



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02946/2016

THE IMMIGRATION ACTS

Heard at Field House
On 29 June 2018

Decision & Reasons Promulgated
On 31 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

KN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Jaquiss, Counsel, instructed by A & P Solicitors

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is citizen of Sri Lanka who is Tamil and was born on 2 November 1970. He is appealing against the decision of Judge of the First-tier Tribunal Rodger promulgated on 13 June 2017 whereby his appeal against the respondent's decision dated 7 March 2016 to refuse his asylum application was dismissed.
2. The appellant claims that he was a low level (non-fighter) member of the LTTE who was arrested on 22 April 2009 and held in an unknown jail between 2009 and 2015 where he was beaten and tortured. He claims to have escaped and thereafter

travelled to the UK. He claims that since arriving in the UK he has been involved in Tamil separatist activity and in particular has joined the Transnational Government of Tamil Eelam (TGTE).

Decision of the First-tier Tribunal

3. Judge Rodger dismissed the appeal on the basis that he did not find the appellant's account credible and he was not satisfied that the appellant would be at risk on return to Sri Lanka as a consequence of his activities in the UK.
4. The judge found the evidence of the appellant about his experience in Sri Lanka to be inconsistent. At paragraph 32 she described it as being "littered with inconsistencies". The main inconsistencies identified by the judge were as follows.
 - (a) *Whether the appellant was a member or supporter of the LTTE.* The judge found at paragraph 34 that the appellant had not been consistent as to whether he was a member or supporter of the LTTE and did not provide a plausible or credible reason for the inconsistency. The judge stated that during cross-examination the appellant, when asked if he was a member of the LTTE, said that he was a member but did not get any training to fight and if he died would "be treated as an LTTE member". However, in his asylum interview the appellant described himself as a supporter of the LTTE and denied being a member.
 - (b) *The duration of the appellant's incarceration.* At paragraph 35 the judge found that the appellant's account of the duration of his detention was not consistent. The judge compared the statement of the appellant in his screening interview that he was arrested on 22 April 2009 and released approximately two months before arriving in the UK (which would mean a period of imprisonment of approximately 6.5 years) with his subsequent statements that he had been in detention for about five – six years from 2009 to 2015 and concluded that the appellant had been vague and inconsistent as to the length of his alleged detention.
 - (c) *Presence of other people during detention.* The judge found the appellant to be inconsistent and vague regarding his detention during cross-examination. At paragraph 37 the judge found that the appellant's account of his detention was not persuasive, finding there to be an inconsistency between his statement in his asylum interview that "nobody was allowed to see me and I didn't have contact with anyone" and his claim that he stayed in a hall with approximately 300 other prisoners.
 - (d) *Lack of knowledge about escape.* The judge, at paragraph 38, found it damaging to the appellant's credibility that he did not know the details of his escape plan or how it had been arranged or by whom. The judge stated: "I do not accept that his knowledge of his release would have been so vague and that he did not have a better understanding of it or that he would not have asked his wife about the amount that was paid."
5. The judge accepted that the appellant's siblings were active LTTE members who were killed during battle and that the appellant's sister had been classed as a martyr.

However, she was unable to accept that the appellant was himself “heavily or significantly involved with the LTTE”.

6. The appellant relied on a medico-legal report from Dr Izquierdo-Martin, a consultant in emergency medicine. The report concluded that the appellant’s scarring was consistent or highly consistent with being inflicted by torture. The judge rejected the report’s conclusions, stating at paragraph 48:

“I of course take into account that Dr Izquierdo-Martin has used his expert knowledge after examining the scars and has provided his opinion on how they are caused but given that I am not satisfied that the appellant is credible and given there are other possible causes of the scarring, I am not able to place much weight on the conclusions within the report that the scarring was caused by torture. I do not accept that the appellant was detained or tortured as alleged. The report sets out that there are other possible causes and whilst there is a reference in the report to the appellant telling the expert that he was a farmer there is insufficient detail within the report as to satisfy me that the experts had fully explored the nature of the appellant’s work as a farmer and how that would have affected any of his scarring injuries. In particular, the appellant told the Tribunal that he worked as a farmer for eighteen years and used traditional farming methods and worked barefooted. The appellant denied that the injuries to his feet were caused by farm work and repeated that he was ill-treated and tortured. It seems likely that working barefooted is something that would be relevant to foot scarring and possibly the leg injuries but was not referred to within the report. In the absence of any detail that his previous lengthy work as a farmer was gone into during the examination, I am not satisfied that I can place weight on the expert’s views as to the leg and foot injuries nor as to his overall view that the appellant’s scarring is highly consistent with torture because it may be that if the expert knew about the methods of work that this would have affected his view on the foot and leg injuries and his overall evaluation of the scarring and injuries.”

