Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02259/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 December 2018	**On 19 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

ANTHONY [F]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms P. Solanki, Counsel instructed by Tamil Welfare Association, Solicitors
For the Respondent: Ms S. Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Shri Lanka who was born on 17 May 1972. He appeals against the determination of First-tier Tribunal Judge D. P. Herbert OBE promulgated on 7 September 2018.

2. In the course of the hearing before me, Ms Solanki accepted as accurate the judge's recital of the appellant's claim set out in paragraphs 8 to 17 of the determination. I need only summarise the material parts. The appellant is a Tamil

who spent some six years in India between the years 1998 and 2004. He returned to Sri Lanka in April 2004. In December 2004 two members of the LTTE came to his home and instructed him to attend the local camp. He did so the following day and between January 2005 and March 2006 (14-15 months) he carried out tasks on the LTTE's behalf by passing information to them about the location of government camps and alerted members of the LTTE of those locations. I take no issue with this but it is, perhaps, somewhat surprising that this was the task allotted to him. Normally, the location of government camps would be a matter of common knowledge in the area and there is no suggestion that he had a greater ability than anyone else to locate these camps. He was never a supporter or a member of the LTTE and did not willingly assist them. On any view, this was assistance at the lowest level. He was not a combatant and did not train as such. The passing-on of local information to members of the LTTE does not, on its face, mark the appellant out in such a way as to differentiate him significantly from other members of the Tamil community who were perforce required to assist the group.

3. He left Sri Lanka on 10 May 2011 in fear, so he claimed, that his activities would become known to the authorities. The centrepiece of his claim was that he feared that if returned to Sri Lanka he would be arrested as a result of his previous involvement with the LTTE and because he escaped from the EPDP in 1998.

4. On arrival in the UK on 18 May 2011, he waited until 18 June 2011 to claim asylum. By a decision made on 13 July 2011, the respondent rejected his claim to be at risk. It was a significant part of the decision-making that the appellant had stopped working for the LTTE in March 2006 and had not had any further contact with them. In paragraph 20 of the decision letter, notwithstanding the rejection of the claim as not credible, the decision-maker stated:

> "In the alternative, even if it were accepted that you worked for the LTTE between January 2005 and March 2006, which it is not, by your own admission, following your decision to stop working for the LTTE you did not experience any further problems either from the LTTE, Sri Lankan authorities or the EPDP after this time, "I was living happily with my family" (AIR Q.85). It is therefore not accepted that you are of any significant or ongoing interest to the LTTE, Sri Lankan authorities or EPDP on return to Sri Lanka."

5. Pausing there, it is easy to discern in the refusal letter that, quite apart from any adverse credibility findings, the principal reasons for refusing the claim were the low level of activity on the part of the appellant, the absence of any history of arrest or detention and the passage of time between March 2006 and the decision in 2017. These were substantial hurdles the appellant had to meet.

6. The appellant did not appeal the respondent's refusal to the Tribunal.

7. According to the respondent's asylum pro-forma, the appellant lost contact with the authorities. He then lodged further submissions on 1 March 2017 which were considered as a second asylum claim. Following an interview, the claim was

rejected in a letter dated 30 January 2018 in which the Secretary of State considered various documentation submitted by the appellant including a letter from an attorney in Columbo dated 13 March 2016 and an exchange of correspondence between the appellant's solicitors and that same attorney.

8. The letter from the attorney was the subject of a detailed critique by the respondent in the decision letter of January 2018. The decision-maker recited the appellant's wife's claim that CID officers were visiting the home in search of the appellant to ascertain his whereabouts. The attorney claims that he was unable to obtain any evidence in the way of warrants or court documentation. The letter, of course, comes many years after the appellant's alleged involvement with the LTTE and many years after the appellant had left should Sri Lanka. Nevertheless, it is said that the police had been frequently searching the home and questioning the appellant's wife. One can only infer that these events had not been witnessed by the attorney and can only have been based upon the instructions of the appellant's wife. The Secretary of State reasonably questioned why, if the appellant's arrest had been sanctioned by the authorities, that this could not be the subject of supporting documentation. The refusal letter continued:

> "It does not make sense why the CID would not state why a person is wanted. [The attorney] has also made an assumption of why you are wanted. He states that he doesn't know why the authorities want to arrest you, but then states he is aware of the special monitoring unit that collect's information on people involved in aiding and abetting Tamil separatists. If he does not know the reason for the arrest warrant, then it is not explained why he has jumped to the conclusion that you are wanted for separatist activities."

