UTIJR6

JR/6326/2018

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of

WH + 3

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Before

Upper Tribunal Judge Finch on 18 February 2019

Application for judicial review: substantive decision

Having considered all documents lodged and having heard Mr. G. Dolan of counsel, instructed by Lova Solicitors Ltd on behalf of the Applicant, and Mr. J. Fletcher of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 18 February 2019.

ANONYMITY

Anonymity should be granted because the case involves protection issues. Unless and until a tribunal or court directs otherwise, the Applicant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any members of her family. This direction applies to the Applicant and to the Respondent. Failure to comply with this

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direction could lead to contempt of court proceedings.

Decision: the application for judicial review is refused

THE HISTORY OF THE APPLICATION FOR JUDICIAL REVIEW

1. The Applicant is a national of Sri Lanka. She arrived in the United Kingdom, as a visitor, on 26 October 2013 with her son. She then applied for asylum on 28 October 2013. Her application was refused on 20 February 2015 but her appeal was allowed by First-tier Tribunal Judge Robertson in a decision promulgated on 1 September 2015.

2. The Respondent appealed against this decision and in a decision, dated 5 January 2016, Deputy Upper Tribunal Judge Black found that First-tier Tribunal Judge Robertson had made an error of law and, in a decision promulgated on 27 April 2016, she allowed the Respondent's appeal and remade the decision, dismissing the Appellant's appeal in a decision promulgated on 27 April 2016. The Applicant sought permission to appeal to the Court of Appeal, but her application was refused and she had exhausted her appeal rights by 17 March 2017.

3. Further representations were made on her behalf on 7 July 2018 but on 22 August 2016 the Respondent decided that they did not amount to a fresh protection or human rights claim.

4. The Applicant lodged her claim for judicial review on 24 September 2018 and the Respondent filed his acknowledgment of service and summary grounds of defence on 23 October 2018. Upper Tribunal Judge Canavan granted the Applicant permission on the papers on 12 November 2018.

5. On 2 January 2019 a lawyer at the Upper Tribunal granted the Respondent an extension of time to file his detailed grounds of defence and he filed these on 11 January 2019. Counsel for the Respondent filed and served his skeleton argument on 12 February 2019. The Applicant failed to comply with any of the directions made by Upper Tribunal Judge Canavan when she granted permission.

THE SUBSTANTIVE HEARING

6. The basis on which permission was granted was limited. Upper Tribunal Judge Canavan found that "given the dearth of evidence showing any activity by the Applicant herself, it is not arguable that the Respondent's finding that there was insufficient evidence of political activity in the UK to give rise to a realistic prospect of success in a hypothetical appeal is outside the range of reasonable responses to such limited evidence. Prior to reaching this decision, the Judge had noted that the evidence of the Applicant's involvement in protests by the Tamil Diaspora in the United Kingdom was limited to unexplained photographs, which did not appear to include the Applicant". Therefore, to the extent that the Applicant relied on any *sur place* political activities in the United Kingdom in paragraph 9 of her grounds of claim, permission has not been given to proceed to a judicial review of the Respondent's decision on this basis.

7. In addition, Upper Tribunal Judge Canavan did not grant permission in relation to the ground of claim contained in paragraph 29 of the grounds of claim and entitled *"Mental Health Grounds"*, which relied on paragraph 450 of *GJ and Others (post- civil war returnees) Sri Lanka CG [*2013] UKUT 00319 and *J v Secretary of State for the Home Department* [2005] EWCA Civ 629.

8. Instead, Upper Tribunal Judge Canavan found that it was at least arguable that a proper reading of the risk categories in *GJ and Others* includes those 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.

9. At the start of the hearing, counsel for the Applicant applied for an adjournment on the basis that he had only been instructed the night before and was not in receipt of the full bundle. He also submitted that, as the Applicant was vulnerable, it was in the interests of justice, that he had time to read the full bundle and draft his skeleton argument. Counsel for the Respondent opposed the application on the basis that no reason had been provided for the failure on the part of the Applicant's solicitors to

comply with the directions.

