



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00228/2017

THE IMMIGRATION ACTS

Heard at Field House
On 12 July 2018

Decision & Reasons Promulgated
On 3 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

BS
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Toal (for York Solicitors)
For the Respondent: Mr N Bramble (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of BS, a citizen of Sri Lanka born 10 April 1985, against the decision of the First-tier Tribunal to dismiss his appeal on asylum grounds on 6 July 2017, itself brought against the decision of the Secretary of State of 22 December 2016 to refuse his claim to remain in the UK on family life grounds.
2. The immigration history indicated by the Respondent records that the Appellant entered the United Kingdom following the issue of a student visa on 23 January 2008 and valid until 31 May 2011, and extended until 18 July 2014. He subsequently overstayed his leave and was placed on reporting conditions. On 28 June 2016 he claimed asylum.

3. His claim was based on the following account. He had lived in Jaffna without material incident until he came to the UK as a student. He was involved with the Pongu Tamil group which promoted Tamil culture.
4. In 2012 he gave evidence to a group investigating past events in Sri Lanka, but not to the Lessons Learned and Reconciliation Commission. He returned to Sri Lanka from October to November 2012, and took part in an anti-government demonstration, during which he was arrested by the authorities, who confiscated his passport and identity document. He was released the following day.
5. He had participated in student demonstrations in the UK from time to time. He had been involved in the Transnational Government of Tamil Eelam (TGTE) since 2008, though not as a member. Around May 2016 he had decided to return to Sri Lanka, and went so far as to purchase a flight ticket to do so; however his plans were forestalled when his mother warned that unknown individuals had visited the family home looking after him. His family believed they were members of the security forces because their subsequent complaint was not actioned by the police. He consulted a solicitor and was advised to claim asylum.
6. The Secretary of State did not accept the Appellant's claim, on the basis of it having been made late and because it was considered implausible.
7. The First-tier Tribunal noted the medical evidence from the Appellant's GP that he had been diagnosed as suffering from anxiety and depression and had been proscribed medication to help these conditions, and noted that these should be taken into account when considering any discrepancies in his account. It dismissed his appeal because
 - (a) There was no sensible reason for the delay of 2-3 months following the receipt of information from his parents in claiming asylum;
 - (b) The available medical evidence did not make good his claim: he appeared to have quit work due to a lack of ability to concentrate prior to the claimed visit to the family home, and were not shown to be related to the cause he asserted;
 - (c) It was not plausible that activities for the Tamil Eelam Student Organisation promoting and celebrating Tamil culture would give rise to political problems;
 - (d) He had failed to provide a copy of his passport which the Home Office held and which he could have obtained by reasonable endeavours;
 - (e) He had produced no letter or statement from his mother confirming the visit to the family home – the letter from his brother of 10 June 2016 addressed to the British High Commission in Colombo post-dated his receipt of notification from the Home Office that he was liable to removal; furthermore, it was implausible that the

authorities would have waited for several years after his arrest in 2012 to visit the family home were he of genuine interest to them;

- (f) His membership card for the TGTE and the evidence of Mr K established that he had played some role in the organisation, but he had done nothing more than participate in a limited number of demonstrations as had some 30,000-50,000 others, on his own evidence;
- (g) His degree of involvement with the TGTE seemed to be exaggerated, given that the letter from Mr Y stated him to be a regular attender at their meetings whereas the Appellant had said he attended "once in a while" - the letter seemed to have been written to order;
- (h) He had been able to leave Sri Lanka having procured a new passport notwithstanding his claimed difficulties with the authorities;
- (i) The flight home said to have been booked in April 2016 was not established as a genuinely confirmed reservation.

8. In conclusion, viewing those findings in the round, the Tribunal concluded that the Appellant may or may not have been a member of a Tamil student organisation during his time in the UK, but any such involvement was for cultural rather than political reasons and thus would not have led to any adverse interest in him by the security forces. He had not had his identity documents confiscated by the authorities, and any involvement with activities in the UK was restricted to the kind of demonstrations that were attended en masse by the Tamil diaspora; he may have supported, but was not a member of, the TGTE. Accordingly he was not at real risk of persecution for political or other reasons.
9. The Appellant lodged an appeal via the First-tier Tribunal, which refused the application. Judge Plimmer granted permission to appeal for the Upper Tribunal on 22 May 2018, based on the renewed grounds of appeal which contended that the First-tier Tribunal had failed to take account of relevant information found in the governing Country Guidelines decision, which demonstrated that students involved in demonstrations from 2011-2012 were of adverse interest to the authorities and that the First-tier Tribunal had effectively overstated the difference between a member and volunteer supporter of the TGTE, which was a proscribed organisation banned by the authorities involvement with which might well create a real risk of persecution.
10. A preliminary issue arose before me in that the Upper Tribunal when granting permission to appeal had not appreciated that the First-tier Tribunal had refused to extend time for what appeared to be a late appeal. Mr Toal drew my attention to material attached to the grounds that indicated that this appeared to reflect some administrative failing of the postal service, or those responsible for sending out the decision at the Home Office. Mr Bramble agreed that no failing lay at the Appellant's

door. It seems to me that wherever the malfunction originated, it could not reasonably be imputed to the Appellant or to his solicitors, and so I duly extend time.