9. These were trenchant criticisms made of the attorney's letter which go to the root of whether reliance can properly be placed upon it. The letter was written in 2016 and there has been ample opportunity in what is now almost 2 ½ years since it was written to seek answers to the reasonable critique provided by the Secretary of State in the refusal decision. The limitations upon this evidence were apparent from the time it was written. It had been expressly raised by the Secretary of State in January 2018 in more than sufficient time to seek and obtain answers before the hearing in August 2018. None had been provided. More significant still, none has been provided to me.

10. It now falls to me to make my own assessment of the weight that can properly be attached to this letter in order to assess whether the First-tier Judge's assessment of it was properly open to him.

11. I am satisfied that the letter from the lawyer poses far greater difficulties then it purports to answer. In simple terms it reduces itself to the unanswered question: why, if the legal process in Sri Lanka has proceeded to the stage where a formal warrant of arrest has been issued by a court, that process is not within the public domain such that the documentation in support of it cannot be accessed on request? The claim by the lawyer that an officer of the CID can give a tantalising suggestion

of serious wrongdoing but yet is unable to say anything more is simply nonsensical. Either the investigation has not reached the stage where it is within the public domain and must remain confidential (at which stage it would be entirely speculative to claim that any risk arises to the appellant from it) or by reason of a court procedure based on evidence and witness statements (what evidence and what witness statements?) such there that there is evidence capable of belief that the appellant has been (presumably) involved in (undisclosed) terrorist activity in the past. If the latter, there can be no truth in the attorney's assertion that this material is not accessible.

12. Judge Herbert took very much the same view. In the third bullet point of paragraph 40 in support of his overall conclusion that the appellant's claim lacked credibility, he, too, considered the letter to be vague and lacking in detail. The advocate did not give the name of the CID officers to whom he spoke, nor the name of the court where the warrant was supposed to have been issued, nor the serial number of the warrant, nor when it was issued. The judge recited the oft-repeated claim that letters apparently emanating from qualified lawyers cannot always be relied upon. The judge accepted that the document before him was the original one but clearly emanated from instructions provided by the appellant's wife. Tellingly, the judge notes there was nothing more recent before him to suggest any current interest. Once again, the appellant or his representatives could and should have treated this as an alarm-call to the appellant to adduce further evidence for the appeal before me.

13. Quite apart from this, there is the undeniable fact that the appellant's purported work for the LTTE (described only as informing the organisation of the location of government camps) ended 12 years ago. The judge said:

> "It is hardly likely that the appellant would be of any interest to the authorities given his low level of activities for the LTTE some 12 years ago."

14. I entirely agree with that sentiment. However, it does not matter whether I agree with it or not. The fact is that it is plainly sensible, rational and compelling. It cannot, therefore, conceivably be classed as unlawful or not properly open to him.

15. It is further supported by paragraph 41 of the judge's reasoning in which he recites the appellant's evidence that the authorities had attended the appellant's home on several occasions to enquire as to his whereabouts. As the judge properly said, this made little sense since they have known from the first that he was living abroad and, if his name is on the stop-list preventing his return to the country without its coming to the attention of the authorities, then as late as 2018 they would not need to make enquiries of his wife as to his current whereabouts.

16. This then leaves the only available point to be made against the judge's reasoning in paragraph 40 of the determination. The judge recited that the appellant's claim stemmed primarily from his original activities with the LTTE [correctly] which

> "… generally speaking took place before the appellant left for India where he spent some time between 2008 and 2011 in a refugee camp before returning to Sri Lanka."

17. The judge has mis-stated this chronology. The appellant was indeed in India and for some time in a refugee camp but it was between 1998 and 2004, not between 2008 and 2011. Indeed the judge had previously recorded the correct chronology in paragraphs 8 to 17 of the determination which is accepted is an accurate summary of his account. However, this obvious error makes no material difference to the substance of the judge's reasoning in relation to the letter. The remaining assessment centred upon the appellant's difficulty in establishing a reason for any continuing interest in him after the passage of so much time. Insofar as the grounds of appeal seek to challenge the judge's reasoning in paragraphs 40 to 42, I am satisfied that the judge reached conclusions that were properly open to him and, indeed, could not reasonably be challenged.

18. In the course of the hearing before me much time was spent by both parties in submitting that the judge either did, or did not, properly apply the Country Guidance provided in *GJ and others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC). Any criticism, however, of the judge must, inevitably, be somewhat muted because there is no evidence on the file that he was provided with a copy of the judgement. Indeed, nor was I. It was, therefore, inevitable that I rose for a copy to be obtained in order to deal with the submissions upon it. Perhaps inevitably, once a copy had been provided, a series of submissions were made upon the relevant passages in the judgment which clearly did not feature in those made to the judge.

