Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05783/2013

THE IMMIGRATION ACTS

Heard at Field House
On 10 July 2014
Extempore judgment

Determination Sent

Before

UPPER TRIBUNAL JUDGE COKER

Between

MR KRISHNABALAN KANDASAMY

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C G Talacchi
For the Respondent: Mr L Tarlow

DETERMINATION AND REASONS

1. This is an application for permission to appeal the decision of First-tier Tribunal Judge Taylor, who dismissed the appeal of the appellant against a decision to remove him from the UK. The judge found that such removal would not result in a breach of the Refugee Convention.

2. Permission to appeal was sought on a number of grounds, first of all failing to properly consider and apply country guidance, secondly taking issue with the head note of the country guidance in that it was said that the

head note did not provide for the exclusive categories of those at risk on return to Sri Lanka.

3. The Court of Appeal in the meantime had granted permission to appeal in the country guidance case of GJ [2013] UKUT 319 and in granting permission indicated that it may not be wise to remove those whose appeals have been determined on the exclusive basis that they fell outwith the risk categories set out in GJ.

4. The judge in the First-tier Tribunal in this case found in paragraph 20 that: "Applying the country guidance as set out in the case of GJ I find no evidence that the appellant would be at risk on return to Sri Lanka." He considered the country guidance risk categories as those specifically delineated in paragraph 7 of the head note.

5. Permission was granted on that basis, and when this appeal came before me in March 2014 I adjourned it to be heard after the Court of Appeal had produced their judgment. The Court of Appeal have now produced their judgment as MP and NT [2014] EWCA Civ 829.

6. In that judgment in paragraph 16 the Court of Appeal says:

> "I think that the UT in KK (application of GJ) Sri Lanka [2013] UKUT 00512 (IAC) was right to conclude that the UT in the present case was endeavouring to provide 'definitive' guidance on risk. That is why in paragraph 356 it stated that the risk categories then set out 'are' rather 'include' those listed. It was therefore rejecting the notion that those currently at risk might embrace for example former LTTE combatants or cadres who lack current potency, real or perceived, to threaten the unitary Sri Lankan state."

7. Lord Justice Maurice Kay went on to say in paragraph 19:

> "All this leads to the conclusion that it was rational and permissible to narrow the risk categories. The UT could have explained its difference in approach from that of the UNHCR more fully and more directly but, in my judgment, it is plain from a careful consideration of the determination as a whole that it had identified an important change as to the 'present objective … to identify Tamil activists in the Diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state'. I am bound to say that, in the light of much of the undisputed evidence, this chimes with common sense and it is not at all counterintuitive. Three years after the end of the civil war and after the completion of the large-scale rehabilitation programme, it is entirely understandable that the Sri Lankan authorities, seeing that the LTTE within the country was 'a spent force' and in the absence of significant acts of terrorism, decided to turn its attention to the group identified by the UT as separatists and destabilisers. As to the adequacy of the reasoning, whilst it could have been more explicit, its basis was sufficiently demonstrated. The UT had heard a great deal of evidence which was subjected to forensic examination."

8. Lord Justice Underhill in paragraph 50 of MP said that he agreed with the analysis of Lord Justice Maurice Kay but wished to emphasise one point:

> "The clear message of the Upper Tribunal's guidance is that a record of past LTTE activism does not as such constitute a risk factor for Tamils returning to Sri Lanka because the government's concern is now only with current or future threats to the integrity of Sri Lanka as a unitary state; and that that is so even if the returnee's past links with the LTTE were of the kind characterised by UNHCR as 'more elaborate'."

9. He goes on to say, however:

> "Even apart from cases falling under heads (b) - (d) in paragraph 356(7) there may, though untypically, be other cases (of which NT may be an example) where the evidence shows particular grounds for concluding that the government might regard the applicant as posing a current threat to the integrity of Sri Lanka as a single state even in the absence of evidence that he or she has been involved in Diaspora activism."

10. Paragraph 356(7) of GJ is replicated in the head note of GJ and sets out the current categories of persons at real risk of persecution. These 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.

    (c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission.

    (d) 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. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.

11. Mr Tarlow drew attention to the interview record sheet, in particular question 128 when the appellant was asked "why would the army have released you even on the payment of a bribe if they were interested in you?" The appellant replied, as far as I can read it:

> "Because my arrest did not go high enough, it did not go to high authorities so they just kept me there, that is all I can think of. If the intelligence was involved or knew of my arrest then they would have got the information about me."

12. Judge Taylor accepted that the appellant's account was credible and the credibility points taken by the respondent had been answered to a considerable extent. The appellant's account was that he had joined the LTTE in 1992 and worked for them until 2008 as a driver. He was driving for Pottu Aman, who was the chief of intelligence of the LTTE, and the officer paid the appellant his wages. He started working for him in 1998 and on and off until 2002. He also worked as a supply driver to pick up casualties on average about twenty times a month. He was not involved in combat but was injured by shelling. He picked up individuals from the front.