11. Mr Toal identified various aspects of the country evidence cited in *GJ* which were relevant to the issues in this appeal but which had been overlooked, including one witness's view that the country "was sinking, ever more deeply, into a really dangerous place, a paranoid culture of ultra-nationalism." This material had not been addressed notwithstanding its potential relevance to the plausibility of the Appellant's account. He had been issued with a card by TGTE, expressly stating that it attested to his affinity and solidarity with the work of Tamil Government of Eelam and was issued in recognition of his identity as an Eelam Tamil.
12. Mr Toal submitted that the First-tier tribunal had been wrong in its approach to the supporting letters: whilst it had correctly identified there was no requirement for the Appellant's account to corroborated, it then went on to hold it against the Appellant that his mother had not written a letter, whilst discounting the brother's letter simply on the basis that it had been written after the Appellant had become liable to removal from the UK. The finding regarding the timing of the Appellant's booked flight was untenable.
13. Mr Bramble replied that the decision was unflawed. Adequate and clear reasons had been provided.

Findings and reasons

14. The headnote of *GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC)* sets out:

"(3) The government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state enshrined in Amendment 6(1) to the Sri Lankan Constitution in 1983, which prohibits the 'violation of territorial integrity' of Sri Lanka. Its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka.

(4) If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.

(5) Internal relocation is not an option within Sri Lanka for a person at real risk from the Sri Lankan authorities, since the government now controls the whole of Sri Lanka and Tamils are required to return to a named address after passing through the airport. ...

(7) The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, 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."

15. In *GJ* evidence was recorded at §156-158 and §188 that Pongu Tamil was a broad social movement which the authorities had viewed as Tamil Tigers, leading to many of them being “liquidated”. Students at Jaffna University were particularly vulnerable to suspicion because of their past association with the LTTE. Students associated with support of the Mahaveera celebrations aimed at recognising the families of those killed in action had been arrested in 2012 in large numbers and many had been sent for rehabilitation, though not ill-treated, apparently with a view to discouraging future attendance at such events. At § 331-332 the LLRC was noted as having had advocated that Tamil rights to celebrate their culture and religion be guaranteed but those recommendations had not been implemented by the time of the *GJ* hearing: it remained the government’s position that the reconstruction of the Northern and Eastern Provinces was encouraged but did not at that time permit recognition of separate Tamil identity.
16. In *UB (Sri Lanka)* [2017] EWCA Civ 85 the Court of Appeal set out Home Office policy guidance dated 28 August 2014, entitled "Tamil Separatism". The judgment records:

“12. Annexed to the guidance is the text of two letters from the British High Commission in Sri Lanka. This material is authoritative and clearly intended to be read with the guidance. The first letter is dated 16 April 2014:

"Proscribed Terrorist Groups

On 1 April 2014, the government of Sri Lanka announced the designation of 16 Tamil Diaspora organisations and 424 individuals under the UN Security Council resolution 1373 on counter-terrorism. The order was issued by the Secretary of Defence. The government asserts that this action has been taken to stop attempts to revive the LTTE. The BHC [i.e. British High Commission] has asked the government of Sri Lanka to provide evidence to support this decision.

Among the organisations proscribed are the Transnational Government of Tamil Eelam (TGTE) and the UK-based Global Tamil Forum (GTF) and British Tamil Forum (BTF). When making the announcement on 1 April, Brigadier Ruwan Wanigasooriya said that individuals belonging to these organisations would face arrest under anti-terrorism laws ... [T]o date, there have been no known arrests based on membership of one of the newly proscribed groups."

13. The later letter is dated 25 July 2014 and the relevant text reads:

"The spokesperson from the DIE stated that returnees may be questioned on arrival by immigration, CID, SIS and TID. They may be questioned about what they have been doing whilst out of Sri Lanka, including whether they have been involved with one of the Tamil Diaspora groups. He said that it was normal practice for returnees to be asked about their activities in the country they were returning from.

The spokesperson from the SIS said that people being "deported" will always be questioned about their overseas activities, including whether they have been involved with one of the proscribed organisations. He said that members of the organisations are not banned from returning to Sri Lanka, they are allowed to return, but will be questioned on arrival and may be detained."

