Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04299/2009

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 12 May 2014	**23 May 2014**
	.....

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

N R
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Davison instructed by Indra Sebastian Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Background

2. The appellant is a citizen of Sri Lanka who was born on 22 January 1976. He arrived in the United Kingdom on 10 December 2008 and claimed asylum. On 27 April 2009, the Secretary of State refused the appellant's claim for asylum. Thereafter, the appellant appealed to the Asylum and Immigration Tribunal. Following a hearing on 30 July 2009, his appeal was dismissed by Judge Alakija. The appellant sought reconsideration which was initially refused by the AIT on 25 August 2009 but was subsequently ordered by the High Court on 3 December 2009. On 27 April 2010, Upper Tribunal Judge King found an error of law and set aside Judge Alakija's decision and directed a substantive rehearing. That substantive hearing was initially listed in November 2010 but was adjourned on that and a number of subsequent occasions. On 1 October 2013, Upper Tribunal Judge Coker remitted the appeal to the First-tier Tribunal for a *de novo* rehearing.

3. The appeal was heard by Judge B Lloyd on 22 November 2013. He dismissed the appellant's appeal on asylum, humanitarian protection and human rights grounds. The appellant sought permission to appeal to the Upper Tribunal and on 29 January 2014 the First-tier Tribunal (UTJ Renton) granted the appellant permission to appeal. Thus, the appeal came before me.

The First-tier Tribunal's Decision

4. Before Judge Lloyd, the appellant's case was that he had been arrested and detained on 27 April 2008 when the police made a security check on his apartment. He was taken to the police station where he was questioned and later that day he was released on bail. On 13 May 2008, the appellant and his room mate were stopped by the police and questioned as to what they were doing, where they worked and where they lived before they drove away. Later that night, the appellant saw nine people in civilian clothes with guns outside the flat and he recognised one of them as a police officer from earlier in the day. The appellant, who went outside, was asked lots of questions before the individuals left.

5. On 17 August 2008, whilst the appellant was staying at his cousin's home, four men from the Special Task Force (STF) went to his flat and questioned his room mate about the appellant and searched the appellant's belongings, taking an old mobile phone and deleting files from his computer. They threatened the appellant's room mate and warned him that if anything went wrong they would be back.

6. On 10 September 2008, four men from the STF came to the appellant's flat again and questioned him about two of his friends, "A" and "K", and told the appellant that they were involved with the LTTE and were suspected of involvement with bombings. The appellant was asked to show the STF where K was boarding. The appellant was taken in a jeep to the house where he believed K was living but on arrival they were told by the owners that K had returned to Jaffna. The STF drove the appellant to other places and eventually dropped him off in a rural area.

7. The appellant's case was that on 5 June 2008, he reported the incident of harassment by the police to the Human Rights Commission and subsequently reported that incident and also the visit by the STF who came to his flat, when he was not there and took items from him, to the 'Home for Human Rights' organisation which campaigns for human rights in Sri Lanka. The appellant claims that after the incident involving the STF search for K, he went to live at his parents' home where he stayed for approximately two months. During that time, friends of A and K visited him and it was then that he found out they were involved with the LTTE. He was accused of reporting them to the authorities and threatened that he would be harmed if A and K were caught by the police. The appellant says he reported this to the police station and was told that as the LTTE were involved the case would be made a priority but he did not hear anything back from the police. He continued to live at his parents' home until he could arrange to leave Sri Lanka which he did, having obtained a visit visa to the UK on 25 September 2008.

8. The appellant claimed that he would be at risk from the authorities because he was a Tamil who had a history of being questioned about links with the LTTE.

9. In addition, the appellant relied upon photographs taken at the beginning of 2006, when the appellant was in the UK, taken with the son of the President of Sri Lanka and "EK", a prominent member of the LTTE. These photographs had been used in articles in a Sri Lankan newspaper and circulated on a number of Sri Lankan websites. The appellant feared that the photographs with EK placed him at increased risk.

