



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/06993/2012

THE IMMIGRATION ACTS

Heard at Field House
On 3 July 2013

Determination Sent
On 9 August 2013
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Before

UPPER TRIBUNAL JUDGE O'CONNOR
UPPER TRIBUNAL JUDGE RINTOUL

Between

SS
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Jegarajah, instructed by A & P Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The First-tier Tribunal made an anonymity order in this appeal and there has been no application before us to discharge that order. No report of these proceedings shall

directly, or indirectly, identify the appellant. A failure to comply with this direction could lead to a contempt of court.

2. The appellant is a citizen of Sri Lanka born in 1988. She appealed to the First-tier Tribunal against a refusal by the Secretary of State, of 10 July 2012, to vary her leave to remain and also against a decision to remove her pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006. First-tier Tribunal Judge Mr R G Walters heard the appellant's appeal on 23 August 2012. In summary the appellant's case at that time was that she was a Sri Lankan national of Tamil ethnicity who had lived her entire life prior to coming to the United Kingdom in Colombo. Her father had been abducted in 1989 and to this day it is not known what happened to him. She was arrested in 2009 by the Sri Lankan police who suspected that she had connections with the LTTE as a consequence of the fact that a cousin who was staying in the family house at the time had assisted the LTTE. The appellant was detained for two days and she was thereafter released.
3. The appellant was subsequently granted entry clearance to come to the United Kingdom as a student and she arrived here on 11 March 2010 to study HND Travel and Tourism at the City College. The appellant travelled back to Sri Lanka for a holiday on 22 August 2010 returning to the United Kingdom on 20 September 2010. She also returned to Sri Lanka on 11 March 2011. Whilst in Sri Lanka she suffered from dengue fever and having recovered from that illness she eventually returned back to the United Kingdom on 16 April 2011. The appellant stated that she discontinued her studies in March 2011.
4. She attended a Hero's Day celebration in London in November 2011 in memory of the Tamil people who had given their lives for the Tamil cause. This was at the Eastbury Comprehensive School in Barking. She states in her witness statement that she had wanted to attend the demonstration against Rajapaksa's visit to the United Kingdom in November/December 2010 but she was unable to do so because she was unwell with stomach problems. She also did not attend the Mullivaikal Remembrance Day celebrations in May 2011 because this was just over a week after her former boyfriend had broken up with her and she was too depressed to think about going to the celebration. She did however attend the Mullivaikal Remembrance Day demonstration on 19 May 2012. As a consequence of her attendance her picture found its way into two newspapers which are published in Sri Lanka and in one of which she was quoted within the newspaper article accompanying the picture, as making anti-government statements.
5. The appellant claims that her mother informed her that she had appeared in the Veerakesari and the Sudar Oli newspapers on 22 May 2012 and 31 May 2012 respectively. She further claims that on 1 June 2012 the CID attended the appellant's family home in Sri Lanka making enquiries about the appellant, that her mother was not there at the time but they left a message that her mother was to report to Kotahena Police Station for enquiries. Her mother did not attend as requested and thereafter moved to stay with a friend in the outskirts of Colombo. She further stated that on 6 June 2012 her mother contacted her to say that the CID had visited her twice

more, and that although thereafter the appellant had attempted to contact her mother on many occasions she had been unable to do so and did not know what has happened to her. On 18 June 2012 she spoke to her aunt in Sri Lanka who was also trying to locate her mother but she had also not heard anything about her mother's whereabouts.

6. First-tier Tribunal Walters dismissed the appeal on Refugee Convention, humanitarian protection and Article 3 ECHR grounds in a determination dated 10 September 2012.
7. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Nicholson in a decision dated 4 October 2012. The matter then came before Deputy Upper Tribunal Judge Macdonald on 18 December 2012 and, in a lengthy decision signed on 3 January 2013, Deputy Judge Macdonald concluded that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and he set aside that decision. The Deputy Judge gave the following reasons for his conclusions:

