error by the Tribunal staff, was not typed or promulgated. In my oral decision I indicated that I would allow the appeal. I did so following the guidance in *TK (Sri Lanka) CG* [2009] UKAIT 00049 which was then the latest country guidance on conditions in Sri Lanka. The evidence in *TK* was substantially out of date, since it predated the end of the civil war in Sri Lanka. I also took account of new UNHCR Eligibility Guidelines promulgated on 21 December 2012. I considered the appellant's appeal in the light of paragraph 339K of the Immigration Rules:

> "339K ` The fact that a person has already been subject to persecution or serious harm or to direct threats of such persecution or of such harm will be regarded as a serious indication of the person's well-founded fear of such 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."

6. This appellant had clearly suffered persecution and serious harm. In the light of the *TK* country guidance and the UNHCR Guidelines, in January 2013 I was not satisfied that there were good reasons to consider that the harm would not be repeated. I gave an oral determination allowing the appeal, but it appears that the hearing was recorded on the Upper Tribunal's computer system as having been adjourned to await the new country guidance decision on Sri Lanka, promulgated on 5 July 2013 as *GJ (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 319 (IAC).

7. On 26 April 2013, Theva solicitors, who represent the appellant, wrote to the Upper Tribunal enquiring about the typed determination. Unfortunately, that letter was not brought to my attention. Instead, the appeal was listed for substantive hearing post-*GJ.* The appellant's solicitors protested, arguing that the appeal had been determined already.

8. Mr Chirico has sought to persuade me that pursuant to paragraph 40 and 40A of the Tribunal Procedure (Upper Tribunal) Rules 2008, the oral determination of the appeal on 7 January 2013 was the binding final determination of the appeal and should stand. I am not persuaded that he is right. While it is right that paragraph 40(1) of those Rules provides that the Upper Tribunal may give a decision orally at a hearing, paragraph 40A(2) provides that the Upper Tribunal must provide the Secretary of State with a decision notice stating the Upper Tribunal's decision and a statement of any right of appeal thereunder. Paragraph 40A(3) requires the Secretary of State to serve that notice and statement and to notify the Upper Tribunal that she has done so. It is clear from the Rules that the decision notice is what triggers any onward right of appeal. If it were to be promulgated now,

9. Even if the oral determination is binding as Mr Chirico contends, if promulgated now, that determination would be vulnerable to challenge as wrong in law because it takes no account of the intervening country guidance decision of the Upper Tribunal in *GJ and Others*. I consider that it is in the interests of justice to set aside the oral decision of 7 January 2013 under paragraph 43 of the Rules and to replace it with a determination made in the light of the country guidance as it presently stands. I indicated that that was my view in my order and directions of 10th October 2013. I invited further submissions to assist me in so doing.

Submissions

10. For the respondent, Mr Jarvis acknowledged that, following *SG (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 940, in particular at [50] and [67], a country guidance determination remains authoritative 'unless and until it is set aside on appeal or replaced by a subsequent Country Guidance determination'. That is not the case with *GJ,* which therefore remains in force*.* The appellant had been placed in a position where he had to engage with the LTTE, who were in effect the government of the north, running the police, the schools and the education. The authorities knew that people who were in business were required to engage with the LTTE and their record keeping was both detailed and extensive.

11. Mr Jarvis accepted that the appellant had suffered detention and torture at the end of the ceasefire which leaves him with permanent impairment. However, a significant amount of time had passed since the appellant left Sri Lanka and despite the kidnap and ransom of his son in 2008, Mr Jarvis argued that the authorities would have no further evidence of ongoing activity by him and there was no evidence that they continued to be

interested in the appellant's family, none of whom remained in Sri Lanka. As regards the appellant's mental health issues, those would militate against his being regarded as a functioning fundraiser within the diaspora and there were no activities which were likely to lead to intelligence interest in him now.

12. For the appellant, Mr Chirico pointed out that this appellant was not simply someone who had paid protection money in order to run his business. He had employed an LTTE member in his business, which was the cause of the authorities' significant interest in him and that interest had continued, because the appellant's family had been forced out of Sri Lanka altogether a year after he left. The appellant had been involved in funding the LTTE on a very large scale as well as employing an LTTE member, not just in Jaffna when he ran his business there but in Colombo.

