



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

Appeal Number: PA/13026/2016

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 12 May 2017**

**Decision & Reasons  
Promulgated  
On 23 May 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE A MONSON**

**Between**

**ZS (SRI LANKA)  
(ANONYMITY DIRECTION MADE)**

Appellant

**And**

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

Respondent

**Representation:**

For the Appellant: Mr B Malik (Counsel)

For the Respondent: Mr N Bramble (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. The Appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Hawden-Beal sitting at Birmingham on 16 February 2017) dismissing his appeal against the decision of the Secretary of State to refuse to recognise him as a refugee, or as otherwise requiring international human rights protection, on account of his alleged profile as a supporter and promoter of Tamil separatism.

2.

### **The reasons for the grant of permission to appeal**

3. On 31 March 2017, First-tier Tribunal Judge M J Gillespie granted the Appellant permission to appeal to the Upper Tribunal for the following reasons:

In a decision which is otherwise full, fair and supported by sound reason, there is, as the grounds disclose, no mention of background evidence, post-dating the decision in **Gj and Ors (Sri Lanka)**, referred to for the appellant at the hearing, that is potentially supportive of the appellant's cause. It is fairly arguable, given the favourable finding of the Tribunal as to past torture and persecution of the Appellant, that the material might not have been considered and that had this material been expressly addressed, a different conclusion as to present risk on return might have been arrived at.

### **Relevant background facts**

4. The Appellant is a national of Sri Lanka, whose date of birth is [ ] 1980. He arrived in the United Kingdom in October 2011 on a student visa. In June 2012 he was excluded from his course for non-attendance, and his leave to remain was curtailed to May 2013.
5. He contacted the Asylum Screening Unit on 27 April 2016, and claimed asylum on 12 May 2016. He underwent a screening interview on that date, and he attended a substantive asylum interview on 1 November 2016.
6. His claim was that he met a Tamil called Vagnesh whilst attending AAT classes. Vagnesh helped him to find employment at Bureau Veritas Consumer Products Services. Vagnesh informed him that the victims of the civil war had become destitute and needed help. He suggested that the Appellant's bank account could be used to conceal financial transactions from abroad. The money was destined for the victims. The Appellant agreed to this arrangement. Once the money was deposited into his account from abroad, he would withdraw the money and give it Vagnesh. He did this from 2006 until either January or April 2011.
7. On 20 June 2011, Vagnesh was arrested. Two days later the Appellant was taken to a police station for questioning. He was released two hours later.
8. On 24 June 2011, he was at home when CID officers came to arrest him. They seized his bank statements, and took him to a building where he was detained for eight days. During this time he was tortured and he was sexually abused on two occasions. On the sixth day he confessed to helping the LTTE. On the eighth day he was released on payment of a bribe by his father. He remained at a friend's house until he left Sri Lanka.
9. Following his release, the authorities had been to the family home to question his father about his whereabouts. On one occasion they had taken his father for further enquiries. His parents had informed him there

was an outstanding warrant for his arrest. Since being in the UK, he had taken part in two or three demonstrations for Tamils.

