IAC-TH-CP-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04893/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 March 2016	**On 12 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

PB (SRI LANKA)
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms. B. Jones, Counsel.
For the Respondent: Mr. T. Melvin, Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant, born on [ ] 1954, is a citizen of Sri Lanka. He appealed on asylum and human rights grounds against the respondent's decision to remove him from the United Kingdom by way of directions under Section 10 of the Immigration and Asylum Act 1999.

2. His appeal was heard on 25 August 2015 and in a decision promulgated on 24 September 2015 Judge of the First-tier Tribunal Monson dismissed the appeal on all grounds raised. In so doing an anonymity order was made which I now remake for the purpose of the proceedings in the Upper Tribunal.

3. The appellant had entered the United Kingdom on a visit visa which expired on 22 April 2013. Shortly after its expiry on 30 April 2013 he claimed asylum on the basis of his fear of the Sri Lankan authorities. That application was refused on 25 June 2013 and he appealed against the decision. That appeal was heard by Judge of the First-tier Tribunal Beg. The appellant sought to have the hearing adjourned as he was unrepresented. The application was refused and the appellant did not attend the hearing and the judge went on to hear the appeal and dismiss it. She did so in a decision promulgated on 14 August 2013. The appellant applied out of time for permission to appeal which was refused on 16 September 2013. A like application was made to the Upper Tribunal but also subsequently refused.

4. Prior to the appellant's consequent removal he was detained. On 7 July 2013 a Rule 35 report was issued by a doctor at the detention centre who had concerns that the appellant may have been the victim of torture. This report was relied upon by the appellant's legal representatives as a trigger to a fresh right of appeal against the refusal of asylum. In the grounds of appeal challenging the decision of 3 July 2014 to remove the appellant to Sri Lanka it was submitted, on the appellant's behalf, that there was fresh and reliable evidence to corroborate his account and that he was known to the Sri Lankan authorities resulting in his claimed ill-treatment. It was argued that this new evidence constituted independent evidence of torture and in light of it and other evidence it was submitted that the appellant fell within the risk categories identified in **GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)** (i.e. that the appellant would be perceived as someone seeking to destabilise the single Sri Lankan state).

5. That led to a CMR hearing taking place on 19 August 2014 at which the appellant's appeal was listed for substantive hearing on 25 February of the following year. Shortly before that hearing the appellant's representative wrote to the Tribunal to say that he was in possession of a DVD/disc which he believed contained material relevant to his appeal. He wished the DVD to be played at the hearing and it was requested that the Tribunal provide appropriate machinery to enable it to be considered. At the hearing the appellant was represented by Ms Asanovic of Counsel and Mr Harvey, Home Office Presenting Officer, appeared on behalf of the respondent. In her skeleton argument, Ms Asanovic said at paragraph 4 that the appellant's sur place activities included taking part in a drama which carried an antiregime and/or pro-Tamil message which was recorded and was on the Tamil National Remembrance Foundation UK website, the address of which was http://tnrf.org.uk/2014-videos. This was the DVD referred to in the letter from those instructing her. Consequently at the

outset of the hearing she applied for an adjournment which was not opposed by the respondent. There was no machinery available to consider this DVD. Judge Ross gave directions for the ongoing processing of the appeal before the Tribunal. Unfortunately, as Judge Monson says in his decision at paragraph 34, there was a complete and unexplained failure to comply with them. The consolidated appellant's bundle did not reach the Tribunal until the day prior to hearing. While it included an additional witness statement from the appellant it did not deal with the DVD, including the circumstances in which it had come into existence and the extent to which the filmed footage of the play shown on it had been published on the internet. There was though an English language translation of the play shown on the DVD at pages 32 to 43 of the consolidated bundle.

6. Unfortunately the directions made by Judge Ross had not included any in relation to the provision of machinery for facilitating the playing of the DVD. This was acknowledged by the appellant's representatives in a letter forwarded to the hearing centre in which they requested the provision of a DVD player so that the appellant's evidence could be played in open court at the substantive hearing.

7. At the outset of the hearing before Judge Monson, Ms Francis, the appellant's then Counsel, applied for an adjournment on two grounds. Firstly that the respondent's bundle was incomplete in that it did not for instance contain the respondent's response to the Rule 35 medical report and also that no DVD player had been provided by the Tribunal.

