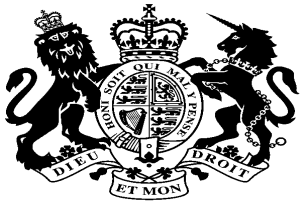

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: RP/00157/2017**

THE IMMIGRATION ACTS

At Field House	**Decision & Reasons Promulgated**
On 29th August 2019	**On 6th September 2019**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

AK
(ANONYMITY ORDER IN PLACE)

Respondent

Representation:

For the Appellant: Mr Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr Coleman, Counsel instructed by S Satha & Co

DECISION AND DIRECTIONS

1. The Respondent is a national of Sri Lanka date of birth 15th March 1994. Although he was recognised as a refugee in 2008 the Secretary of State has made a decision to deport him under s32 of the UK Border Act 2007. The reason for that action is that on the 6th May 2016 the Respondent was convicted of Actual Bodily Harm and sentenced to a period of imprisonment of 54 months. Before the First-tier Tribunal the Respondent successfully argued that notwithstanding his criminality he should not be deported because he continues to require the protection of the United Kingdom. His appeal was accordingly allowed. The Secretary of State now has permission to appeal against that decision.

2. The foundation of the First-tier Tribunal's decision was the 4th September 2008 determination of Immigration Judge Bryant in case number AA/05802/08. Judge Bryant heard live evidence from the Respondent's mother, and from the Respondent himself. Judge Bryant was impressed by that evidence and found that both were at a real risk of serious harm should they be returned to Sri Lanka. In particular Judge Bryant accepted that:

    i) The Respondent's father was a member of, or 'associated with' the Liberation Tigers of Tamil Eelam (LTTE) from at least 2001;

    ii) Between 2007 and 2008 the Sri Lankan security services in Jaffna repeatedly questioned the Respondent, his mother and brothers about the father's whereabouts;

    iii) In March 2008 the family were all detained and questioned;

    iv) The Respondent and his brother were held in detention, ill-treated, photographed, fingerprinted and forced to sign a document before they were released on bail;

    v) They thereafter failed to comply with the terms of that bail;

    vi) The family then moved to Negombo in order to avoid further arrest;

    vii) When the Respondent and his brother failed to answer to their bail conditions the security services were searching for them at the family home in Jaffna;

    viii) The family subsequently fled Sri Lanka and claimed asylum in the United Kingdom;

    ix) Having regard to the fact that they skipped bail, that "there is a reasonable likelihood that there are records relating to [the Respondent] which would be held either on computer or other records at the airport" as a result of which the Respondent would be reasonably likely to be detained upon arrival at Colombo airport. Given that such detention would give rise to a real risk of serious harm, the Respondent had made out his case that he was a refugee.

3. Judge Cohen treated those findings as his *Devaseelan* starting point. He then said this, and allowed the appeal:

> "35. The [Secretary of State] does not appear to have engaged sufficiently with these findings and has produced no evidence to impugn the findings of Immigration Judge Bryant and has not discharged the burden of proof.

> 36. The appellant [the Respondent] has provided an expert report from Dr Chris Smith supporting his appeal and finding that it was reasonably likely that the appellant would be on a Stop List, or at the very least the Watch List upon return to Sri Lanka.
>
> 37. I find that the appellant is reasonably likely to appear on the records at the airport based upon his own perceived political opinion and imputed political opinion based on his LTTE familial affiliation. The appellant clearly has a number of significant risk factors as identified in the case of GJ
>
> 38. The appellant will be returned on an Emergency Travel Document and the Sri Lankan High Commission will pass details of the appellant to the Sri Lankan authorities and the appellant will be asked questions upon his arrival in Sri Lanka. This conjunction with his name being on the database means that it is reasonably likely that the appellant will be arrested and detained".

4. The Secretary of State submits that these findings are unsustainable in light of the country guidance case of GJ and Others [2013] UKUT 00319 (IAC), which post-dated the decision of Judge Bryant, and indeed armed hostilities in Sri Lanka, which reached their apogee in Spring 2009. It is the Secretary of State's case that the guidance in GJ, properly understood, could not support a finding that the Respondent 's fear of return to Sri Lanka is currently well-founded. Particular reliance is placed upon the findings at paragraph 311:

> 311. 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 which the parties produced of those who were ill-treated on return, were of persons who had significant LTTE links (whether direct or familial). The evidence is that although LTTE cadres were screened out and rehabilitated in May 2009, the government's concern now is not with past membership or sympathy, but with whether a person is a destabilising threat in post-conflict Sri Lanka.

