



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

Appeal Number: AA/11871/2014

THE IMMIGRATION ACTS

**Heard at: Field House
On: 23rd September 2021**

**Decision & Reasons Promulgated
On 20th October 2021**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**VM
(anonymity direction made)**

Appellant

And

Secretary of State for the Home Department

Respondent

**For the Appellant: Ms Jegarajah and Ms Miszkiel, Counsel instructed
by AASK Solicitors**

For the Respondent: Mr Clarke, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a Tamil national of Sri Lanka born in 1986. He seeks protection in the United Kingdom.

Anonymity Order

2. This appeal concerns a claim for protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Background and Matters in Issue

3. The history of this matter is long and complex, but for the purposes of this decision can be summarised as follows. The Respondent refused to grant protection on the 19th December 2014. The Appellant’s subsequent appeal was dismissed by the First-tier Tribunal (Judge Bowler) on the 29th April 2015. Judge Bowler accepted that the Appellant was tortured by the Sri Lankan authorities in 2009, and that he had latterly become involved with the TGTE in the United Kingdom, but found that he did not fall within any of the ‘risk categories’ set out in the then-extant country guidance of GJ & Others (post-civil war – returnees) [2013] UKUT 319 (IAC). In particular he did not accept that the extent of the Appellant’s involvement with the TGTE in the United Kingdom could bring him within the ambit of paragraph 7(a) of the headnote to GJ:

“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”

4. The Appellant appealed to the Upper Tribunal and the matter came before Deputy Upper Tribunal Judge Davey. By his decision of 6th November 2015 Judge Davey dismissed the appeal, finding no misdirection by the First-tier Tribunal. The Appellant appealed to the Court of Appeal and by a consent order sealed on the 23rd November 2017 the matter was remitted *de novo* to the Upper Tribunal. The Statement of Reasons include the following:

“5. Neither the First-tier Tribunal nor the Upper Tribunal considered the fact that, on 1 April 2014, the Government of Sri Lanka proscribed the TGTE as a terrorist group. Neither Tribunal was referred to the up-dated guidance which was provided in the form of two letters from the British High Commission dated 16 April and 25 July 2014 which were annexed to the Home Office policy guidance entitled Tamil Separatism and dated 28 August 2014 (“the Guidance”).

6. In UB (Sri Lanka) v Secretary of State for the Home Department [2017] EWCA Civ 85 this court allowed UB's appeal in a case where the lower Tribunals had not been referred to the Guidance and the Court could not be certain that this would not have affected the outcome".
5. The matter returned to the Upper Tribunal on the 11th July 2018 when Upper Tribunal Judge O'Connor found error of law and set the decision of the First-tier Tribunal aside for the reasons identified in the Court of Appeal litigation. It has languished here since then. First because there was a protracted debate about whether it should be designated as potential country guidance, then because the Appellant's representatives considered it vital that he be permitted to adduce certain evidence, then because of the pandemic, then because it eventually came to be stayed behind the case which was eventually designated as country guidance: KK and RS (Sur place activities: risk) Sri Lanka [2021] UKUT 0130 (IAC).
6. On the 4th June 2021 I sent directions to the parties setting out the case history in greater detail and making the observation:
- "Today the Upper Tribunal has handed down the decision in KK and RS (Sur place activities: risk) Sri Lanka [2021] UKUT 0130 (IAC). Given that this is current country guidance which specifically addresses the matter in issue in this appeal, namely whether *sur place* TGTE activism places an individual at risk of persecution upon return to Sri Lanka, it is appropriate that this appeal now be listed without further delay, and without the necessity for a five day hearing. The Appellant's representatives are, **within 7 days of these directions being sent**, to inform the Tribunal of a revised witness list and time estimate, so that the matter can proceed to listing. Fresh bundles are to be served within **21 days of these directions being sent** including the latest material on the Appellant's TGTE activity (including the material served on the Respondent on the 26th June 2020). Given that there is fresh country guidance it is not anticipated that there will be a need for extensive country background material. Any such material that the Appellant considers necessary to include in the bundles must be limited to the specific matter in issue before the Tribunal and be up to date."
7. Following these directions the Appellant's representatives served an up to date witness statement and a bundle containing *inter alia* documentary evidence of the Appellant's continued involvement in the TGTE.

The Country Guidance

8. The headnote of KK and RS reads as follows:

In broad terms, GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) still accurately reflects the situation

facing returnees to Sri Lanka. However, in material respects, it is appropriate to clarify and supplement the existing guidance, with particular reference to sur place activities.