10. Judge Lloyd dismissed the appellant's appeal on two bases. First, he did not accept all of the appellant's account of what he claimed had happened to him in Sri Lanka. At paras 58-60, Judge Lloyd said this:

> "58. I find that the basic factual matrix which was set out by the Appellant was likely to have been true. That is to say, he was briefly detained by the police while they made enquiries about his connection with the two persons in question. However, I find the evidence supports a conclusion that he was cleared of all suspicion. I find that it is likely that he has relied on the initial event of his helping the police with their enquiries to create a highly exaggerated account which has been intended to support an asylum claim in the UK. I think that the reference to his being harassed by a drunken police officer in May 2008 and a visit from the STF in August 2008 are fabricated. If there was some follow-up by the authorities it is in my view more likely to have been in the context of the complaint he had made about his detention. It had nothing to do with any suspicion that he was involved with the LTTE.
>
> 59. I do not as such disbelieve him when he says that he was subject to enquiry, therefore, in April 2008. However, his credibility goes no further than that in my view.
>
> 60. I believe that after a period of return to Sri Lanka after the completion of his studies in the UK in 2006 he decided he had a better future in the UK. Events of April 2008 I believe provided a convenient factual basis on which he then built by exaggeration to put together the means of

> securing leave to remain in the UK; so as to pursue his career and future here."

11. Secondly, Judge Lloyd applied the country guidance case of GJ and Others (Post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). He concluded that the appellant, even if his account were true, did not fall within a risk category identified in GJ and Others. Judge Lloyd's reasons are set out at para 61 of his determination as follows:

> "61. Having regard to the recent determination of **GJ** there has therefore to be the further dimension to my findings and conclusions. That is to say, even if there were any real suspicion about the Appellant back in 2008, even on his own evidence matters will have fundamentally changed given the massive political changes in Sri Lanka and the virtual obliteration of the LTTE. I believe that **GJ** sets out clearly what the potential risks are and who faces those risks. The Appellant does not in my conclusion fall within any category of potential risk. He was on his own evidence found not to be connected with the terrorist activities of the LTTE."

The Submissions

12. On behalf of the appellant, Mr Davison submitted that the judge's adverse credibility finding could not stand.

13. First, he submitted that it was not entirely clear what the judge had accepted of the appellant's account. In particular, Mr Davison submitted that the judge had made no finding in relation to whether the appellant had been released on bail and, if he had, whether he would be at risk on the basis that he would be subject to an arrest warrant and, therefore, be on a "stop" list which was one of the at risk categories recognised in GJ and Others at para 256(7)(d).

14. Secondly, Mr Davison submitted that in reaching his adverse credibility finding, Judge Lloyd had failed to take into account the background documents which supported the appellant's account. He referred me to a document at page 48 of the bundle which purports to be a letter dated 14 May 2008 from the police station where the appellant was detained and addressed to the appellant's employer, stating that he had been taken into custody on 27 April 2008 on suspicion of being involved in terrorist activities but:

> "[a]s it had been disclosed on enquiries made thereon that he had had no involvement in terrorist activities, he was released on bail at 19.10 hrs the same day."

15. Mr Davison also relied upon the letter from the 'Home for Human Rights' association at page 57 of the bundle dated 4 November 2008 which refers to the appellant making a complaint concerning his initial detention, his encounter with the police outside his flat and the visit and search of his flat by the STF on 17 August 2008. Mr Davison submitted that the judge had failed to take these documents into account in assessing the appellant's credibility and the expert report of Simon Harris dated 12 July

2009 which supported the authenticity or genuineness of these documents.

16. Thirdly, Mr Davison submitted that the judge had made no findings in relation to the 2006 photographs which showed the appellant with a prominent LTTE member and therefore the judge had failed to consider whether the appellant fell within the risk category identified in GJ and Others in para [356(7)(a)], namely:

> "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."

