Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00143/2018

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice	**Decision & Reasons Promulgated**
On 8 July 2019	**On 14 August 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

UR
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr A Syed-Ali, Counsel, instructed by Lova Solicitors

DECISION AND REASONS

1. Following a hearing on 29 April 2019 I found errors of law in the earlier decision of the First-tier Judge, who allowed the appellant's appeal against the respondent's decision on 10 September 2018 to deport him as a foreign criminal. It seemed unlikely that there would be more than a little further fact-finding to be made at today's hearing and in the event, Mr Syed-Ali did not call the appellant and therefore I was concerned with legal submissions only. There are two points of consideration. The first of those is the application of section 72 of the Nationality, Immigration and Asylum Act 2002. The Secretary of State in the decision letter certified that the

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presumption in section 72(9)(b) of the Act applied to the appellant and therefore, unless he can show that he should not be excluded from refugee protection, that certificate will stand. The second issue is that of risk on return, which, it is common ground, will apply whether or not the certification is upheld. Even if the appellant is excluded from the protection of the Refugee Convention, he can argue that he is entitled to avail himself of Article 3 protection.

2. The appellant had previously been successful in an appeal before an Immigration Judge in 2009. The First-tier Judge noted and in part founded his decision on the positive credibility findings in that appeal hearing. The judge accepted that in November 2001 the appellant and his father were arrested and interrogated about an uncle who had been a senior member of the LTTE. The appellant was beaten and tortured whilst in detention and he and his father were subsequently released unconditionally in April 2002.

3. Subsequently, he was forcefully made by the LTTE to dig bunkers for them and was captured after an attack by the Sri Lankan forces and held, beaten and tortured and eventually admitted his involvement with the LTTE. He was released on 8 May 2009 following payment of a bribe by his aunt to the EPDP. He came to the United Kingdom later that month.

4. From his interview it is relevant to note in answer to question 43 that he said it was peacetime when he was released on the first occasion and they released him on no conditions. With regard to the second occasion when he was arrested he was asked at interview whether they had asked him about his uncle that time and he said no. He said that they told him when they released him on the payment of a bribe by his aunt that if he remained in Sri Lanka they would arrest him again and his life would be in danger.

5. As I say, the First-tier Judge adopted the positive credibility findings of the Immigration Judge. However, he did not accept the appellant's claim to have been engaging in sur place activities while in the United Kingdom.

6. The appellant's profile therefore with regard to risk on return is of a person who was arrested in 2001 on account of his association with his uncle, and subsequently released unconditionally in April 2002, and was arrested in 2008, no reference being made to his uncle, but on account of having been digging bunkers for the LTTE. The claimed sur place activities have not been accepted.

7. As regards his criminal record and the section 72 issue, on 26 March 2015 the appellant was convicted of possession and/or control of articles for the use of fraud. He was further convicted on 18 May 2015 of two offences of possession and/or control of articles for the use of fraud and he was sentenced to 33 months' imprisonment.

8. On 30 March 2017 at Isleworth Crown Court he was convicted on three counts of possessing/controlling articles for use in fraud and sentenced to 40 months' imprisonment for count 1 and 40 months' imprisonment each concurrent for counts 2 and 3.

9. The effect of section 72 of the Nationality, Immigration and Asylum Act 2002 is that a person is to be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least two years. The presumption is rebuttable.

10. The argument in respect of rebuttal of the presumption of serious crime under section 72 was in part based on the argument as set out in Mr Syed-Ali's skeleton, that the Secretary of State is not obliged to revoke refugee status on the grounds that the appellant constitutes a danger to the community, having been convicted of a particularly serious crime. He referred to the fact that the judge found the appellant to pose only a low risk according to the OASys Report. The judge did not, however, as noted in my earlier decision, address the section 72 certificate.