7. Having found that the appellant was not credible and taken the view that on this basis the appeal should not succeed, the judge proceeded to consider whether the appellant would be at risk, taking his account at its highest, which the judge characterised as being that he was a low level supporter of the LTTE. The judge considered the country guidance in *GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319* and concluded that it was consistent with the country guidance to find that the appellant did not face a risk on return as he would not be perceived to be a threat to the integrity of Sri Lanka as a single state.

8. The judge then considered the appellant’s activities in the UK, stating that she was

“... not persuaded that the appellant is genuinely and actively involved in the Eelam Tamils within the UK or that he would be perceived as a risk to the single state on return to Sri Lanka. I have not found the appellant to be a credible person and whilst he states that he works for the TGTE and assists them with meetings and leaflets and has attended various demonstrations organised by the TGTE I am not able to accept his account. There was no persuasive evidence of such alleged involve other than that he is now a cardholding member of the TGTE. There is no persuasive evidence that he has attended all of the demonstrations or events as alleged nor to corroborate his account of him

working for the TGTE. The appellant's TGTE card has only been issued recently and given my overall assessment of the appellant's credibility I am not persuaded that his obtaining of the card and attendance at the event on 18/05/17 and paying tribute is anything other than an attempt to bolster his asylum appeal. Whilst the intention behind becoming involved is not necessarily relevant to the perception of the Sri Lankan authorities, I am not persuaded that the appellant genuinely and actively supports the cause of the TGTE or that he is a committed Tamil activist or that he would be perceived as one or a risk to the single state by the Sri Lankan authorities."

9. The judge then concluded, applying the country guidance case of *GJ*, that the appellant can safely return to Sri Lanka.

Grounds of Appeal and Submissions

10. The grounds of appeal make two submissions. The first is that the judge erred in the assessment of the appellant's credibility. The grounds characterise the judge's credibility findings as "*Wednesbury* unreasonable" and make the following points:
- (a) Firstly, it is contended that the judge was mistaken in finding that the appellant had been inconsistent in describing himself at one time as a supporter and on another occasion as a member of the LTTE as the appellant had been consistent throughout as to what his role had been within the LTTE.
 - (b) Secondly, it is submitted that the appellant was consistent in the evidence he gave about the duration of his detention and the slight difference between the durations is readily explained by the nature of the detention where he was held for long periods without access to a calendar and without knowing day from night.
 - (c) Thirdly, it is submitted by the appellant that he gave broadly consistent information about the nature of the torture that he was subjected to.
11. The second ground of appeal argues that the judge failed to have regard to the risk the appellant would face upon being returned to Sri Lanka as a consequence of his membership of and involvement with the TGTE in the UK, given that the TGTE is a proscribed organisation in Sri Lanka. Reference is made in the grounds to the Court of Appeal judgment *UB (Sri Lanka)* [2017] EWCA Civ 85, which refers to policy guidance issued by the Home Office on 28 August 2014 relevant to the risk arising from membership of the TGTE. It is highlighted in the grounds that this was raised before the First-tier Tribunal but ignored in the decision. The policy in question annexes to it two letters from the British High Commission in Sri Lanka. These state amongst other things that the TGTE has been designated a proscribed organisation.
12. At the hearing Ms Jaquiss elaborated on the grounds. She submitted that even if the appellant had used the words supporter and member on different occasions when describing his involvement with the LTTE he had been consistent throughout when describing his activities and role within the organisation. As to the duration of incarceration Ms Jaquiss argued that the appellant had not been inconsistent when describing the incarceration as lasting for five to six years when the gap between the date of his arrest (22 April 2009) and the date two months before he travelled to the

UK was six and a half years. Given the circumstances and duration of the imprisonment, in Ms Jaquiss' view it is irrational to state that there is an inconsistency because "five to six years" and "six and a half years". She also maintains that the appellant had not been contradictory about the nature of his incarceration as when he referred to no-one being allowed to see him or have contact with him he was describing that he was unable to see people from outside the prison, not that there were not other people incarcerated with him.

13. Ms Jaquiss also focused on the medical report, arguing that it contained a detailed and thorough assessment and that reference was made within the report to the appellant having worked as a farmer and therefore it was not accurate for the judge to criticise the report for failing to recognise that aspect of the appellant's history. She identified in the report how the expert had addressed alternative explanations for each of the scars before concluding that they were most likely the consequence of torture.
14. With regard to the second ground of appeal Ms Jaquiss argued that the judge had simply ignored the Court of Appeal decision in *UB (Sri Lanka)* which postdates *GJ*. She also observed that the judge had accepted that the appellant's family was involved with the LTTE and that his sister had been treated as a martyr and she argued that this would give him a higher profile and therefore was relevant as to how his TGTE membership would be perceived.
15. Mr Melvin's response was that this was a case where the judge had carefully assessed the appellant's evidence, properly directed herself to the burden and standard of proof and had identified numerous inconsistencies which justified a conclusion of lack of credibility. In respect of the issue of whether the appellant was a member or supporter of the LTTE, in his view the judge had considered in detail the appellant's attempted explanation before rejecting it. Mr Melvin also argued that anxious scrutiny was given to the expert evidence and that it is apparent from the decision that the judge dealt with it thoroughly and in detail.
16. With regard to the appellant's claimed involvement in the UK with the TGTE, Mr Melvin's position was that the judge found the appellant not to be involved at all with the organisation apart from being a cardholding member and that his attendance at a demonstration was no more than an attempt to bolster the asylum claim. He observed that no-one from the TGTE attended the hearing to give evidence on behalf of the appellant and neither the appellant nor his witness in their statements gave any detail of activities for the TGTE. He argued that in these circumstances there was no basis to find a material error of law.