13. After the ceasefire in 2004 he worked in Jaffna parking cars for the LTTE and registered as a member of the LTTE. He studied and lived in LTTE camps and worked for an intelligence officer named Newton but returned to work for Pottu Aman after Newton was kidnapped. He was hiding in the jungle from November 2008 and not involved in fighting but was arrested on 16th July 2010 in Vavuniya when the army took control of the area. He was detained for two and a half years, questioned about his LTTE activities, asked about LTTE camps, where weapons were hidden, beaten, tortured and detained in solitary confinement. He was taken to locations, shown maps and asked for information. The judge accepted this evidence ([19] First-tier Tribunal determination).

14. The background information in the country guidance supports that a known LTTE operative would be at risk of such treatment in interrogation. At paragraph 18 of the First-tier Tribunal determination the judge found that the authorities may well not have known the exact role of the appellant in the LTTE but it was known that he was involved in some way in the LTTE as he had been in hiding and they had received information.

15. The judge in paragraph 20 then identified the four categories of those who were at risk. In the third sentence from the end of paragraph 20 the judge says:

> "The appellant has submitted no evidence that he is in any of the risk categories as listed in GJ and neither has he claimed to be in such categories. He did not claim to be politically active in the UK."

16. With great respect to the judge that is the wrong question. It is not a matter for the appellant to say "I am in a particular risk category" or "I claim to be in a particular category". The evidence was put forward by the appellant and he claimed that he would be at risk if returned to Sri Lanka. That evidence should have been considered by the judge in the light of the background material that was placed before him and considered in the light of the country guidance case as to whether or not those facts for this appellant were such as brought him within one of the four risk categories.

17. I am satisfied that there is an error of law in the determination of the First-tier Tribunal such that I set aside the decision to be remade.

18. Mr Talacchi on behalf of the appellant accepts that there is sufficient material before me to enable me to remake the decision and both he and Mr Tarlow confirmed that they had said all that they wished to say in connection with a possible remaking of the decision.

19. In **MP** the Court of Appeal considered the case of the appellant NT. His appeal had been dismissed by the First-tier Tribunal and the Upper Tribunal had upheld that dismissal finding that NT did not fall within the four risk categories. In paragraph 13 the Court of Appeal comment on NT who had been an LTTE cadre who had been detained and tortured around the time of the end of the civil war. His release had been prompted by the payment of a large bribe. He had not taken part in Tamil separatist activity in the UK.

20. The Court of Appeal went on to look at NT and summarised the basis of NT's claim and concluded in paragraph 42:

    i. "It is not disputed that NT's separation from his family in the Chettikulan camp occurred only two days after their arrival. Nor is it disputed that he was transferred by the CID to the Anuradhapura camp where he was interrogated under torture many times. There is, however, one feature of the determination of the UT which causes me concern. It stated in paragraph 424 of GJ:

    ii. 'It appears from the evidence that he was not of sufficient concern in 2009 to be one of the 11,000 active LTTE cadres who were considered to require re-education through the rehabilitation programme before being reintroduced into Sri Lankan civil society.'

21. Lord Justice Kay goes on to say in paragraph 43:

    i. "The problem with this approach is that the appellant was released following payment of a 'huge' bribe only three months after the commencement of his determination. The selection process for rehabilitation or prosecution was still taking place at least until mid 2010. It seems that the UT failed to have regard to this when concluding that the appellant was not of sufficient concern in 2009 to be one of the 11,000 active LTTE cadres who were considered to require re-education through the rehabilitation programme."

22. The appellant, the subject of this appeal, was detained for some two and a half years. It appears from the background material as referred to in GJ that he must on that basis have been considered to be someone in whom the authorities were extremely interested and that he would be

able to provide them with a considerable amount of information. He was detained during that period and required to identify arms, camps and various other matters. He was also a driver for the chief of intelligence of the LTTE and another intelligence officer. As a driver he would have been a trusted LTTE member and it does not take much imagination to realise that he would have been privy to a large number of potential secrets.

23. The issue is whether that is sufficient to bring him within 356(7)(a): individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka when that is read in the light of the findings of NT by the Court of Appeal and what Lord Justice Underhill says in paragraph 50 that there may, though untypically, be other cases where the evidence shows particular grounds for concluding that the government might regard him as posing a current threat.

24. I am satisfied that this appellant on the very particular facts that have been found in his case has such a risk profile. This is particularly because of the length of time that he was detained, that throughout that period he was taken to places to identify camps and so on and because of the link that he had with those involved in intelligence.

25. I do not accept the submission by Mr Talacchi that the appellant would be on a stop list. He is not the subject of an arrest warrant or an extant court order. The fact that he has been released through payment of a bribe and that release took place relatively recently is not on the basis of GJ sufficient to cause him to be on a stop list although of course it may put him on a watch list but a watch list does not prevent him getting through the airport.

26. However, as I have said earlier, the role that he played in Sri Lanka, that he was specifically arrested and then detained during that period when individuals were being detained for lengthy periods of time in order to obtain extensive information from them and then he is coming from the UK I am satisfied that he would be perceived to have been involved in post-conflict Tamil separatism because of the extent of those links that he had and because he has come from London.

27. On that basis I remake the decision by allowing the appeal on refugee grounds.

Conclusion

There is an error of law such that I set aside the decision to be remade.

I remake the decision and allow the appeal on asylum grounds.

Signed Date 15th July 2014

Upper Tribunal Judge Coker