“7. On the appellant's evidence she is someone who has strong political views which are against the Sri Lankan authorities. It is true, as the judge said in paragraph 59, that the appellant had produced no country evidence to show that persecution was taking place against either persons who had demonstrated in London or against their relatives in Sri Lanka. The difficulty with that finding is that it does not sufficiently connect with the profile of the appellant who had done more than simply attend a demonstration in London. She appears in two articles in newspapers namely “Virakesari” and “Sudar Oli”. Whatever the real truth of her political views, her claim that she faced a real risk of persecution had to be based on not only her attendance at the demonstrations mentioned in her statement but also the fact that she appeared in two newspapers where she was particularly critical of the government and where it is within judicial knowledge that there is a wealth of current background material highlighting human rights abuses against those who have some kind of interest in the LTTE. Given that the judge did not properly assess the appellant's personal circumstances it is clear that this was an error in law and that the judgment cannot stand. It seems to me that what the judge was required to do was to assess whether it was reasonably likely that the appellant would be interrogated at the airport and, answering truthfully, what answers the appellant would be bound to give. In the absence of such reasoning I am concluding that the judge erred in law and that a fresh hearing will be required.”

8. The Deputy Judge adjourned the hearing and directed that a decision on the appellant's appeal should be re-made by the Upper Tribunal.
9. The appeal initially came before Upper Tribunal Judge Rintoul sitting alone on 10 May 2013, however on that occasion the Secretary of State produced new

documentation from the appellant's former college, the admission of which Ms Jegarajah on behalf of the appellant objected to. Given that the appellant had not had an opportunity to consider these documents in any detail the hearing was adjourned.

10. The appeal next came before the current panel on 3 July. At the outset of the hearing Ms Jegarajah requested an adjournment on the basis that it was understood that the Upper Tribunal were to issue a fresh country guidance case relating to Sri Lanka in the few days following the hearing. This application was refused; however an indication was given that the Tribunal would hear the oral evidence to be given by the appellant and then would require submissions to be made in writing, the Secretary of State being given seven days to make such written submissions after the date the country guidance case first appeared in the Tribunal's website and the appellant being given seven days thereafter to make her written submissions in response. Such submissions were received by the Tribunal in a timely fashion after the posting of the country guidance case on the Tribunal website and are summarised below.
11. Mr Avery subsequently renewed the Secretary of State's application to admit evidence that had not been placed before the First-tier Tribunal. This evidence consisted of a number of documents and e-mails written by the City College, the educational institute that the appellant previously attended in the United Kingdom, sent to the Secretary of State. The first document is a form sent by the Principal of the college to the migrant reporting e-mail of the UK Border Agency on 16 June 2011. The form sets out the appellant's details and the name and duration of the course that she was attending with the college. It notes that the appellant enrolled in March 2010 and that all was ok until early 2011 at which point the college lost contact with the appellant. The form also observes that the appellant received a formal warning about her progress and lack of payment in October 2010 and that she was excluded on 16 June 2011 for "non-attendance, zero progress, and non-payment of fees". The second document is an e-mail of 22 June 2012 sent from the principal of the college to a local enforcement team of the UK Border Agency. This e-mail observes that the appellant was excluded from the college in June 2011 but that on 22 June 2012 she attended the college, asking them to produce a letter of her attendance. The college refused to produce the letter because her attendance had only been 9%. There are then a number of e-mails between a Senior Home Office Presenting Officer (not Mr Avery) and the college.
12. Ms Jegarajah objected to the production of these documents on the basis that they had not previously been produced in the First-tier Tribunal in circumstances in which it was reasonable to expect that they would have been.
13. Having considered the Tribunal Procedure (Upper Tribunal) Rules 2008 and in particular Rules 2 and 15 (2A), we concluded that it was just and fair to admit the documentation given the nature of their contents and given the fact that the appellant had now been given adequate opportunity to address any matters referred to therein.

