



IAC-AH-KRL-V1

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

Appeal Number: AA/04343/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5<sup>th</sup> January 2016**

**Decision & Reasons Promulgated  
On 25<sup>th</sup> January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FRENCH**

**Between**

**NN  
(ANONYMITY ORDER MADE)**

**Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Miss S Anzani, instructed by Nag Law Solicitors

For the Respondent: Miss A Everett, Senior Home Office Presenting Officer

**Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008**

**I order that the disclosure or publication of any matter likely to lead members of the public to identify the Appellant is prohibited. Any breach of this order may lead to proceedings for contempt of court.**

**DECISION AND REASONS**

1. The Appellant comes from Sri Lanka and is of Tamil ethnicity. He arrived in the United Kingdom on 16<sup>th</sup> February 2014 and claimed asylum on the following day. The essence of his claim was that he was at risk from the Sri Lankan Authorities in the light of his history. His mother, he said, had disappeared in 1992, his sister had been an active member of the LTTE who had been killed in the course of that service and he himself had been forcibly recruited by the LTTE although he had managed to escape. His father was suspected of being an LTTE member as a result of which he was ill-treated. In December of 2013 some skulls were discovered in the local area and the Appellant gave evidence to an investigating judge concerning the disappearance of his mother. A matter of days later the Appellant claimed that he was arrested, taken to an army camp and seriously ill-treated. The detaining Authorities were aware of the Appellant's cousins who had been given asylum in the United Kingdom and he was accused of providing information concerning the discovery of the skulls to his cousins which was to be given to Channel 4. During his detention he was fingerprinted. He was released following the payment of a bribe via the Eelam People's Democratic Party but was obliged to sign a document in Sinhalese which he believed to be a confession. With the assistance of false documents he left via the airport. The Respondent did not accept the substance of the Appellant's claim, refused his application and made a decision to remove him to Sri Lanka.
2. The Appellant's appeal against that decision was heard before Judge of the First-tier Tribunal J H H Cooper. The appeal was dismissed in a decision promulgated on 22<sup>nd</sup> September 2015. The judge heard evidence from the Appellant and from his cousin. For the purposes of decision the judge accepted that the Appellant's mother had disappeared in 1992, that his sister had joined the LTTE in 2000 and had been killed in 2008 and that the Appellant had been forcibly recruited into the LTTE in 2007 and spent three or four months with them, before escaping. The judge did not however accept that the events subsequently claimed had occurred. He pointed out that injuries to the Appellant's father did not appear to have been attributed by a hospital to the cause claimed. He accepted the discovery of the grave with the skulls in December of 2013 but said that the only evidence given by the Appellant to the judge in Sri Lanka appeared to be details of his mother and of himself and his father and that the Appellant had spoken at the behest of the local village officer. Although a medical report referred to a scar on the Appellant's arm there was no medical assessment of the source of that scar.
3. As to the Appellant's claimed detention and ill-treatment the Judge Cooper noted a letter produced by a Sri Lankan attorney, which appeared to corroborate the Appellant's claim to have given evidence to the judge in Sri Lanka and to have subsequently been unlawfully detained, and Judge Cooper accepted that he should not seek to doubt the letter's authenticity. He said however that the information given was all hearsay, presumably from the Appellant's aunt and the letter indicated that inquiries of the police and CID showed that they denied holding the Appellant. A letter from the Appellant's aunt was written in English. The Appellant's cousin had given evidence that his mother, the Appellant's aunt, had telephoned him on the

day the Appellant was detained in order to tell him what had happened but the witness accepted that what he knew he had been told by others.