10. I have considered the overriding objectives contained in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In particular, I have taken into account the need to provide the Applicant with the opportunity to participate fully in these proceedings by being properly represented and the need to avoid unnecessary delay. I have also considered the fact that any adjournment would involve more expense for the Applicant in terms of the costs thrown away for today and the need to meet the costs of instructing counsel at any adjourned hearing.

11. Having done so, I found that it was not necessary to adjourn the hearing to another day and that providing counsel for the Applicant with time to prepare for a hearing at 2 p.m. would ensure that the Applicant was able to participate in the hearing through her counsel. I also ensured that counsel for the Applicant had all of the papers missing from his Bundle. When the court reconvened, I heard oral submissions from both counsel and I have taken the content of these submissions into account when reaching my decision below.

THE SUBSTANTIVE DECISION

12. Paragraph 353 of the Immigration Rules states:

> "Fresh claims
>
> When a human-rights…claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection".

13. The Applicant had made an earlier protection claim, which had been refused and her subsequent appeal had been dismissed by Deputy Upper Tribunal Judge Black in a decision, dated 21 March 2016. Therefore, paragraph 353 of the Immigration Rules applied and the Respondent had to consider whether there was material which had not previously been considered and whether any such material, taken together with the previously considered material, created a realistic prospect of success before another First-tier Tribunal Judge.

14. This consideration needs to take place in the context of the country guidance provided in *GJ and Others* in which the Upper Tribunal made the following relevant findings:

> "(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 within the diaspora and/or a renewal of hostilities within Sri Lanka.
>
> …
>
> (d) a person whose name appears on a computerised "stop" list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.

15. When she remade the decision, Deputy Upper Tribunal Judge Black adopted the findings of fact made by First-tier Tribunal Judge Robertson. In particular, in paragraph 33 of her decision she found that the Applicant had been arrested, detained and tortured by the authorities on two occasions, once in 2011 and once in 2013.

16. I accept that paragraph 339K of the Immigration Rules states that:

> "... the fact that a person has already been subject to persecution of serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear or persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated".

17. I have also taken into account that in paragraph 34 of her decision, First-tier Tribunal Judge Robertson noted that past persecution was an indication of future ill-treatment and found that the Applicant had suffered past persecution on the basis of a perception by the Sri Lankan authorities that she had links to the LTTE. She also found that evidence of past torture is a good indicator that the Applicant is likely to be tortured on return.

18. However, the country guidance in *GJ and Others* did not find that the mere fact that a person had been suspected of an involvement with the LTTE in the past and had been arrested, detained and tortured gave rise to a future risk of persecution in every case.

19. Instead, the Upper Tribunal noted that there were a number of particular basis upon which a risk of persecution on return would arise. One of these was when a person was or was perceived to a threat to the integrity of Sri Lanka as a single state because they have, or are perceived to have, a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka. Therefore, even if there was a prior finding that the Applicant had at one time been perceived to have been involved with the LTTE, it was also necessary for her to establish, albeit to a low standard of proof, that she would be perceived to have a significant role in post-conflict Tamil separatism within the diaspora or within Sri Lanka.

20. In paragraph 34 of her decision, First-tier Tribunal Judge Robertson found that the Applicant did not have any significant role in a threat to any renewal of hostilities in

Sri Lanka and this finding was maintained by Deputy Upper Tribunal Judge Black in paragraph 5 of her error of law decision. In addition, Upper Tribunal Judge Canavan had found that it was not arguable that it was irrational to find that the Applicant had not been involved in any *sur place* activities in the diaspora in the United Kingdom in support of the LTTE.