The country guidance is restated as follows:

(1) The current Government of Sri Lanka ("GoSL") is an authoritarian regime whose core focus is to prevent any potential resurgence of a separatist movement within Sri Lanka which has as its ultimate goal the establishment of Tamil Eelam.

(2) GoSL draws no material distinction between, on the one hand, the avowedly violent means of the LTTE in furtherance of Tamil Eelam, and non-violent political advocacy for that result on the other. It is the underlying aim which is crucial to GoSL's perception. To this extent, GoSL's interpretation of separatism is not limited to the pursuance thereof by violent means alone; it encompasses the political sphere as well.

(3) Whilst there is limited space for pro-Tamil political organisations to operate within Sri Lanka, there is no tolerance of the expression of avowedly separatist or perceived separatist beliefs.

(4) GoSL views the Tamil diaspora with a generally adverse mindset, but does not regard the entire cohort as either holding separatist views or being politically active in any meaningful way.

(5) Sur place activities on behalf of an organisation proscribed under the 2012 UN Regulations is a relatively significant risk factor in the assessment of an individual's profile, although its existence or absence is not determinative of risk. Proscription will entail a higher degree of adverse interest in an organisation and, by extension, in individuals known or perceived to be associated with it. In respect of organisations which have never been proscribed and the organisation that remains de-proscribed, it is reasonably likely that there will, depending on whether the organisation in question has, or is perceived to have, a separatist agenda, be an adverse interest on the part of GoSL, albeit not at the level applicable to proscribed groups.

(6) The Transnational Government of Tamil Eelam ("TGTE") is an avowedly separatist organisation which is currently proscribed. It is viewed by GoSL with a significant degree of hostility and is perceived as a "front" for the LTTE. Global Tamil Forum ("GTF") and British Tamil Forum ("BTF") are also currently proscribed and whilst only the former is perceived as a "front" for the LTTE, GoSL now views both with a significant degree of hostility.

(7) Other non-proscribed diaspora organisations which pursue a separatist agenda, such as Tamil Solidarity ("TS"), are viewed with hostility, although they are not regarded as "fronts" for the LTTE.

(8) GoSL continues to operate an extensive intelligence-gathering regime in the United Kingdom which utilises information acquired through the infiltration of diaspora organisations, the photographing and videoing of demonstrations, and the monitoring of the Internet and unencrypted social media.

At the initial stage of monitoring and information gathering, it is reasonably likely that the Sri Lankan authorities will wish to gather more rather than less information on organisations in which there is an adverse interest and individuals connected thereto. Information gathering has, so far as possible, kept pace with developments in communication technology.

(9) Interviews at the Sri Lankan High Commission in London (“SLHC”) continue to take place for those requiring a Temporary Travel Document (“TTD”).

(10) Prior to the return of an individual traveling on a TTD, GoSL is reasonably likely to have obtained information on the following matters:

- i. whether the individual is associated in any way with a particular diaspora organisation;*
- ii. whether they have attended meetings and/or demonstrations and if so, at least approximately how frequently this has occurred;*
- iii. the nature of involvement in these events, such as, for example, whether they played a prominent part or have been holding flags or banners displaying the LTTE emblem;*
- iv. any organisational and/or promotional roles (formal or otherwise) undertaken on behalf of a diaspora organisation;*
- v. attendance at commemorative events such as Heroes Day;*
- vi. meaningful fundraising on behalf of or the provision of such funding to an organisation;*
- vii. authorship of, or appearance in, articles, whether published in print or online;*
- viii. any presence on social media;*
- ix. any political lobbying on behalf of an organisation;*
- x. the signing of petitions perceived as being anti-government.*

(11) Those in possession of a valid passport are not interviewed at the SLHC. The absence of an interview at SLHC does not, however, discount the ability of GoSL to obtain information on the matters set out in (10), above, in respect of an individual with a valid passport using other methods employed as part of its intelligence-gathering regime, as described in (8). When considering the case of an individual in possession of a valid passport, a judge must assess the range of matters listed in (10), above, and the extent of the authorities’ knowledge reasonably likely to exist in the context of a more restricted information-gathering apparatus. This may have a bearing on, for example, the question of whether it is reasonably likely that attendance at one or two demonstrations or minimal fundraising activities will have come to the attention of the authorities at all.

(12) Whichever form of documentation is in place, it will be for the judge in any given case to determine what activities the individual has actually undertaken and make clear findings on

what the authorities are reasonably likely to have become aware of prior to return.