10. On 10 November 2016, the Secretary of State gave her reasons for refusing the Appellant's asylum claim. He had a Muslim surname and he identified his religion as Islam. Given that Sri Lankan Moors were not recognised as Tamils, it was not accepted that his ethnicity was that of a Tamil. His account of assisting Vagnesh, and of his subsequent arrest, detention and release, contained inconsistencies and therefore it was not accepted.
11. He claimed that after he left the country the authorities had continued to visit his family home in search of him, and that so far they had been 4 to 5 times, and that during this last year they had been to his home three times. Given that he had claimed his release occurred in June 2011, it remained unexplained why the authorities waited four years before visiting his home in search of him. It was also unexplained why the authorities waited so long to ascertain his whereabouts when his mother continued to reside in her own house, and therefore her location was known to the authorities.
12. As he had remained in Sri Lanka after his release for three months, and as he had exited from the country using his valid passport at the airport, it was not accepted the authorities waited until after his departure to issue a warrant for his arrest.
13. He had not provided any evidence of any involvement in pro-Tamil political activism in the UK.
14. His credibility was also damaged by his delay in claiming asylum. It was further damaged by the fact that on 13 October 2015 he had obtained a passport from the Sri Lankan Embassy in London. This conduct was damaging to his overall credibility to have a well-founded fear of persecution by the Sri Lankan authorities.
15. Consideration had been given to risk on return to Sri Lanka using the most recent country guidance case of **GJ and Others (post-Civil War: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)**. It was noted the Court of Appeal upheld this country guidance case and the case of **MP (Sri Lanka) and Another v SSHD [2014] EWCA Civ 829**. Commenting on the risk categories in **GJ**, Lord Justice Maurice Kay stated at paragraph [19]: *"All this leads to the conclusion that it was rational and permissible to narrow the risk categories."*
16. The appellant was not on a stop list. He was not a journalist and he had not given any evidence against the Sri Lankan security forces or the Sri Lankan authorities. He did not have a high profile and so he would not be at risk on return to the Sri Lankan authorities as a suspected pro-Tamil separatist. On 10 January 2015, the Guardian reported that Mahinda Rajapaksa was defeated in the Presidential Elections by Maithripala

Sirisena who promised “no more abductions, no more censorship”. On 19 May 2015 the BBC reported that the Sri Lankan President had promised to seek reconciliation on the sixth anniversary of the Army’s victory over Tamil Tiger separatists.

### **The Hearing before, and the Decision of, the First-tier Tribunal**

17. Both parties were legally represented before Judge Hawden-Beal. Mr Malik of Counsel appeared on behalf of the Appellant.
18. The Appellant gave evidence through a Sinhalese interpreter. As she noted at paragraph [6] of her decision, the Judge also had before her a 746 page bundle compiled by the Appellant’s solicitors. This included Counsel’s Skeleton Argument, the Appellant’s most recent witness statement, a medical report from Dr Baha Al-Wakeel, a letter from his mother, a letter from the Sri Lankan Muslim diaspora initiative, various reports and some authorities, including **GJ**.
19. In his Skeleton Argument, Mr Malik addressed the question of whether the Appellant would be mistreated if he was returned to Sri Lanka. He said that if the Tribunal found that the Appellant suffered ill-treatment in 2011, then paragraph 339K of the Immigration Rules effectively created a rebuttable presumption that the Appellant’s fear of persecution was well founded. The findings of the Tribunal in **GJ and Others** were clearly instructive on the issue of whether presumption had been rebutted. But **GJ** was not conclusive, for there was other reliable material that post-dated the **GJ** decision, “*which indicates that Tamil returnees to Sri Lanka who are suspected of association with the LTTE are still frequently subjected to ill-treatment amounting to torture (See [88]-[99], and [171])*”.
20. The Judge set out Mr Malik’s closing submissions on behalf of the Appellant at paragraphs [20] to [24]. So far as **GJ** was concerned, she said that Mr Malik agreed that the Appellant was not on a watch list. But he submitted that there were documents postdating **GJ** (paragraphs 64.1, 6.53 and 6.6.1 of the country guidance at pages 88, 90 and 91 of the Appellant’s bundle), “*which show that there is a possibility of any Sri Lankan associated with the LTTE being persecuted*”.
21. The Judge’s findings were set out at paragraphs [31] onwards. She found that the Appellant was of Tamil ethnicity, and she accepted his account of helping Vagnesh, and as a result being arrested, detained, tortured and then released in June 2011.
22. However, she did not accept the authorities were still looking for him, as he and his mother and his wife claimed. She did not consider it plausible that four years after he was detained and then released on payment of a bribe, the authorities would admit to having “lost” a detainee through corruption by looking for him again.