8. Judge Monson refused the adjournment application on the basis that no complaint about alleged omissions from the respondent's bundle had been ventilated at the hearing on 25 February 2015 and that in any event he was satisfied that any further documents from the respondent were unnecessary to ensure the appellant received a fair hearing. As to the second ground the judge directed the Tribunal staff provide for the hearing a DVD player. However, it was incompatible with the age of the DVD provided. The judge was given evidence about the DVD from the appellant's representative. He said it was a recording of a play that had been performed the London ExCeL Centre in November 2014 and the same recording appeared on YouTube and on the website referred to by Ms Asanovic in her skeleton argument. The YouTube recording was accessed on the representative's iPhone and an extract shown to the judge. It was agreed that the information on YouTube showed that the recording had been uploaded to it on 8 January 2015 and that there had been 229 "hits" since that date. It was also agreed that the appellant's representative (as opposed to his Counsel) would go through the entire recording making notes as to when the appellant appeared in the play and steps were taken for the Home Office Presenting Officer to view the recording during the lunchtime break.

9. Following an adjournment during which Judge Monson dealt with another appeal this appellant's hearing resumed at 15.15 hours. At that juncture

the judge was provided with a schedule in manuscript showing when the appellant made appearances in the play. The Home Office Presenting Officer had viewed the entire recording as had the appellant's Counsel and the Home Office Presenting Officer accepted that the drama depicted in the recording carried an antiregime and/or pro-Tamil message. The only thing that the Home Office Presenting Officer did not accept was that the appellant was an actor in the play and/or that he was recognisable as an actor in the play. Judge Monson felt that he was in a position to exercise his own judgment regarding recognition particularly in light of the fact that the appellant was able to give oral evidence in relation to his involvement. He felt it unnecessary and disproportionate to adjourn the hearing rather than to receive the appellant's oral evidence on the one issue about the DVD which remained in controversy (namely whether he appeared in the play recorded on the DVD).

10. The appellant gave evidence as to his involvement in the production. Additionally he gave evidence in relation to another aspect of his claim by producing three colour photographs of which two depicted him taking part in demonstrations in the United Kingdom.

11. Judge Monson went on to consider the evidence before him recognising that he was "**Devaseelan** bound" by the earlier decision of Judge Beg. In her submissions the appellant's Counsel accepted that the principles of **Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702** applied with respect to the decision of Judge Beg but that there had been since then two years of sur place activity, that the appellant had joined a proscribed organisation and that he was highly visible in the play shown on the DVD.

12. The conclusions of Judge Monson's analysis of the evidence can be gleaned from paragraphs 59, 60 and 61 of his decision which state:-

> "59. Turning to the appellant's refugee sur place activities, there is more evidence now probative of such activities than was made available to Judge Beg. Nonetheless, there are still some remarkable gaps in the evidence. The appellant has never provided any documentary evidence to support the G–TV television broadcast of an alleged interview conducted by him, and he has not brought forward any evidence from a third party or third parties confirming his alleged role in the British Tamil Forum or any other organisation. The appellant's name also does not appear on the internet, or in any print media (including in a programme of events for the celebration of Heroes' Day at ExCel Exhibition Centre) in connection with his asserted sur place activities.
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> 60. I am persuaded to the lower standard of proof that the appellant has participated in at least two public performances of plays, most notably the play which is shown on the CD. I accept that a recording of this play has been uploaded to YouTube and,

although not shown proof of this, I am prepared to accept it has also been uploaded to the website referred to by Ms Asanovic in her skeleton argument. Despite an absence of satisfactory supporting documentary evidence, I am also prepared to accept that the play was performed at the ExCel Exhibition Centre on Heroes' Day on 27 November 2014 in front of a large audience. I am not prepared to accept that the audience was as large as 30,000 people as alleged by the appellant. The actual size of the audience is easily capable of objective verification from reliable and independent sources of evidence within this jurisdiction, and the appellant has not brought forward any evidence of this nature. I consider his estimate is a gross exaggeration. However, as was conceded by Ms Ibe, and as is apparent from the English language transcript of the play, the play carries a pro-Tamil and antigovernment message. It constitutes a protest against the Sri Lankan government's denial of Tamil nationhood and self-determination, and it accuses the Sri Lankan government of genocide. I accept the appellant acted the role which he described in his oral evidence, that he spoke the lines which he says he did, and that if the Sri Lankan authorities wished to identify the actors who took part in the drama, including the appellant, they would probably be able to do so, deploying visual recognition technology if necessary. The appellant was not wearing a mask, and so depending on the degree of magnification of the footage and/or the location of the observer in the auditorium, the appellant was and is capable of being recognised as one of the actors.

61. Nonetheless, I do not consider that the appellant has discharged the burden of proving, even to the lower standard of proof, that he plays, or would be perceived as playing, *a significant role* in post-conflict Tamil separatist activities in London such as to excite the adverse interest of the Sri Lankan authorities. As previously noted, the appellant is essentially operating under conditions of anonymity: he acts anonymously and he protests anonymously. He has only shown participation as an attendee, not an organiser, in a few demonstrations and in two plays (and the content of the 2013 play is unknown, save that the appellant does not appear to have been acting a member of the government or army, judging by his attire). Moreover, it is fanciful to characterise plays such as the one the appellant performed in last year at the ExCel as being on a par with a piece of investigative journalism or a war crimes deposition. There are not substantial grounds for believing that the Sri Lankan authorities would be angered by such a play (which has attracted little interest on the internet, judging by the number of hits on YouTube since a recording of it was uploaded in January 2015) because it reveals 'the truth' about their culpability in genocide,

still less that they would thereby acquire an adverse interest in the actors."