4. The judge laid particular emphasis on the claim that the Authorities suspected the Appellant of giving information to his cousins and to Channel 4, but there was no evidence from Channel 4 and if that television channel had broadcast anything about the matter prior to the Appellant's detention it would have been easy to ascertain that fact. Having regard to those matters the judge did not find it reasonably likely that even if the Appellant had spoken to the judge in Sri Lanka he was detained and tortured as claimed. He concluded "that finding is consistent with his ability to leave Sri Lanka without hindrance (whether or not using a false passport)." On the basis of his findings the judge dismissed the appeal.
5. In seeking permission to appeal to this Tribunal it was noted in the grounds that the judge had accepted that the Appellant's mother had disappeared in 1992, that his sister had been a member of the LTTE from 2000 until she was killed in 2008 and that the Appellant himself had been forcibly recruited. There had been no clear finding, it was said, as to whether the Appellant had spoken to the judge as claimed and his claim to have been detained and tortured was specifically rejected, notwithstanding the supporting corroborative evidence. It was submitted that no basis had been given for dismissing the evidence from the Appellant's aunt and that in turn impacted upon the judge's consideration of the letter from the attorney and the oral evidence of the Appellant's cousin which was seemingly dismissed as hearsay. No explanation was given as to why such evidence was unreliable. Reliance was placed upon the reported decision of **MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC)** as to the need to give reasons if evidence was rejected. It was also stated that the judge had erred in suggesting that the Appellant's ability to leave Sri Lanka via the airport was determinative of his earlier detention and torture. It was clear from background material and reported decisions, it was said, that having left Sri Lanka without difficulty was not probative of a lack of interest in an individual. That had been accepted by the Secretary of State in **GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT (IAC)**. It was said that the judge had erred in placing any reliance upon the Appellant having left through the airport without being stopped. Permission was granted on both grounds. In a response under Upper Tribunal Procedure Rule 24 it was asserted that the judge had adequately reasoned his findings.
6. At the hearing before me Miss Anzani provided a copy of the decision in **MK** and also of the judgment of the Court of Appeal in **MM (Sri Lanka) v SSHD [2014] EWCA Civ 36** in which the Secretary of State had accepted that an Upper Tribunal Judge had made a material error of law in concluding that an appellant would not have been able to depart from the airport unnoticed if the Sri Lankan Authorities had an interest in him. She then expanded upon the Grounds of Appeal. She said there had been no independent evidence of the oral evidence of the Appellant. There was documentary evidence to support the Appellant's evidence and also the separate oral evidence of the cousin. The reasoning rejecting that evidence, she said, was inadequate in law. Simply to suggest that the evidence was hearsay was not

sufficient. Numerous elements of the Appellant's evidence had been accepted by the judge. With regard to the claim that there was no objective evidence from Channel 4 it was not necessary for there to be evidence from that source or even for Channel 4 to have been contacted in connection with the finding of the skulls for the Authorities to make the allegation that the Appellant was involved in that way. The antipathy between the Sri Lankan Government and Channel 4, she said, was well-known and the fact that there have been no broadcast by a particular date was a very substantial leap to make in finding it significant in indicating that the Appellant was not being truthful.

7. She continued that the second ground was connected. The country guidance, as confirmed in the judgment of the Court of Appeal in MM, was clear that an individual's ability to leave Sri Lanka without being stopped at the airport was not determinative of whether that individual was at risk. In the case of this Appellant he had left under a false identity. That was a further cause of concern as to the assessment of credibility. I queried whether if the Appellant's case was proven in its entirety that he would come within the guidelines within GJ. Miss Anzani responded that the detention in 2013 was recent and there was likely to be a record of that. The Appellant was already on record and was accused of LTTE connections. He had family in the UK whom the Authorities suspected. He had been released from detention on an irregular basis and he had exacerbated his position by coming to the UK. If he were returned it would have to be on the basis of an emergency travel document and the Sri Lankan Authorities would be aware of his circumstances and of his sympathies. He would be likely to be detained and interrogated on return and if detained there was a real likelihood that he would be seriously ill-treated. She submitted that he would come within category (a) and potentially category (d) of the head note to point (7) of GJ.
8. In response Miss Everett said that in the refusal letter the Secretary of State had taken issue with the Appellant's claim that the Authorities were concerned with a connection with Channel 4 and the Secretary of State would have expected evidence to be produced. She accepted that a non-broadcast was not a good basis for disregarding the Appellant's evidence but said that he could have obtained some evidence as to contact with Channel 4 and that had not been addressed by the Appellant. His cousin had allegedly cooperated with Channel 4. She relied upon the judgment of the Court of Appeal in TK (Burundi) v SSHD [2009] EWCA Civ 40 to the effect that importance could be attached to a lack of supporting evidence when it would have been readily available. As to the weight placed by the judge upon the letter from the attorney that that was a matter for him. The letter from the aunt was in English and all the cousin could say was that he had no reason to disbelieve his aunt. The balance shown by the judge had been indicated by the fact that he had accepted other elements. Many people were likely to have given evidence to the judge's inquiry in Sri Lanka as to the disappearance of relatives. With regard to the second ground she submitted that the judge had not misdirected himself in a material way. Although in itself it was not a good point that the Appellant had left through the airport without being detained, that had not been determinative.