23. At paragraph [40], she commented on the fact that in October 2014 he had obtained a passport from the Sri Lankan embassy in the UK. She did not find it credible that, if there was a warrant out for his arrest by the CID, such a warrant would not have been noted by the embassy, given the acceptance of the fact that in **GJ** the approach to the authorities to identifying Tamil activists was based on sophisticated intelligence both as to activities in Sri Lanka and in the diaspora, and that a computerised watch list was maintained. If the Appellant believed the authorities were still looking for him, he would not jeopardise himself by renewing his passport, knowing full well the type of intelligence which the authorities made use of to identify those in whom they had an interest. Having been off the radar since 2011, she did not find it credible the Appellant would focus the authorities' spotlight on him again by applying for a passport unless the authorities were really not in the slightest bit bothered about him.
24. At paragraph [41], she said that she had considered his sur place activities and she had found there to be none. He was not a member of any of the high profile Sri Lankan Tamil groups here in the UK. On his own evidence, the Appellant was not politically active. At paragraph [42], she said that, having considered **GJ** in the light of the above, she was not satisfied that he met any of the risk categories set out in that case. She cited **MP** at [50] where the Court of Appeal considered that the clear message of **GJ** was that a record of past LTTE activism did not as such constitute a risk factor for Tamils returning to Sri Lanka, because the government's concern now was only with current or future threats to the integrity of Sri Lanka's unitary state.
25. At paragraph [44] the Judge said:

Therefore in summary, although I accept that he was indirectly involved with the LTTE through Vagnesh and was detained by the CID because of that tenuous link, I am not satisfied that his past history or even current history is such that the authorities have considered him to be risk to the state and would thus have an interest in him if he were to be returned to Sri Lanka. Therefore I find the appellant has not discharged the burden of showing that he has a well-founded fear of persecution for any convention reason.

26. At paragraph [45] the Judge noted that past persecution/serious harm was said to be a good indicator of future persecution/serious harm. Although she accepted the Appellant had been tortured by the CID in the past, *"the evidence before me now does not persuade me that he would be of interest [to] the authorities upon his return now."*

### **The Hearing in the Upper Tribunal**

27. At the hearing before me to determine whether an error of law was made out, Mr Malik took me through the post **GJ** decision evidence which he said he had drawn to the Judge's attention. This comprised not only the passages referenced in the Judge's decision and in his Skeleton Argument, but also additional passages referenced in his oral submissions. He

submitted that the Judge had failed to engage adequately with the substance of this material, and she had failed to explain why it did not dislodge the guidance as to risk categories given by the Tribunal in **GJ and Others**.

28. On behalf of the Respondent, Mr Bramble submitted that the Judge was fully aware of the post decision evidence relied on by the Appellant, as she expressly referred to it at paragraph [24] of her decision. The Judge's finding at paragraph [45] covered the evidence referred to in paragraph [24]. Her finding on the issue could have been better worded, but there was no material error. The post decision material cited by Mr Malik did not show that the risk factors identified by the Tribunal in **GJ and Others** should be broadened.

### **Discussion**

29. I do not find it necessary to comment on every passage in the post decision background evidence cited by Mr Malik. As I explored with him in oral argument, I consider that much of the material is highly equivocal in its import. It does not clearly point to an increased risk for returnees beyond that apprehended by the Tribunal in **GJ and Others**, and Mr Malik showed me one report which, if anything, pointed to a diminution of risk. In the USSD country report on human rights practices for 2015 at page 128 of the Appellant's bundle, the following is stated:

The law prohibits arbitrary arrest and detention, but such incidents occurred *although at a decreased rate relative to 2014* (my emphasis).

30. I consider that the high watermark of the case advanced by Mr Malik is represented by paragraph 6.56 of the country information and guidance on Tamil separatism in Sri Lanka, Version 3.0, dated August 2016 (Appellant's bundle pages 90 to 91) which Mr Malik set out in full in the permission application and of which I set out the gist below.
31. In an August 2015 study of 148 Sri Lankan torture cases perpetrated "since the end of the Sri Lankan Civil War in May 2009", Freedom from Torture recorded that 139 people were of Tamil ethnicity, and the majority (142) described an association with the LTTE at some level and/or said that they had been associated with the LTTE by the Sri Lankan authorities in some way. It was of particular concern to Freedom from Torture that more than one third of the people whose cases were reviewed in the study were detained and tortured in Sri Lanka after returning from the UK following the end of the armed conflict (55 of 148 cases or 37%. Most had been in the UK as students but three had claimed asylum and forcibly removed after their asylum claims were rejected. All but seven of the people were detained within weeks of their arrival in Sri Lanka and the majority were specifically interrogated about their reasons for being in the UK, their activities and/or their contacts in the UK. 21 people were accused of attending particular protests and demonstrations in the UK and 11 were shown photographs taken at those events.