17. Fourthly, relying upon the grounds, Mr Davison submitted that the judge had failed to consider whether the appellant was at risk outside the categories recognised in GJ and Others and he relied upon the grant of permission to appeal by the Court of Appeal in MP and NT (Sri Lanka) (order dated 13 November 2013) in which the country guidance decision of GJ and Others is subject to challenge. In its order the Court of Appeal stated that:

> "Pending the final determination of this appeal or under further order, individuals who fall outside the said risk categories should not for that reason alone have their claims for asylum rejected, whether by the respondent or on appeal to the First-tier Tribunal or the Upper Tribunal."

18. On behalf of the Respondent, Mr Richards submitted that the judge's decision should stand as there was no material error of law. He submitted that the expert report added very little as it merely stated that there was no particular feature that would persuade the expert that it was not genuine. Mr Richards relied upon the fact that the letter from the police station stated that the appellant had been cleared of all suspicion and that was supported by the fact that he had remained for five months after he was released without any difficulty.

19. As regards GJ and Others, Mr Richards submitted that it was difficult to see how the judge could have come to any other conclusion that, the appellant having been released on bail if that was the case, but had been cleared of all suspicion, it could be suggested that he was at risk on the basis of being on a "stop list" because an arrest warrant had been issued. Mr Richards submitted it was difficult on the judge's finding to see how the judge could possibly have come to a different conclusion.

Discussion

20. The appeals process in this case has been somewhat protracted. Nevertheless, I have come to the conclusion that the judge's findings cannot stand and the appeal must again be reheard.

21. First, I accept Mr Davison's submissions that the judge failed to make a finding on whether the appellant had been released on bail and, if he had,

whether by his actions he had effectively jumped bail and therefore would be subject to an arrest warrant which would bring him within one of the risk categories in GJ and Others.

22. Secondly, the judge made a differential credibility finding. He accepted that the appellant had been arrested and detained in April 2008 but not that he had subsequently been of interest to the police, in particular by the STF whom the appellant claimed visited in August 2008 and then again in September 2008. In fact, the judge makes no reference in his finding to that second visit at all. Further, in concluding that he did not accept that the incident in May 2008 and the visit in August 2008 had occurred but were "fabricated", the judge did not consider the documents and expert evidence which provided some support to the appellant's claim that these incidents occurred. Failing to take those documents into account, the judge erred in law and his adverse credibility finding (so far as it went) cannot stand.

23. In addition, the judge made no findings in relation to the photographic evidence relied upon by the appellant as potentially bringing him within the risk category in GJ and Others identified in para [356(7)(a)]. I express no view on the strength of the appellant's claim, even if the photographic evidence is accepted, that will be a matter for the Tribunal rehearing the appeal. Suffice it to say that the point is not unarguable.

24. Those are, in my judgment, sufficient reasons to set aside the judge's decision and require the appeal to be reheard. It is not necessary to determine whether the judge erred in law in failing to consider the appellant's claim outside of the risk categories in GJ and Others. In the absence of any sustainable findings, that matter does not arise. It will be a matter for the Tribunal to consider, in the light of the Court of Appeal's conclusion on the correctness of GJ and Others and in the light of the Tribunal's factual findings on the appellant's claim.

Decision and Disposal

25. The decision of the First-tier Tribunal to dismiss the appellant's appeal on asylum and humanitarian protection grounds and under Arts 2 and 3 of the ECHR involved the making of an error of law. The decision is set aside and must be remade.

26. The First-tier Tribunal's decision to dismiss the appellant's appeal under Art 8 was not challenged and stands.

27. Having considered the issues that arise, and in the light of the need to consider the continuing effect of GJ and Others following the Court of Appeal's decision, it is appropriate that the decision should be remade in the Upper Tribunal and not remitted to the First-tier Tribunal.

28. This appeal will, as a consequence, be relisted before the Upper Tribunal for a resumed hearing *de novo* in relation to the appellant's asylum and humanitarian protection claims.

Signed

A Grubb
Judge of the Upper Tribunal