(13) GoSL operates a general electronic database which stores all relevant information held on an individual, whether this has been obtained from the United Kingdom or from within Sri Lanka itself. This database is accessible at the SLHC, BIA and anywhere else within Sri Lanka. Its contents will in general determine the immediate or short-term consequences for a returnee.

(14) A stop list and watch list are still in use. These are derived from the general electronic database.

(15) Those being returned on a TTD will be questioned on arrival at BIA. Additional questioning over and above the confirmation of identity is only reasonably likely to occur where the individual is already on either the stop list or the watch list.

(16) Those in possession of a valid passport will only be questioned on arrival if they appear on either the stop list or the watch list.

(17) Returnees who have no entry on the general database, or whose entry is not such as to have placed them on either the stop list or the watch list, will in general be able to pass through the airport unhindered and return to the home area without being subject to any further action by the authorities (subject to an application of the HJ (Iran) principle).

(18) Only those against whom there is an extant arrest warrant and/or a court order will appear on the stop list. Returnees falling within this category will be detained at the airport.

(19) Returnees who appear on the watch list will fall into one of two sub-categories: (i) those who, because of their existing profile, are deemed to be of sufficiently strong adverse interest to warrant detention once the individual has travelled back to their home area or some other place of resettlement; and (ii) those who are of interest, not at a level sufficient to justify detention at that point in time, but will be monitored by the authorities in their home area or wherever else they may be able to resettle.

(20) In respect of those falling within sub-category (i), the question of whether an individual has, or is perceived to have, undertaken a "significant role" in Tamil separatism remains the appropriate touchstone. In making this evaluative judgment, GoSL will seek to identify those whom it perceives as constituting a threat to the integrity of the Sri Lankan state by reason of their committed activism in furtherance of the establishment of Tamil Eelam.

(21) The term "significant role" does not require an individual to show that they have held a formal position in an organisation, are a member of such, or that their activities have been "high profile" or "prominent". The assessment of their profile will always be fact-specific, but will be informed by an indicator-based approach, taking into account the following non-exhaustive factors, none of which will in general be determinative:

- i. *the nature of any diaspora organisation on behalf of which an individual has been active. That an organisation has been proscribed under the 2012 UN Regulations will be relatively significant in terms of the level of adverse interest reasonably likely to be attributed to an individual associated with it;*
- ii. *the type of activities undertaken;*
- iii. *the extent of any activities;*
- iv. *the duration of any activities;*
- v. *any relevant history in Sri Lanka;*
- vi. *any relevant familial connections.*

(22) The monitoring undertaken by the authorities in respect of returnees in sub-category (ii) in (19), above, will not, in general, amount to persecution or ill-treatment contrary to Article 3 ECHR.

(23) It is not reasonably likely that a returnee subject to monitoring will be sent for “rehabilitation”.

(24) In general, it is not reasonably likely that a returnee subject to monitoring will be recruited as an informant or prosecuted for a refusal to undertake such a role.

(25) 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 are associated with publications critical of the government, face a reasonable likelihood of being detained after return, whether or not they continue with their activities.

(26) Individuals who have given evidence to the LLRC implicating the Sri Lankan security forces, armed forces, or the Sri Lankan authorities in alleged war crimes, also face a reasonable likelihood of being detained after their return. It is for the individual concerned to establish that GoSL will be aware of the provision of such evidence.

(27) There is a reasonable likelihood that those detained by the Sri Lankan authorities will be subjected to persecutory treatment within the meaning of the Refugee Convention and ill-treatment contrary to Article 3 ECHR.

(28) Internal relocation is not an option within Sri Lanka for a person at risk from the authorities.

(29) In appropriate cases, consideration must be given to whether the exclusion clauses under Article 1F of the Refugee Convention are applicable.

APPLICATION OF THE PRINCIPLE IN HJ (IRAN)

It is essential, where appropriate, that a tribunal does not end its considerations with an application of the facts to the country guidance, but proceeds to engage with the principle established by HJ (Iran) [2010] UKSC 31; [2010] 1 AC 596 , albeit that such an analysis will involve interaction with that guidance.

When applying the step-by step approach set out in paragraph 82 of HJ (Iran), careful findings of fact must be made on the genuineness of a belief in Tamil separatism; the future conduct of an individual on return in relation to the expression of genuinely held separatist beliefs; the consequences of such expression; and, if the beliefs would be concealed, why this is the case.