32. Mr Malik's submission is that it was incumbent upon the Judge to explain why the information reported in this study did not disclose a real risk on return for the Appellant, even though he was not on a watch list or stop list, and even though he had not engaged in pro-Tamil separatist activities in the UK.
33. However, I do not consider that the import of the Freedom from Torture report (as summarised in paragraph 6.5.6) is clear with regard to its potential impact on the continued applicability of the risk categories identified by the Tribunal in **GJ and Others**.
34. Firstly, no information is given as to the chronological spread of the 148 Sri Lankan torture cases perpetrated since the end of the Sri Lankan Civil War in May 2009. There is nothing to indicate that there is an even distribution of such cases over the period running from May 2009 to August 2015. Having regard to the evidence considered by the Tribunal in **GJ and Others**, it is highly unlikely that the cases were evenly distributed on a yearly basis, rather than being concentrated in the period 2009 to 2013, preceding the identification of the narrow risk categories in **GJ and Others**.
35. Secondly, there is nothing in the summary of the report at paragraph 6.5.6 which indicates the specific risk profile of the 55 returnees who were detained and tortured in Sri Lanka, beyond the fact that 21 of them were accused of attending particular protests and demonstrations in the UK.
36. Although not cited to me, I have had regard to **Muse & Others v Entry Clearance Officer [2012] EWCA Civ 10** on challenges to the adequacy of a judge's reasons. In **South Bucks District Council v Porter (2) [2004] UKHL 33**, cited with approval by the Court of Appeal at paragraph [33], Lord Brown said:
- The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need only refer to the main issues in the dispute, not to every material consideration.
37. The Judge gave adequate reasons for finding that the Appellant was not credible in his claim that the authorities had an ongoing adverse interest in him when he left Sri Lanka in 2011 or in his claim that the authorities had issued a warrant for his arrest after his departure, or that the authorities had in recent times been making regular enquiries of his mother about his whereabouts. It was also open to the Judge to find, for the reasons which she gave, that the Appellant's actions in seeking a new

passport from the Sri Lankan Embassy in 2014 were inconsistent with both a well-founded and a genuine fear of persecution.

38. Mr Malik submits that it was irrational of the Judge to make findings in the Appellant's favour with regard to his account of past persecution, but to reject his account of there being a warrant out for his arrest and his explanation for obtaining a new passport from the Sri Lankan Embassy. But there was nothing irrational in the Judge's approach. She applied the same anxious scrutiny to the question of ongoing and future risk, as she applied to the question of past persecution. It was open to her to find in the Appellant's favour on the issue of past persecution, but to reject his claim of ongoing adverse interest in him on the part of the Sri Lankan authorities.
39. In the light of the Judge's sustainable findings discussed above, it was not incumbent on her to explain why, nonetheless, the post decision material referred to at paragraph [24] did not avail the Appellant in establishing future risk. The Judge had to be satisfied that there were strong reasons to justify her from departing from country guidance authority, and neither the case advanced by Mr Malik on the post decision evidence, nor the post decision evidence itself, disclosed strong reasons for departing from country guidance authority on the particular facts of the Appellant's case, as the Judge had found them to be.
40. I consider that it is to be inferred that the Judge took the post decision evidence into account, as she expressly refers to it in paragraph [24] of her decision. I also consider that the Judge adequately engaged with the case on the post decision material which was advanced by Mr Malik in his Skeleton Argument through the findings which she made in paragraphs [39] to [45], and in particular in her specific finding at paragraph [45] that, the evidence did not persuade her that he would be of interest "now" to the authorities upon his return.

### **Notice of Decision**

41. The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Signed

Date: 22 May 2017



Deputy Upper Tribunal Judge Monson