17. I accept having regard to the evidence and materials just cited that the First-tier Tribunal made material errors of law. Of course, in *PR (Sri Lanka)* [2017] EWCA Civ 1946, McCombe LJ cautioned in accepting reliance on isolated passages of evidence in a Country Guidelines decision that had been cited for completeness and which appeared to play no part on the final decision. However, here the material relied on was consistent with the conclusions in *GJ* and in any event is highly relevant to findings made on the plausibility of the account: as shown by decisions such as *HK* [2006] EWCA Civ 1037, any assessment of plausibility must be made by reference to the available country information.
18. Firstly, the Appellant's affiliation with demonstrations celebrating Tamil culture as a student in 2012 can now be seen as activities that might well be deemed as political by the Sri Lankan state. Indeed the First-tier Tribunal accepted this aspect of the Appellant's case. It concluded that involvement with cultural rather than political activities would not attract adverse attention. However, the country evidence cited in the Country Guidelines decision clearly shows that students may be at risk. As set out at Regulation 6 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, "the concept of political opinion shall include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution ... to their policies or methods". It is clear from the material cited above that activities of the kind with which the Appellant was associated might so qualify.
19. The relevance of this error is that it is essentially a prismatic one, which affects the way in which the evidence received below was assessed generally. It is impossible to be confident that the same decision would have been reached as to the Appellant's credibility had the Judge not been under a false impression as to the likely consequence of cultural expression over the period in question.
20. Secondly it is apparent that, whether or not he is a member of the TGTE, the Appellant holds a card that ostensibly associates him closely with that organisation. Accordingly the Home Office policy guidance given prominence in *UB (Sri Lanka)* is relevant to this appeal in two ways: firstly it demonstrates that there may be a duty on the Secretary of State's advocate to draw attention to relevant guidance. Secondly, as it happens, the guidance in question is directly relevant to the facts of the instant Appellant's claim: the TGTE is one of the proscribed groups involvement with which may attract adverse attention from the security forces on a return. True it is that "members" are identified as having a higher profile, but the country evidence can be read as supporting a broader class of returnee as being of interest, given the possibility of questioning for having "been involved with one of the Tamil Diaspora groups". It seems to me that any risks arising from the Appellant's return to Sri Lanka must be assessed with this in mind. He cannot be expected to dissemble if he is questioned by the authorities.
21. Mr Toal also made submissions based on what he described as a lack of reasoning in the decision of the First-tier Tribunal, and a failure to apply the appropriate standard of proof. This provoked a brief exchange between Mr Toal and the bench which deserves comment. Generally speaking, the grounds for an appellate tribunal to intervene in factual findings made by a Judge who has heard the evidence for themselves are those

identified in the landmark decision of *R (Iran)* [2005] EWCA Civ 982 §9: the essentially public law errors, any of which must be in relation to a *material* matter: irrationality, failing to give adequate reasons for findings, failing to take account of relevant material (or considering irrelevant issues), material misdirections of law (doubtless including those principles of fundamental relevance to the assessment of an asylum seeker's credibility, such as the need to evaluate plausibility in the light of the country evidence), and procedural unfairness.

22. It seems to me that where the reasoning of the First-tier Tribunal is comprehensible, then however objectionable it may be, the complaint is essentially one of rationality, unless the reasons given fail to take account of relevant evidence or considerations. Equally, a complaint regarding the standard of proof needs to identify some express misdirection; or at least be able to point to some overt feature of the finding which is flatly inconsistent with the standard of proof (see eg Lewison LJ in *ME (Sri Lanka)* [2018] EWCA Civ 1486 §18). Otherwise, grounds of appeal voiced by reference to a failure to apply the standard of proof are in truth covert rationality challenges.
23. This is essentially the point made by Beatson LJ *Haleemudeen* [2014] EWCA Civ 558 §33, 35, addressing grounds that had been labelled by their authors as asserting both an *insufficiency* of reasoning and an assault on the alleged *inadequacy* of the reasons given: "It is, in my view, important to keep the two grounds separate and to recognise clearly the difference between the largely procedural nature of an "inadequate reasons" challenge and a substantive challenge that the reasons given display an error of law or other public law flaw ... the reasons must give sufficient detail to show the parties and the appellate tribunal or reviewing court the principles upon which the lower tribunal has acted, and the reasons that led it to its decision, so that they are able to understand why it reached its decision".
24. This said, the threshold necessary for rationality to be established may vary with the subject matter. Asylum appeals must be approached applying the appropriate anxious scrutiny, and as Carnwath LJ explained in *YH* [2010] EWCA Civ 116 that term "has by usage acquired special significance as underlining the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account." That principle originated in the speech of Lord Bridge in *Bugdaycay* [1986] UKHL 3 where he stated that "The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."
25. It seems to me that when the Tribunal supervises decision making of the First-tier Tribunal, it is essential that it ensures that the Judge below gave the appropriately intense scrutiny to the evidence before them. It may well be that the appropriate intensity is captured by the possibility that a decision may be irrational in the sense identified, in a different context, by the court in *Balchin* [1998] 1 PLR 1 - ie where the reasoning does not add up, because there some error therein which robs the decision of logic.

26. In any event, it is unnecessary for the purpose of disposing of the instant appeal to venture further into these deep waters. For the reasons set out above, the decision of the First-tier Tribunal is flawed by material errors of law, in that relevant evidence was not taken into account when assessing the credibility of the claim.

Decision:

The decision of the First-tier Tribunal contains material errors of law.
The appeal is remitted for hearing afresh.

Anonymity Order

I make an anonymity order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure of any information or matter likely to lead members of the public to be able to identify the Appellant.

A handwritten signature in black ink, appearing to read 'M.A.S. Symes', with a long, sweeping underline that extends to the left and then curves back under the signature.

Signed:
Deputy Upper Tribunal Judge Symes

Date: 31 July 2018