The Preserved Findings

9. In 2015 Judge Bowler made the following findings of fact:
- i) The Appellant was tortured by the Sri Lankan authorities in 2009;
 - ii) He was at that time a low level actor engaged in activities to support the LTTE such as collecting and donating funds and taking children to and from events;
 - iii) The Appellant's account of being investigated as a member of the LTTE in 2014 is not credible;
 - iv) Although he had previously attended annual Tamil events such as the Heroes Day memorials in London he did not join the TGTE until November 2013 at around the same time that he claimed asylum. The Tribunal concluded that he did so in order to bolster his claim;
 - v) At the date of the decision the Appellant's involvement in the TGTE consisted of handing out flyers and CDs, collecting signatures for petitions, talking to young Tamils about their culture, volunteering at a community centre, organising catering for events, and being a member of the 'genocide committee', a group tasked with encouraging Tamils in the UK not to forget the events in Sri Lanka.
10. Judge Bowler also appeared to accept that the Appellant is "barely identifiable" in a photograph which appeared on a Tamil website reporting on a visit of Tamils to Westminster to lobby their MPs. He concluded:
- "I recognise that this activity is greater than some others involved with the TGTE in that he is encouraging people to participate, but it is still far from being a significant role in post-conflict separatism, or from being a role that would be perceived to be so by the Sri Lankan authorities. Talking about prior events and the effect on the Tamils does not mean that a person is active in trying to achieve a separate state now".
11. It is of course that analysis which led to the consent order in the Court of Appeal, and brings the case back before me.

More Recent Evidence

12. Seven years have elapsed since Judge Bowler made those findings. What has the Appellant been doing since then?
13. The Appellant has produced an updated witness statement. Therein he states that since the appeal before Judge Bowler he has continued his involvement with the TGTE and the Tamil community generally. He states that he has attended numerous Tamil festivals organised by the TGTE, memorial events, a public hunger strike; numerous protests about the injustices faced by the Tamil community at venues such as the Sri Lankan High Commission and Downing St; he has gone to, and helped organise, meetings.
14. Importantly for the purpose of his appeal, he has been photographed at a number of these events. On the 18th October 2019 the Appellant attended a demonstration at Westminster Magistrates Court staged by Tamils demanding the conviction of Brigadier Fernando, a Sri Lankan Army brigadier who infamously made a 'throat slitting' gesture at Tamil protesters in London. Photographs of the Appellant attending the event appeared in various places, including a Tamil website and the Viresakari newspaper. More significantly, the Appellant states that he and others were secretly filmed in a video which subsequently appeared on a Sinhalese news website Hiru News. The video can be viewed on Youtube. I have watched the video. The Appellant can be seen about a minute and a half in, as the camera pans across the protestors. Immediately following this the crowd starts to chant "Stop stop spying on Tamil protestors". The Appellant returned to Westminster Magistrates for the actual trial, which took place in December 2019. The Appellant has produced an article from 'Morningstar online' which reports that during the trial a man was taking photographs of the witnesses and the public gallery.
15. Subsequent to the trial of Brigadier Fernando the Appellant states that he has attended further protests outside the Sri Lankan High Commission in London. Photographs of him at these events have appeared in various Tamil language websites and newspapers. At the hearing Ms Jegarajah was able to show to myself and Mr Clarke clear colour copies of these photographs, in which the Appellant was readily identifiable.
16. Other evidence adduced of the Appellant's ongoing involvement in the TGTE includes a TGTE membership card issued in January 2020 and a letter from Mr Yogalingham TGTE MP dated 14th March 2019 which attests to the Appellant's active involvement and genuine commitment to the organisation.

17. Given the documentary evidence produced of the Appellant's attendance at various protests etc. I indicated that I did not regard it as necessary to hear further evidence from him. As Mr Clarke agreed, even I excluded from my consideration those events which are mentioned in the witness statement but are unsupported by photographs, there is still good evidence of the Appellant's attendance at a number of events over the past nine years. These protests are, it is clear from the placards and banners shown, overtly against the policies of the government Sri Lanka, and vehemently in support of Tamil self-determination.

Discussion and Findings

18. The preserved findings are that due to his 'low level' support for the LTTE the Appellant was tortured by the Sri Lankan authorities in 2009. He has been a member of the TGTE since 2013 and although the First-tier Tribunal considered his motivation for joining the group in the UK to be cynical, it would appear that since its decision in 2015 the Appellant has maintained and indeed increased his level of involvement. Recent documentary evidence shows him to have been in attendance at several protests in London.