Analysis

17. The judge has made two material errors of law such that the decision cannot stand.
18. The first error concerns the assessment of credibility. The judge has given several reasons for finding the appellant not credible. In my view at least three of the reasons do not withstand scrutiny.

- (a) The judge found that the appellant contradicted himself by describing himself as a supporter of the LTTE but later calling himself a member. However, although the appellant has used both the term supporter and member, he has not contradicted himself about his role within the LTTE. The appellant's consistent account is that he was not an LTTE member in the sense of being a trained fighter (who would have received an "identification number plate") but was someone who worked for the LTTE one or two days a week directing traffic and looking out for illegal activities such as prostitution but would be treated as the equivalent of a fighting LTTE member if he died. Given the appellant's claimed role in the LTTE, and its lower status than being a member who is a fighter, it is not unreasonable that he would characterise himself as a supporter rather than a member (or vice versa) and the fact that he used the term supporter on one occasion and member on another occasion (and also, at paragraph 27 of the asylum interview, described himself as an "agent" for the LTTE) is not, in my view, a reasonable basis upon which to find that his credibility is undermined.
- (b) The judge found damaging to the appellant's credibility that there was an "inconsistency in the length of time he claimed to have spent in prison". Having reviewed the evidence that was before the First-tier Tribunal, I do not accept that there was a meaningful inconsistency. The appellant stated in the asylum interview that he was detained for 5-6 years from 2009 to 2015 and he stated in the screening interview that he was detained between 22 April 2009 and two months before coming to the UK (which would be a period of approximately 6.5 years). As argued by Ms Jaquiss, the difference between these two periods is minimal. In my view, it is not contradictory or inconsistent for a person who has spent 6.5 years in prison to say that he was imprisoned for 5-6 years or that he was imprisoned between 2009 and 2015 (which can in any event cover period of 6.5 years). In my view, the appellant's description of the duration of his incarceration has been broadly consistent and is not a basis upon which he could be found to lack credibility.
- (c) The judge found damaging to the appellant's credibility that there was a contradiction between his statement that nobody was allowed to see him while he was in prison and his statement that he had stayed in a hall with 300 other prisoners. The appellant gave a clear explanation for this, which was that the reference to no one being allowed to see him was to people outside the prison. In my view, this was not an inconsistency and cannot be a basis to find the appellant lacked credibility.
19. Given that the three claimed inconsistencies considered in paragraph 18 above formed a core part of the judge's reasoning for not finding the appellant credible, the judge's overall conclusion on credibility cannot stand.
20. I now turn to the second ground of appeal, which concerns the failure of the judge to consider the implications of the appellant's membership of the TGTE. The evidence of the appellant is that he was a member of the TGTE. The Court of Appeal in *UB* made clear that it was an error of law to fail to have regard to the respondent's policy

issued on 28 August 2014, which concerned the fact that on 1 April 2014 the Sri Lankan authorities declared the TGTE to be a proscribed terrorist group. The judge has made no reference to this policy and has assessed the risk on return solely by reference to the country guidance case of *GJ*. However, the aforementioned policy postdates *GJ* and there is Court of Appeal authority in the form of *UB (Sri Lanka)* to the effect that it is necessary to have regard to the policy.

21. In *UB* it is made clear that the risk to a citizen of Sri Lanka who is a member of the TGTE does not arise merely because of membership but rather depends on membership being detected on arrival in Sri Lanka. Given the judge's finding that the appellant's siblings were LTTE fighters and that his sister was classed as a martyr, it may be that even if the appellant's involvement with the TGTE in the UK has been minimal the authorities in Sri Lanka would be aware of him and interested in his activities. The failure to address these issues in light of the 2014 policy and the decision in *UB* is a material error of law.
22. As I have found that the judge erred in the assessment of credibility the remaking of the appeal will require significant fact-finding. Having regard to paragraph 7.2(b) of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal, I consider this an appeal which is appropriate to remit to the First-tier Tribunal.

Notice of Decision

- A. The appeal is allowed.
- B. The decision of the First-tier Tribunal contains a material error of law and is set aside.
- C. The appeal is remitted to the First-tier Tribunal to be heard by a different judge.

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 his 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



Deputy Upper Tribunal Judge Sheridan

Dated: 20 July 2018