13. The test was whether there was a real risk of recurrence of the ill-treatment which the appellant had already suffered. On the facts there must be a real risk that his name would at least appear on a warned list as a person in whom the authorities remained interested should he return to Sri Lanka. The effect of his mental illness would be that he would be unable to talk his way out of any difficulties: Mr Chirico relied upon paragraphs 271 and 447 and following of the decision in *GJ*.

Discussion

14. The Upper Tribunal in *GJ* identified the categories of persons at risk on return to Sri Lanka at subparagraph (7) of the guidance:

> *"(7) The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, are:*
>
> > *(a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, 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.*
> >
> > *(b) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government.*
> >
> > *(c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.*

> *(d) A person whose name appears on a computerised "stop" list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant."*

15. The thrust of the guidance in *GJ* was that there has been a significant change in the approach of the Sri Lankan authorities since 2007 and that the interest of the Sri Lankan authorities is focused on present diaspora activities and in particular, attempts to revive and/or refinance the separatist conflict in Sri Lanka, together with persons in certain specific categories. This appellant is a person who has in the past had more elaborate links than the ordinary Tamil citizen: he gave very significant amounts to the LTTE, and he employed a member of the LTTE in his shop in Colombo. That became known to the authorities and he was badly tortured in consequence, leaving him with permanent physical and mental injuries. His family have left Sri Lanka because they remained a target at least for extortion by the Karuna faction. The appellant is the type of person who, even in the present climate, might be considered a potential source of finance for those wishing to revive the conflict, and therefore is likely to be of interest to the Sri Lankan authorities if returned.

16. In considering his health issues, I have had regard to paragraphs 447 and following of the Tribunal's determination in *GJ* which related to the appeal of the third appellant, a person with an LTTE history and what the UNHCR Guidelines refer to a "more elaborate links" to the LTTE. That appellant also bore torture marks on his body but had been of no particular interest to the authorities in Sri Lanka after his release from torture and detention, nor had he taken any part in UK diaspora activities; he had significant mental health problems including severe post-traumatic stress disorder and severe depression typical of trauma victims. His mental health was fragile and he was considered to be a suicide risk even in the United Kingdom. The Upper Tribunal reminded themselves of the test in *J v Secretary of State for the Home Department* [2005] EWCA Civ 629 and the observations of Lord Justice Sedley in Y *(Sri Lanka) v SSHD* [2009] EWCA Civ 362 at paragraph 16.

17. The Upper Tribunal noted the lack of psychiatric support in Sri Lanka, there being only 25 working psychiatrists in the whole of Sri Lanka and money spent on mental health going only really to large mental health institutions in capital cities which were inaccessible and did not provide appropriate care for mentally ill people. The treatment of post-traumatic stress disorder was considered at paragraph 455 (based on the UKBA Country of Origin Report issued in March 2012 at paragraph 23.28 to 23.29) which indicated that many patients often relied upon traditional non-medical treatments for post-traumatic stress disorder long before approaching public hospitals, which often resulted in their suffering from psychosis. The appeal of the third appellant in *GJ* was dismissed on asylum and humanitarian protection grounds but allowed under Article 3

ECHR on the basis that there was inappropriate care for the severely mentally ill in Sri Lanka.

18. There is no doubt that this appellant suffered past persecution before leaving Sri Lanka and that he continues to endure very significant consequences from the torture he received, from which he has significant pain and physical and mental difficulty even now. He suffers from depression, anxiety, neck pain, back pain, chest pain and severe headaches and has considered suicide in the past, being restrained only by thoughts of his wife and son, who now live in India. I remind myself of the provisions of paragraph 339K:

> "339K. 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."

I am not satisfied that in the case of this appellant, on the undisputed facts and in the light of his physical and mental health issues, there are good reasons to consider that the persecution and serious harm to which he was previously subjected would not be repeated. I consider that to return this appellant to Sri Lanka, where he has no family support, in the light of his past and of his present physical and mental health, would breach the United Kingdom's international obligations under both the Refugee Convention and Article 3 ECHR.

19. For all of the above reasons I allow the appeal on both asylum and human rights right grounds.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.

I re-make the decision in the appeal by allowing it.

Consequential Directions

Forthwith on receipt of this decision the respondent shall grant the appellant leave to remain for such period as is necessary to give effect to this determination.

Signed Date

Upper Tribunal Judge Gleeson