19. The country guidance notes that the TGTE is an avowedly separatist organisation which is currently proscribed in Sri Lanka. It is viewed by government in Sri Lanka with a significant degree of hostility and is perceived as a "front" for the LTTE. The Tribunal further found that the Sri Lankan security service continues to operate an extensive intelligence-gathering regime in the United Kingdom which utilises information acquired through the infiltration of diaspora organisations, the photographing and videoing of demonstrations, and the monitoring of the Internet and unencrypted social media.

20. Prior to any return of the Appellant to Sri Lanka he would need to be interviewed at the High Commission in order to obtain a travel document. As Mr Clarke very fairly, but realistically, acknowledged, on the basis of the information in the country guidance about the Commission's intelligence gathering capabilities, it has to be assumed that they will be, or become, aware of the Appellant's attendance at the London protests at such an interview. I find it to be reasonably likely that they will have obtained information on his membership of the TGTE, his attendance at commemorations, meetings and protests over the past 9 years, his role in helping to organise such events and raise funds, and other activity such as promoting petitions.

21. The country guidance states that the Government of Sri Lanka operates a general electronic database which stores all relevant information held on an individual, whether this has been obtained from the United Kingdom or from within Sri Lanka itself. This database

is accessible at the SLHC, BIA and anywhere else within Sri Lanka. Its contents will in general determine the immediate or short-term consequences for a returnee. A stop list and watch list are still in use. These are derived from the general electronic database.

22. The watch list will include those returnees who, because of their existing profile, are deemed to be of sufficiently strong adverse interest to warrant detention once the individual has travelled back to their home area or some other place of resettlement. The question of whether an individual has, or is perceived to have, undertaken a "significant role" in Tamil separatism remains the appropriate touchstone. In making this evaluative judgment, the Sri Lankan authorities will seek to identify those whom it perceives as constituting a threat to the integrity of the Sri Lankan state by reason of their committed activism in furtherance of the establishment of Tamil Eelam. The term "significant role" does not require an individual to show that they have held a formal position in an organisation, are a member of such, or that their activities have been "high profile" or "prominent". The assessment of their profile will always be fact-specific, but will be informed by an indicator-based approach, taking into account the following non-exhaustive factors, none of which will in general be determinative:

- i. the nature of any diaspora organisation on behalf of which an individual has been active. That an organisation has been proscribed under the 2012 UN Regulations will be relatively significant in terms of the level of adverse interest reasonably likely to be attributed to an individual associated with it;
- ii. the type of activities undertaken;
- iii. the extent of any activities;
- iv. the duration of any activities;
- v. any relevant history in Sri Lanka;
- vi. any relevant familial connections.

23. Mr Clarke accepted that the Appellant has attended those events that are depicted in the photographic evidence before me. He did ask me to bear in mind Judge Bowler's finding that such activity was cynically motivated, and asked me to consider whether the Appellant would be regarded as having been significantly involved. I have done so. As I indicated to Mr Clarke I consider that the real difficulty for the Secretary of State in this case is the length of time that the Appellant has apparently been involved in the TGTE activity in the UK, and the frequency of his attendance at events such as the Magistrates' Court protest. Mr Clarke accepted, in light of that long association of TGTE, there is a reasonable likelihood of all of these activities would come to light at the 'pinch point' of the interview at the Sri Lankan High Commission.

24. Given the nature and extent of the Appellant's activities with the TGTE since 2013 I am satisfied that he has had a significant role to play, and that he will be perceived as such by the authorities in Sri Lanka. He is someone who has been involved in the organisation for a long period, and who has regularly attended public events in that capacity. His image has appeared on several websites and in newspapers; he is one of the protestors against Brigadier Fernando depicted in a Sinhalese news reel. I bear in mind his historic, albeit low level, association with the LTTE and the fact that he continues today to bear the scars of his previous torture. Given the findings in KK & RS in respect of the Sri Lankans' intelligence gathering capabilities I am satisfied that there is a reasonable likelihood that his name will appear on a 'watch list' and that there is a reasonable likelihood that following his entry to Sri Lanka he will be considered to be of sufficient adverse interest to warrant arrest and questioning, during which there is a reasonable likelihood of persecutory ill treatment.

Decisions

25. The appeal is allowed on protection and human rights grounds.
26. There is an order for anonymity.



Upper Tribunal Judge Bruce
23rd September 2021