13. The appellant sought permission to appeal Judge Monson's decision which was initially refused by Designated Judge of the First-tier Tribunal McCarthy in a decision dated 6 November 2015. However, permission was subsequently granted by Judge of the Upper Tribunal Perkins on 22 January 2016. The reasons for his decision are:-

> "1. Although Designated First-tier Tribunal Judge McCarthy appears to have given very full consideration to the grounds that were before him it seems likely that he was not aware of Additional Grounds settled by Counsel in the case and served in time.
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> 2. All grounds may be argued but, with respect to the appellant's representatives, this is a case where the grounds have generated more heat than light. For example the suggestion that the Judge erred by giving weight to the unsworn evidence of the Appellant's solicitor might be thought ill considered and rude but meritless. Similarly it may be that there was no material error in the admission of a hastily prepared oral statement concerning the number of appearances the Appellant made in a dramatic performance. It will assist the Tribunal if both parties could make conspicuous efforts to concentrate on the relevant of the alleged deficiencies of the First-tier Tribunal.
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> 3. I have given permission because I think it is reasonably arguable that the Judge should have found that the Appellant was at risk in the event of his return because of his involvement in Tamil separatist groups in the United Kingdom. The Judge may well have considered this the main point in the appeal and may well have reached sustainable conclusions but the contrary argument merits consideration.
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> 4. I am concerned that the Appellant is so agitated by the arguable failure of the Tribunal to make express findings on the article from the OSU newspaper. I do not understand why it is thought to be so important. I particularly draw the Appellant's attention to my difficulties on this point. It may be that he considers the point so obvious that he does not need to spell it out. If that is the case then he is wrong.
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> 5. I see no need to refer the file to the First-tier Tribunal Judge for his comments. He is not accused of acting improperly but of misdirecting himself. If either party sees a need for the Judge's comments then that party should make an application."

14. Thus the appeal came before me today.

15. In the renewed grounds of appeal to the Upper Tribunal there is a complaint that the grounds settled by Counsel were not linked to the permission application and consequently Designated Judge McCarthy did not address those grounds but only the initial grounds of appeal which had been put before him. The renewed grounds of appeal emphasised that the appellant relies on both the "initial and additional grounds". The renewed grounds conclude by urging the Tribunal to take account of the additional grounds "which assert a significant level of procedural unfairness in relation to the judge's conduct of the proceedings in the First-tier Tribunal".

16. So that there is no further misunderstanding I confirm that I have considered both the "initial" and "additional" grounds which Ms Jones relied on in her submissions to me today.

17. Ms Jones sought to highlight that the judge had misdirected himself as to the risk the appellant would face upon return to Sri Lanka in light of the evidence in relation to his 2012 detention and diaspora activities in the United Kingdom. In particular the judge has failed to make a finding as to whether he accepts the Rule 35 report and whether or not it constitutes evidence of torture in detention. The judge cannot simply dismiss it by reason of it not being corroborated. By not having sight of the respondent's response to that Rule 35 report the judge has erred in not enabling himself to have the "full evidential picture" before him. Ms Jones accepted that Judge Beg in the first decision had rejected the 2012 detention but argued that Judge Monson should have made findings and did not do so in relation to it. He simply "implicitly" rejected it in an unsatisfactory way without properly surveying the evidence.

18. She then referred me to the issue relating to the ORU newspaper article and urged me to accept that the judge had erred in not recognising the importance of it within the context of the background material which shows that the appellant was associating with proscribed organisations. She complains that there is no mention of this article within Judge Monson's decision. I was urged to find that Judge Monson had further erred by accepting that the government of Sri Lanka relies on facial recognition techniques yet concluding that the appellant could be "anonymous" if returned to Sri Lanka and that the finding that it would be "fanciful to characterise plays such as the one the appellant performed in last year at the ExCel as being on a par with a piece of investigative journalism or a war crimes deposition" was contrary to the guidance and identified risk categories within **GJ**. She submitted the appellant's found diaspora activities placed him at risk upon return.

19. She then argued that there was a procedural unfairness in refusing the adjournment application at the hearing and in not watching the DVD itself. Beyond that the judge had restricted the appellant's evidence. However, she accepted that the position was not as asserted in the grounds and that there was only a "bit of restriction".