5. It is the Secretary of State's case that there is nothing about the Respondent which would lead the Sri Lankan security services to conclude that he is a "destabilising threat" in post-conflict Sri Lanka. He was only 14 when he was detained, he has spent ten years in the United Kingdom and there is no evidence of any diaspora opposition activity.

Discussion and Findings

6. As a preliminary observation I would note that the submission that the Secretary of State makes before me is the same submission made before, and considered by, the First-tier Tribunal: see paragraphs 5, 6, 18, 31 and 37 of the determination where GJ is specifically addressed. It cannot therefore be said that the First-tier Tribunal was unaware of the country guidance, failed to consider it, or the Secretary of State's submissions about its effect.

7. The question then is whether the approach taken by the Tribunal is an irrational or otherwise impermissible application of the guidance. The *ratio* of the decision is as follows.

8. There is an undisturbed finding of fact by a Judge that the Respondent was arrested in 2008 in connection with an investigation into LTTE activity. Along with his brother he was detained, beaten, and forced to sign a blank document. Before they were released on official bail they were photographed and fingerprinted. The Respondent then skipped bail. He failed to comply with his reporting conditions and this led to the security services searching for him and his brother – they attended the family home and questioned the boys' grandmother. These facts led Judge Bryant to conclude, in September 2008, that there was a real risk that their names would be on a computer or other record at the airport, and that this would lead to the Respondent's detention and ill-treatment upon return.

9. That, quite properly, was Judge Cohen's starting point. Because this was a cessation case he then proceeded to consider [at §31] whether the Secretary of State had submitted any evidence to demonstrate that the Respondent would no longer face a real risk of harm. He recorded that the Secretary of State had produced no such evidence. The Respondent had however produced a report from Dr Chris Smith (an acknowledged expert on the security situation in Sri Lanka) who upon examination of the Respondent's current circumstances had concluded that it was reasonably likely that his name would be on a 'Stop List' today. At paragraph 356 of GJ the Tribunal had concluded that those who found themselves on a 'Stop List' would be detained upon arrival; such detention was reasonably likely to lead to ill-treatment and could not therefore be returned to Sri Lanka. It was on that basis that Judge Cohen allowed the Respondent's appeal.

10. Before me Mr Melvin acknowledged that the HOPO at the First-tier Tribunal hearing had not submitted any country background material: he had simply relied upon GJ. Mr Melvin nevertheless urged me to find that the Tribunal had erred in concluding that the Respondent was at risk because he would be on a 'Stop List'. In GJ the Tribunal found that this list comprised of individuals subject to an arrest warrant or court summons. Mr Melvin submitted that since there was no evidence that the Respondent was the subject of either, it followed that he could not be at risk: the 2008 findings of Judge Bryant that the Respondent's name would be on a computer at the airport did not, without more, justify the conclusion in 2019 that his name would appear on a 'Stop List' today.

11. I find the Secretary of State's grounds not to be made out for two principle reasons. First because the Secretary of State did not, at any point, challenge the conclusions of Dr Smith. Dr Smith had opined that the Respondent's name was reasonably likely to be on a Stop List. He knew and understood the guidance in GJ: in fact he was one of the experts that the Upper Tribunal relied upon to give the country guidance. The First-tier Tribunal was entitled to rely on that unchallenged evidence. Second because the absence of evidence does not amount to evidence of absence. The fact that the Respondent had not managed to show that he is subject to an arrest warrant or court summons is not at this stage sufficient to demonstrate that the risk to him has abated. He skipped official bail whilst under investigation for LTTE association. That was sufficient for Dr Smith to consider him to be at ongoing risk of being on the list, and for the First-tier Tribunal to accept those conclusions. I can find no irrationality or other error in the Tribunal's decision, which appears to follow the guidance in GJ.

12. The Secretary of State's appeal is accordingly dismissed.

Anonymity

13. The Respondent is entitled to international protection. As such I am satisfied, having had regard to the guidance in the *Presidential Guidance Note No 1 of 2013: Anonymity Orders*, that it would be appropriate to make an order in accordance with Rule 14 of the *Tribunal Procedure (Upper Tribunal) Rules 2008* in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions

14. The decision of the First-tier Tribunal is upheld.

15. There is an order for anonymity.

Upper Tribunal Judge
30th August 2019