19. I shall deal with the principal passages to which the parties referred. The italicised words forming the headnote are found in paragraph 356 of the judgment:

> (2) The focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009. The LTTE in Sri Lanka itself is a spent force and there have been no terrorist incidents since the end of the civil war.
>
> (3) The government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state enshrined in Amendment 6(1) to the Sri Lankan Constitution in 1983, which prohibits the 'violation of territorial integrity' of Sri Lanka. Its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka.
>
> (4) If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.
>
> (5) Internal relocation is not an option within Sri Lanka for a person at real risk from the Sri Lankan authorities, since the government now controls the whole of Sri Lanka and Tamils are required to return to a named address after passing through the airport.
>
> (6) There are no detention facilities at the airport. Only those whose names appear on a "stop" list will be detained from the airport. Any risk for those in whom the Sri Lankan authorities are or become interested exists not at the

airport, but after arrival in their home area, where their arrival will be verified by the CID or police within a few days.

(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.

(8) The Sri Lankan authorities' approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war. In post-conflict Sri Lanka, an individual's past history will 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.

(9) The authorities maintain a computerised intelligence-led "watch" list. A person whose name appears on a "watch" list is not reasonably likely to be detained at the airport but will be monitored by the security services after his or her return. If that monitoring does not indicate that such a person is a Tamil activist working to destabilise the unitary Sri Lankan state or revive the internal armed conflict, the individual in question is not, in general, reasonably likely to be detained by the security forces. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual.

20. Reliance was also placed upon the UNHCR guidelines which were set out in the judge's decision:

UNHCR guidelines

288. Revised UNHCR Guidelines issued on 21 December 2012 reflect the post-conflict changes in Sri Lanka now and, in common with our own country

guidance, have not been reviewed since very soon after the end of the conflict. The previous UNHCR Guidelines were issued in July 2010. The Preamble to the present document sets out the need for new guidelines:

> "These Guidelines … are issued against the backdrop of the current situation in The Democratic Socialist Republic of Sri Lanka (hereafter Sri Lanka), where ongoing human rights concerns are reported, including in particular with regard to reports of post-conflict justice, torture and mistreatment, disappearances, arbitrary detention and freedom of expression.
>
> UNHCR's recommendations, as set out in these Guidelines, are summarized below.
>
> All claims lodged by Sri Lankan asylum-seekers, whether on the basis of the refugee criteria contained in the 1951 Convention, or complementary forms of protection based on human rights obligations, need to be considered on their own merits according to fair and efficient status determination procedures and up-to-date and relevant country of origin information. More specifically, the possible risks facing individuals with the profiles outlined below require particularly careful examination. UNHCR considers that individuals with these profiles – though this list is not exhaustive – may be, and in some cases are likely to be in need of international refugee protection, depending on the individual circumstances of their case."

289. The list of groups requiring 'particularly careful examination' who may be, and in some cases are likely to be, in need of international protection was as follows:

> "(i) persons suspected of certain links with the Liberation Tigers of Tamil Eelam (LTTE);
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> (ii) certain opposition politicians and political activists;
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> (iii) certain journalists and other media professionals;
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> (iv) certain human rights activists;
>
> (v) certain witnesses of human rights violations and victims of human rights violations seeking justice;
>
> (vi) women in certain circumstances;
>
> (vii) children in certain circumstances; and
>
> (viii) lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals in certain circumstances."

21. It should be noted that the Secretary of State had conceded in *GJ and others* that those who were detained were likely to be ill-treated. However, the Tribunal rejected (at paragraph 290) the appellant's submission that the UNHCR Guidelines established that *any* former links with the LTTE was determinative of an asylum claim. Instead, the Tribunal noted page 26 of the Guidelines:

"A. Risk Profiles

A.1 Persons Suspected of Certain Links with the Liberation Tigers of Tamil Eelam (LTTE)

At the height of its influence in Sri Lanka in 2000-2001, the LTTE controlled and administered 76% of what are now the Northern and Eastern Provinces. Therefore, all persons living in those areas, and at the outer fringes of the areas under LTTE control, necessarily had contact with the LTTE and its civilian administration in their daily lives. Originating from an area that was previously controlled by the LTTE does not in itself result in a need for international refugee protection in the sense of the 1951 Convention and its 1967 Protocol.

However, previous (real or perceived) links that go beyond prior residency within an area controlled by the LTTE continue to expose individuals to treatment *which may give rise to a need for international refugee protection, depending on the specifics of the individual case.* The nature of these more elaborate links to the LTTE can vary, but may include people with the following profiles:

1) Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the Northern and Eastern Provinces;

2) Former LTTE combatants or "cadres";

3) Former LTTE combatants or "cadres" who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, "computer branch" or media (newspaper and radio);

4) Former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE;

5) LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE;

6) Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles.