20. In response to Mr Melvin's submissions and questions from me Ms Jones accepted there was no finding within **GJ** that the government of Sri Lanka actually had available facial recognition technology albeit that it is funding research into it and "may" be using it.

21. Mr Melvin relied on his own skeleton argument and the Rule 24 reply dated 22 February 2016. He argued that the grant of permission had been a generous one and in particular focused on the issue of risk on return. However, Judge Monson has considered this in the round having correctly directed himself to appropriate country guidance and background material alongside the subjective evidence of the appellant. The conclusions that he came to were open to be reached and the judge's decision contains no material error of law. Mr Melvin emphasised that the Rule 35 report was dealt with in the respondent's decision and a reply to it was served upon the appellant whilst he was in detention. Judge Monson has properly dealt with the issue and there was no reason for him to adjourn the hearing for further disclosure of it. The ORU letter takes the appellant's appeal no further, the evidence was in the bundle and has been taken into account. In any event there is background material to suggest that such articles easily appear in Sri Lankan newspapers and there is nothing to tie this particular appellant with the organisation. The appellant's performance in the play is accepted. However, it is mere speculation that the judge would have come to any other conclusion had he personally watched the DVD. He received evidence in relation to the performance and the play and in particular that it was poking fun at the ex-president of Sri Lanka. Moreover, it had not been served by the appellant's representatives. The judge has dealt with all relevant issues.

22. On my own analysis the judge has promulgated a careful and detailed decision and has given cogent and sustainable reasons which were fully open to him on the evidence for concluding that this appellant did not leave Sri Lanka because of persecution and that he can return there without facing a risk of serious harm. This is dealt with by Judge Monson at paragraph 56 of his decision. He was obliged to find himself "**Devaseelan** bound" and in light of his consideration of Judge Beg's earlier decision and the further material that he had to consider and which is detailed at paragraph 47 of his decision, the Rule 35 medical report, the lawyers' letter and additional evidence and documents relating to the appellant's sur place activities, the judge was entitled not only to make the adverse credibility findings that he did, but also that in light of the advanced sur place activities to find the appellant did not fall into one of the risk categories identified in **GJ**. It was always open to the appellant's representatives to submit independent medical evidence. None was provided to Judge Monson. He had before him the Rule 35 report which he found was insufficient to establish the claimed medical condition. There is nothing unreasonable or irrational in that finding and on a plain reading of the decision and the judge's findings I do not accept that he was seeking corroboration of the appellant's medical position as is asserted. The judge has dealt with the Rule 35 report in the context of "new evidence" arising since the hearing before Judge Beg and was entitled to come to the

conclusions and findings that he did which are detailed at paragraph 48 of his decision. The burden of proving his case always rests with the appellant and it was always open to him to provide additional medical evidence if so advised. He chose not to. The judge has carefully analysed the Rule 35 report and the conclusions that he came to in relation to it were open to be made.

23. Similarly the judge properly analysed the other evidence that was before him. He does not have to deal with each and every item within the appellant's bundle and there is no error in not making express findings on the article from the ORU newspaper. The judge has considered the totality of the evidence in the round before coming to his conclusions.

24. This is an appellant who has had a fair hearing. The judge gave time for an analysis of the appellant's part in the play on the DVD to be prepared and took evidence in relation to it. I am not prepared to accept that the appellant's evidence has in any way been fettered by Judge Monson. The judge was not bound to agree to the adjournment application given the procedural history of this appeal and the role in it of the appellant's own representatives. He was doing no more than pursuing the overriding objective in not only giving time to the appellant's representatives to ensure a fair hearing but also proceeding with the appeal on the day that it was listed before him. Judge Monson found at paragraph 60 of his decision that to the lower standard of proof the appellant had participated in at least two public performances of plays and "most notably the play which is shown on the CD". He also accepted that it had been uploaded to YouTube and was entitled to conclude that albeit the play had been performed the audience was not as large as 30,000 people as claimed by the appellant. He also found that the play carried a pro-Tamil and antigovernment message and constituted "a protest against the Sri Lankan government's denial of Tamil nationhood and self-determination, and it accuses the Sri Lankan government of genocide". He also accepted the appellant acted the role which he described in his oral evidence to Judge Monson and that the appellant was and is capable of being recognised as one of the actors within the play.

25. Judge Monson has then gone on to apply the factual matrix of this appeal to **GJ** and the findings at paragraph 61 of his decision are sustainable ones in light of his analysis. It was open to him on the evidence to find that this particular appellant's diaspora activities would not place him at risk upon return to Sri Lanka when setting his own findings into the context of the risk categories identified in **GJ**.

Conclusions

26. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

27. I do not set aside the decision.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 31 March 2016

Deputy Upper Tribunal Judge Appleyard