9. I queried with both Counsel whether if the Appellant's claim were as set out that he could be at risk in accordance with the criteria in GJ. Both were of the view that that would depend upon the findings made and therefore potentially he could do so. If I found a material error they agreed that the appeal would have to be reheard.
10. The decision by Judge Cooper is detailed and articulate. He considered that certain events could be accepted as having occurred. The crucial issue was whether the Appellant was or was not detained as claimed, and significantly ill-treated, by the Sri Lankan Authorities following giving evidence to the judicial inquiry. The judge found that he had not. I found there was force in the submission made by Miss Anzani but it was not sufficient simply to say that the supporting evidence was hearsay. The Appellant himself had given evidence on the point. The letter from the attorney was detailed and the judge accepted that he should not doubt its authenticity. In that letter the attorney stated that he had been contacted by the Appellant's aunt on 26<sup>th</sup> December 2013 and instructed that the Appellant had been arrested. He made inquiries of the police and the CID who denied holding the Appellant. The attorney stated that he was preparing to submit a habeas corpus application when the aunt advised him that the Appellant had been released. He stated that the arrest and detention were therefore extrajudicial and had not involved court proceedings.
11. The aunt's statement (which it is correct was in English and without any version in a Sri Lankan language) stated that she had instructed the attorney. The cousin stated that on the evening of the claimed arrest his mother, the Appellant's aunt, had telephoned him and told him of the arrest. Together those elements present a coherent picture and it was incumbent on the judge to state why he rejected the evidence, both of the Appellant, of the cousin and the supporting evidence. The reliance on elements of that evidence being hearsay does not in itself discredit the evidence and the parties giving evidence were entitled to know with reasons why that evidence was not accepted. The head note to MK reads:
- “(1) It is axiomatic that a determination discloses clearly the reasons for a Tribunal's decision.
- (2) If a Tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons.”
12. Miss Anzani also referred to the judge's reliance upon the fact that there was no evidence from Channel 4, in particular that there had been no broadcast on or before 25<sup>th</sup> December 2013. The judge stated at the end of paragraph 64 of his decision:
- “Finally there is no evidence that Channel 4 broadcast anything about this matter before 25<sup>th</sup> December 2013; unless they had done so there is no way that the interrogating officers could have accused him of passing information to that organisation.”

That I believe to be a non-sequitur. The Authorities could have made an accusation to that effect simply on the basis of a fear that the Appellant, who had an LTTE background both personally and from his family, would pass or have passed details to an overseas broadcasting organisation of the finding of the graves. The judge's reasoning in that respect was speculative.

13. As to the judge's reliance upon the Appellant leaving the airport without being detained, that was, as was accepted by Miss Everett, not a good point but it is arguable that the judge was simply making a passing comment. However in the light of the other errors I have referred to, I have come to the conclusion that I must set aside the judge's decision and the appeal will have to be reheard. In the light of the fact-finding necessary I agree with the submissions of the two representatives that the appropriate course is remittal to the First-tier Tribunal. Having regard to statement 7(2)(b) of the Tribunals Judiciary Practice Statements I remit the case accordingly to the First-tier Tribunal under Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and I make the directions set out below.

### **Decision**

The making of the decision by the First-tier Tribunal involved a material error of law and the decision is set aside.

I remit the appeal to the First-tier Tribunal to be reheard.

I have made the anonymity order set out above.

Signed

Dated 22 January 2016

Deputy Upper Tribunal Judge French

### **DIRECTIONS**

Sections 12(3)(a) and 12(3)(b) of the Tribunals, Courts and Enforcement Act 2007

- (1) The appeal is to be reheard by the First-tier Tribunal by a judge other than Judge J H H Cooper, with no findings preserved;
- (2) The appropriate hearing centre is Taylor House. The time estimate is three hours and a Tamil interpreter will be required;
- (3) Each party shall serve upon the other and upon the Tribunal copies of all documents, including witness statements, upon which reliance is sought to be placed at least seven days before the hearing.

Signed

Dated 22 January 2016

Deputy Upper Tribunal Judge French