11. It does not seem to me that the presumption in this case has been rebutted. The appellant has, as Mr Clarke pointed out, been convicted on two occasions of serious fraud offences. With regard to the 2015 offences, it is clear that a further offence was committed six days after the grant of bail. It is clear from the sentencing remarks in respect of the second group of offences that the appellant was offending again within six weeks of his release in August 2016. The author of the OASys Report does not appear to have been aware of the earlier offences. The only offences referred to, at page 7 of 35 of the report, are the three 2016 offences. Mr Syed-Ali pointed to page 3 of 35 and the reference to sources of information including previous convictions, but the only convictions specifically referred to are those of 2016, and as I say, the author of the report does not appear to have been aware of the earlier offences, or that an offence among the earlier ones was committed while the appellant was on bail, and he committed the subsequent offences at least in one case within six weeks of his release from prison. The author of the report does not appear to have seen the sentencing remarks. In light of the fact that the appellant had referred to alcohol as his reason for offending, the conclusion at page 16 of 35 that alcohol is not linked to his offending appears to be at least problematic. I agree with Mr Clarke that though one cannot go behind the conclusion in the report, nevertheless it is appropriate to point out weaknesses and limitations in that report, which does not appear to be based on the full picture of the appellant's offending or the evidence pertaining to him. This is of relevance to bear in mind in deciding whether the offence is a serious one or not, and I have concluded that the offence is indeed serious.

12. The question remaining is that of risk on return. Clearly the presumption under section 72 can be rebutted on this basis and I have concluded that

the offences involved convictions by a final judgment for a particularly serious crime and it has not been rebutted in relation to the terms of subsection 9.

13. I therefore uphold the Secretary of State's certification.

14. In any event, however, risk on return has to be considered in light of the fact that even without the protection of the Refugee Convention the appellant is entitled to rely on the protection of Article 3 of the Human Rights Convention.

15. I have set out above the essential findings of the Immigration Judge which were preserved by the First-tier Judge, and also the First-tier Judge's finding that the appellant is not engaged in sur place activities. As Mr Clarke argued, it is somewhat surprising as a consequence of that to see an expert report which among other things deals with issues of sur place activities despite the fact that the author of the report, Dr Smith, had seen the First-tier Judge's decision and also my earlier decision. The relevant country guidance is still GJ [2013] UKUT 00319 (IAC), and as the headnote in that case makes clear, the present objective of the Sri Lankan government at the time that decision was written is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state.

16. As regards the current categories of risk identified in that decision, the only ones of potential relevance in paragraph 7 of the headnote are 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 or 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. It is said that such people will be stopped at the airport and handed over to the appropriate Sri Lankan authorities in pursuance of such order or warrant.

17. As regards the category in paragraph 7(a), it is not possible in my view to consider the appellant, given his record, as a person who is perceived to have a significant role in relation to post-conflict Tamil separatism and to be a threat to the integrity of Sri Lanka as a single state. Any interest in him as a relative of his uncle had apparently disappeared by 2009, and otherwise he was simply a person who was arrested having been digging bunkers.

18. Nor is there any evidence to suggest that his name would appear on a stop list. There is no arrest warrant extant or court order, and there is no reason to believe that he is a person whose name is on a list and who would therefore be stopped at the airport and handed over to the appropriate authorities.

19. As regards subparagraph 9, the maintenance of computerised intelligence-led “watch” lists, such that a person is not reasonably likely to be detained at the airport but to be monitored by the security services after his or her return, it is said that 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 such person is not reasonably likely to be detained by the security forces. That is a question of fact in each case, dependent on any diaspora activities carried out by such an individual.

20. Again, I see no reason to suppose that the appellant falls within this risk category. He is not and never has been a Tamil activist and monitoring would not indicate that he is such an activist working to destabilise the unitary Sri Lankan state, and his claimed diaspora activities were found to lack credibility.

21. Nor do I see anything in Dr Smith’s report insofar as it deals with risk on return to suggest that the country guidance has in any sense been overtaken. There are a number of examples given of people thought to have been associated in some way to the TGTE and the BTF experiencing detention and/or ill-treatment on return to Sri Lanka. These are all fact-sensitive cases, and one can see in any event that these were people of a degree of high profile and/or sur place activity. None of them is anywhere near the appellant in terms of their profile. As a consequence, I do not consider that Dr Smith’s report advances the case of the appellant any further and it does not show that the country guidance has in any sense to be replaced by more recent evidence of the kind which he presents.

22. As a consequence, I consider that even if it were the case that the certificate of the Secretary of State were not to be upheld, the appellant in any event, whether under the Refugee Convention or under Article 3, does not face a real risk on return to Sri Lanka. The picture has changed significantly since his appeal hearing in 2009. There is more recent country guidance which reflects the position as of now as opposed to the earlier guidance in force at the time when the Immigration Judge heard the appeal in October 2009. Accordingly, the appellant’s appeal is dismissed under the Refugee Convention and also with regard to human rights and humanitarian protection.

Notice of Decision

The appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 his 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 19 July 2019

Upper Tribunal Judge Allen