22. In paragraph 311 of *GJ and others,* the Tribunal made express reference to the self-evident position of the general populace who were caught up in the conflict and remained living in areas effectively controlled by the LTTE. The LTTE was the *de facto* government of large areas of Sri Lanka during the conflict and all residents of those areas at times of LTTE governance would have LTTE connections. The majority of the examples of those who had been ill-treated on return, were of persons who had had significant LTTE links (whether direct or familial). Thus, the government's concern was not and is not with past membership or sympathy, but with whether a person is a destabilising threat in post-conflict Sri Lanka.

23. It is inevitable that with such a large-scale conflict, the government of Sri Lanka as the victors of the conflict could not continue to treat large sectors of the Tamil community as its enemies. Thus, as the Tribunal noted in paragraph 342, some 11,000 former LTTE cadres had been through a rehabilitation process and only a handful had relapsed into ordinary crime, not terrorism. It was for this reason that the Tribunal found that the risk of LTTE resurgence did not come from within Sri Lanka now.

24. It would be wrong to paint an over-positive picture of present conditions. There is a dearth of jobs for Tamils who were internally displaced and economic conditions are hard. Furthermore, as the Tribunal referred to in paragraph 343 of the decision in *GJ and others,* there are some worrying features such as a number of 'white van' disappearances in Colombo and the Northern Province: some individuals had turned up in TID hands, some were held for ransom, and many had not turned up at all. Worse still, the number of such disappearances was increasing during the period when the Tribunal was reporting in 2013, rather than decreasing. The standing army of Sri Lanka was then, and I assume is now, larger than that of the United Kingdom.

25. It was to the activities of the diaspora that the government had turned its attention. There was no evidence that the appellant had involved himself in any such activities in the United Kingdom. Indeed, it was part of his case that he had distanced himself from any LTTE activity since the time he carried out surveillance duties in 2006 (or in 2007/8 as the judge noted in paragraph 26 of the determination). Notwithstanding the Sri Lankan government's sophisticated intelligence gathering, the effect is to distinguish between those who are actively involved in seeking to assist and fund the separatist movement within the diaspora and those who have no such interest. Even those who occasionally attend demonstrations will not be assumed to be committed Tamil activists seeking to promote Tamil separatism within Sri Lanka, see paragraph 351.

26. The material to which I have referred makes it abundantly plain that the authorities in Sri Lanka are pursuing a well-established course. That does not mean that the United Kingdom authorities or the Tribunal would condone the brutality that arises in the course of this process. However, it is far from being indiscriminate. Indeed, its discriminating nature emerges clearly from the background material. Inevitably, distinctions are made as between those who continue to pose a risk and those who do not. Broadly speaking, it is not a punitive process directed towards the entire Tamil population. Nor is it a punitive process which is directed towards LTTE combatants of the past. Whatever the feelings of individuals may be, there are simply too many Tamils who were swept up in the war for all of them to be the subject of attention now.

27. For the reasons I have already provided, the activities of the appellant which ended in 2006 or perhaps in 2007/8 can only be classified as activities which can no longer be treated as causing the authorities to be interested in him. All of the

evidence provided by the appellant and the documentation said to be in support of it is discredited. It seeks to establish a continuing interest on the part of the authorities in this appellant which does not bear scrutiny. It is a fiction. The judge properly rejected this part of his claim. Hence, he was required to make his assessment of the appellant in light of the case law and, in particular, the country guidance set out in*GJ and others.* I am satisfied that he did so.

28. He made a sustainable finding of fact that the appellant was never detained or arrested by the Sri Lankan authorities and that his profile did not fit somebody at risk on his return. So much is clear from paragraph 44 of the determination. In a clear allusion to *GJ and others,* he listed the categories of those who might be at risk: he had not given evidence of crimes against humanity; is not a person whose activity in London has shown any evidence of his being involved in fundraising; he did not jump bail or escape from custody or sign a confession or similar document that would heighten his risk on return; he was not asked by the authorities to become an informer; his scarring is not a relevant factor; he has never been arrested as a suspected supporter of the LTTE; there is limited evidence of his having escaped from the EPDP. These are all material factors which the judge sets out in paragraphs 44 to 46 and in doing so, as is clear from paragraph 47, he does so by reference to the factors set out in *GJ and others*. It therefore becomes strikingly obvious that the judge's findings are strictly in accordance with background material and Country Guidance.

DECISION

The First-tier Tribunal Judge made no error on a point of law and his determination of the appeal shall stand.

ANDREW JORDAN
DEPUTY UPPER TRIBUNAL JUDGE
10 December 2018