14. The appellant was then called to give evidence before the Tribunal, she adopting the contents of her witness statement of 21 August 2012 as being true and accurate.
15. Under cross-examination the appellant stated that she first attended a demonstration in the United Kingdom on Hero's Day in 2010. She had also attended Mullivaikal demonstrations in the United Kingdom but did not attend in the year she arrived here because she was having "monthly problems". At this point Mr Avery directed the appellant's attention to the contents of her witness statement in which the appellant had stated therein that she had not attended the Mullivaikal demonstrations in 2010 because she had been too busy setting up with her college. The appellant indicated that she had been unable to mention the true reason she had not attended the demonstration at the time of making her witness statement.
16. Mr Avery then asked the appellant why she had not attended the demonstrations against Rajapaksa's visit in November and December 2010, to which the appellant replied that she was new to the country at that time so she had been unable to attend. Mr Avery then pointed out that in her witness statement the appellant had indicated that she had not attended such demonstrations because at that time she had had stomach problems. In response the appellant stated that she must have mixed up the two questions today and that the evidence that she had given in her witness statement was the correct evidence.
17. In relation to her attendance at college the appellant confirmed that this had been low because she had suffered from illness for some time, including a cold and including an occasion on which she fell on ice and had to remain at home for a week or so. She accepted that she had been excluded from college in 2011.
18. Mr Avery's cross-examination then turned to the problems that the appellant claimed that her mother had had. The appellant stated in evidence that her mother had first informed her that the CID had been to the family home on 1 June 2012, she was then asked was this the only time that they came to the house and she responded by saying that they also attended on 5 June. Mr Avery then asked the appellant to confirm whether the authorities had been on just two occasions and the appellant confirmed that this was so. The appellant's attention was then drawn to question 82 of her asylum interview at which time she had asserted that the authorities had visited the family home on three occasions. In response the appellant stated that she had misunderstood the earlier question put by Mr Avery. The appellant continued by stating that she had last spoken to her mother on 6 June who, on that occasion informed her that the CID had been to the house again and that she had moved to a different place through fear. She further confirmed that her mother has a mobile phone in Sri Lanka. However asked when she first tried to contact her mother after 6 June she stated that this had occurred on 20 June and that she had not tried to contact her earlier because she had believed her mother to be safe. Her mother normally called her and when no such call had been received she tried to call her mother. She confirmed that she had not had contact with her mother since 6 June.

Submissions

19. The respondent relied on the refusal letter, submitting that in addition, her credibility is undermined by the documents from her college indicating that she was having significant problems with her studies prior to the break down in her relationship with her boyfriend which she had said left her unable to concentrate on her studies. It is also submitted that her evidence indicates that she is not a committed anti-government activist, given that initially her participation in anti-government events were sparse and there was an inconsistency in the reasons advanced for that in interview and in what she had said in oral evidence.
20. The respondent further asserted that the appellant's evidence about the CID visits to her house in Sri Lanka was confused, and lacking in credibility, leading to doubts that she had attracted attention from the CID.
21. The respondent concluded by submitting that although the appellant may, through the publication of newspaper articles, appear to fall within of GJ & Others (post-civil war: returnees) Sri Lanka CG [2013] 00319 (IAC), she does not present a profile that would attract the interests of the Sri Lankan authorities, given that their approach is based on sophisticated intelligence.
22. Ms Jegarajah submitted that, as the appellant has been photographed in two nationalist newspapers, and an interview with her published in which she espouses views which are anti-state or would be so perceived. Further, if interrogated about her involvement in the protests or her political views, she would face persecution if she told the truth - that she is committed to self-determination and redress for those killed and abused during the war - views which she could not be expected to suppress.

Findings and Reasons

23. As regards the appeal on asylum grounds, the burden of proof is on the appellant to demonstrate that there are substantial grounds for believing that she would, if returned to Sri Lanka, face a real risk of being persecuted for one or more of the reasons referred to in Article 1(A) of the Geneva Convention relating to the Status of Refugees, that is to say by reason of her race, religion, nationality, membership of a particular social group or political opinion. As confirmed by the Court of Appeal in Karanakaran v Secretary of State for the Home Department [2000] Imm AR 271, this standard of proof (which we shall refer to as the lower standard) applies both to the assessment of prospective harm and to the evidence of past events.
24. When arriving at our conclusions below we confirm that we did so having considered the whole of the evidence in the round. We did not form our view as to the credibility of any part of the appellant's case without first having looked at the evidence in its entirety, including the country background situation as set out in the documentation before us and in the relevant country guidance authorities.

25. In her Reasons for Refusal Letter dated 5 July 2012 the Secretary of State accepted the following matters of fact in relation to the appellant's claim:
- (i) that she had been arrested in 2009 as a consequence of the police having had a suspicion that she was a member of the Liberation Tigers of Tamil Eelam (LTTE). It was further accepted that the appellant was officially released from this detention;
 - (ii) the appellant attended her studies in the United Kingdom until March 2011;
 - (iii) the appellant attended the Mullivaikal Remembrance Day demonstration in the United Kingdom on 19 May 2012;
 - (iv) a photograph of the appellant attending the Mullivaikal Remembrance Day demonstration appeared in the news publication entitled "Virakesari" on 22 May 2012;
 - (v) a photograph of the appellant attending the Mullivaikal Remembrance Day demonstration, along with a quotation from the appellant, appeared in the Sudar Oli news publication on 30 May 2012.
26. The Secretary of State did not withdraw the above concessions during the hearing before the First-tier Tribunal or during the hearing before us, as a consequence of this we proceed to determine the appellant's appeal on the basis that the evidence as reflecting the concessions is to be found to be credible.
27. There are however a number of core aspects of the appellant's account that we do not accept as truthful. We do not accept it is credible that the appellant attended the demonstration in May of 2012 because she had committed views on Tamil separatism. The appellant arrived in the United Kingdom in 2010. We find if she were committed to the Tamil separatist cause to the extent that she asserts she is, she would have attended the Mullivaikal Remembrance Day celebrations in 2010 and 2011 and she would also have attended the demonstrations against Rajapaksa's visit to the United Kingdom in November and December 2010.
28. We have considered carefully the explanation the appellant provides for failing to attend these demonstrations but do not accept that she is telling the truth in this regard. We observe that the appellant gave differing explanations as between her substantive asylum interview and the evidence before the Upper Tribunal. Although when this was pointed out to her during the course of cross-examination before the Upper Tribunal she reverted back to the evidence given in her witness statement and substantive asylum interview, the only explanation she could offer for giving a different account under cross-examination is that she got confused and misunderstood the questioning. There was nothing confusing about the questioning of Mr Avery, who undertook his cross-examination with admirable clarity. We find that the appellant gave differing accounts as to the reasons she failed to attend the aforementioned demonstrations in the United Kingdom because the explanations she provided were not truthful or credible.

29. We also reject the appellant's evidence that the CID had visited her mother on numerous occasions in Sri Lanka and that her mother had now gone missing. Her evidence in this regard contains significant inconsistencies and when looked at as a whole we conclude that those inconsistencies are such so as to lead us to disbelieve substantially the appellant's evidence in this regard. We do accept, however, that the CID visited the appellant's family home in Colombo on 1 June 2012 and that her mother was not present at the home at that time. This has been a consistent strand of the appellant's account running from her screening interview onwards. It is notable however that the appellant does not mention that the CID came on more than one occasion during the course of her screening interview, that during the course of her substantive asylum interview the appellant stated that the Sri Lankan authorities had visited the family home in Sri Lanka on three occasions, and yet before the Upper Tribunal in cross-examination the appellant initially stated that the CID had only come on two occasions to the family house. When the inconsistency was pointed out to the appellant during the course of her cross-examination she simply indicated that she had misunderstood Mr Avery's questioning. We have reviewed the questions asked by Mr Avery and found them to be entirely clear and we find that in fact the appellant gave an incorrect answer during the course of her cross-examination because her evidence was untruthful. We are reinforced in this finding by the evidence given by the appellant during cross-examination that she had not attempted to make contact with her mother after 6 June until 20 June 2012, this being despite the fact that her mother had informed her on 6 June that she was fearful of what would happen to her. We find this totally implausible. It is also inconsistent with the evidence given by the appellant at paragraph 12 of her witness statement, in which she asserts that she attended the Asylum Screening Unit on 8 June 2012 because she had found out that her family could not locate her mother.
30. We must now assess whether, on the accepted facts, there is a real risk of the appellant suffering persecutory treatment upon return to Sri Lanka. In doing so we have carefully considered the very recent country guidance decision of GJ & Others. We observe that this country guidance case replaces all previously existing country guidance case law on Sri Lanka.
31. The headnote to GJ & Others materially states as follows:
- (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*

(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.*

32. We have no doubt that the Sri Lankan authorities have on record that the appellant was detained in 2009 on suspicion of being a member of the LTTE but that record would also show that the appellant was released from detention without any further requirement for her to report. It is not reasonably likely that the record from 2009 would indicate anything other than that it was concluded that the appellant was not of interest at that time. This is reinforced by the fact that the appellant was able to exit and then re-enter Sri Lanka on numerous occasions subsequent to 2009 without having any difficulties at the airport whatsoever.

33. As indicated above the appellant attended the Mullivaikal Remembrance Day celebration in London in 2012. It is reasonably likely that the authorities would have

taken photographs of that demonstration. It is difficult to know whether the appellant would have been identified from those photographs given the large numbers of people who attended demonstrations, but this is not a matter that we need determine because we are prepared to accept the authorities are aware the appellant attended demonstrations, this being as a consequence of the fact that she appeared in two newspapers published in Sri Lanka, with a photograph of her in those newspapers at the demonstration holding up a placard stating "Tamil Women".

34. This fact even taken together with the appellant's previous arrest and detention, would not lead us to conclude that she would be at real risk of suffering from persecutory treatment were she to return to Sri Lanka now. However, not only was the appellant photographed at the demonstration but she was also quoted in the Sudar Oli newspaper in the following terms;

"Student Miss S S of Kotahena, Colombo while expressing her opinion,

'our relatives were massacred at Mullivaikal without any kind of sympathy or consideration. In northern areas, including Vanni, massacres are still continuing without any sympathy or consideration for life. Many of our relatives have fallen victims in the Mullivaikal battle. It is essential that war crime enquiry should be brought against those committed this type of massacre.

Incidents of young women being subjected to forced sex and then killing them still continues in the northern area. I had joined in this programme to shed tears thinking about our relatives who were massacred at Mullivaikal. I have had lost many of relatives during the final battle at Vanni. Therefore it is essential to expedite the war crime enquiry against the Sri Lankan government under the present circumstances. All our relatives should unite together and take action'."

35. We note also that the enquiry by the CID occurred shortly after the newspaper articles in question were published, and we consider that, given the sensitivity on the part of the Sri Lankan authorities to the views such as those expressed by the appellant, that the visit was prompted by the publication of the articles.
36. We are satisfied that, given the nature of the views expressed in this article, published in Sri Lanka, that it would have attracted the adverse attention of the authorities. While the appellant is not a journalist, she is, we consider reasonably likely to be perceived as being a human rights activist working for Tamil separatism and to destabilise the unitary Sri Lankan state, this being irrespective of the sophistication of their intelligence and the appellant's lack of true commitment to the Tamil cause. The terms of the quotation, which is in the public domain, carries significant criticism of the government and makes clear allegations of the involvement of the Rajapacksa regime in war crimes.

37. Given the adverse interest in the appellant whose identity is known, and as it is known that she is in the United Kingdom, we are satisfied in the light of the material set out in GJ & Others and the guidance given that, in the particular circumstances of this case, where the appellant's views as expressed in a newspaper have already attracted adverse attention, and would be perceived as a threat to the state, she would be again taken into detention to determine the extent of her activities. As noted in GJ & Others, there is therefore a real risk that she would, on account of her perceived political views, be subjected to ill-treatment of sufficient severity to engage the Refugee Convention and article 3 of the Human Rights Convention. It has not been submitted to us, nor do we accept, that the appellant's activities are such that she should be excluded from protection, and we are therefore satisfied that to remove her to Sri Lanka would be in breach of the Refugee Convention and the Human Rights Convention. We allow her appeal on those grounds.

Summary of Conclusions

For reasons already given the determination of the First-tier Tribunal did involve the making of an error of law and is set aside.

We re-make the decision by allowing the appeal on Refugee Convention and Human Rights Convention (Article 3) grounds.

The anonymity order made by the First-tier Tribunal remains in place.

Signed:



Upper Tribunal Judge O'Connor
Date 5 August 2013