21. In addition, I note that Deputy Upper Tribunal Judge Black set aside First-tier Tribunal Judge Robertson's decision on the basis that the Judge had found that the Applicant had not fallen within any of the risk categories in *GJ and Others* but had gone on to find that she was at future risk of persecution in Sri Lanka. When doing so she also noted that there was no evidence of any charges or outstanding warrants in her name which would result on her being on the "stop list". She also noted that there had been a two-year gap between her two arrests and that there was no evidence before the First-tier Tribunal that her husband or her friend, Priya, had any links to the LTTE or had played a significant role in any renewal of hostilities in Sri Lanka.

22. When remaking and dismissing her appeal, Deputy Upper Tribunal Judge Black also found that there was no evidence before the Tribunal to show that there was a risk of repetition of the past ill treatment given the lack of profile and involvement of the Applicant in any political activity. She also found that there was no evidence of any arrest warrants or factors which that would place the Applicant at risk of appearing on a stop list nor any evidence that she was of current interest to the authorities.

23. When further representations were made on the Applicant's behalf she did not provide any evidence that there was an arrest warrant or court charges in her name or that the authorities had been looking for her. She did submit an article entitled *Inaction and delayed action by the Government as well as the law enforcement arm leads to a repeat of the 2014 Aluthgama Anti-Muslim violence in Sri Lanka,* which had been published by the Media Unit of the Council of Sri Lankan Muslim Organisations in UK, dated March 2018. However, this article has not been included in the Applicant's Bundle and was not referred to in the grounds of claim.

24. The Bundle does include the expert report by Dr. Chris Smith, dated 31 May 2018. However, at paragraph 82 of his report, he stated that “it is clearly the case that the Appellant did not have a role of significance or importance in the LTTE – she does not even claim to have been a member” He did go on to state that “however, this does not mean, *ipso facto,* that [she] will not be of adverse interest”. But at paragraph 83 he continued by explaining that “the authorities would seem to continue to be interested in ex-LTTE members and have been since the end of the war”. However, it was not the Applicant’s case that she was an ex-LTTE member.

25. At paragraph 87 of his report, he did also state that “thus far, the [Applicant] has been detained twice in 2011 and 2013, therefore, clearly adverse interests had clearly been established … [and the Applicant can be re-arrested at any time for the same case, under the PTA”.

26. However, the expert was instructed on the basis that the Applicant was married to someone who was involved in “the” political party and that she was arrested in 2011 after her husband disappeared. There was no evidence that her husband had been politically active in Sri Lanka.

27. At paragraph 20 of his report Dr. Smith also stated that the Applicant “claims to be of adverse interest because the authorities believe that [she] was involved in transporting explosives for the LTTE. This led to [her] detention and ill-treatment on two occasions”. This has never been part of the Applicant’s case.

28. The Respondent addressed the content of the expert report from page 10 of the refusal letter. He noted that the Applicant’s account of her contact with her husband between 2011 until 2013 was inconsistent. He also noted the inaccuracies referred to above in paragraph 27 of this decision. be of adverse interest because the authorities believe that [she] was involved in transporting explosives for the LTTE. This led to [her] detention and ill-treatment on two occasions”. The Respondent also noted that paragraph 96 of his report Dr. Smith had also referred to the Applicant having said that an arrest warrant had been issued in her name. Again, this was not her case. In addition, he noted that in paragraph 47 of his report, the expert referred to the risk

faced by those associated with the TGTE but the Applicant had not claimed any such association.

29. In his decision letter the Respondent clearly gave anxious scrutiny to the expert report but given its factual inaccuracy it was reasonable to give its findings only limited weight.

30. It was also rational for the Respondent to take into account that at paragraph 22 of his report, Dr. Smith accepted that much of the information provided about the circumstances in Sri Lanka was collected over eight years previously. Therefore, his expert opinion was not based on evidence that was before the Upper Tribunal when they considered its country guidance in *GJ and others.*

31. The Respondent also considered the psychological report provided by Georgia Costa, dated 8 April 2018. She concluded that "it is clear that a decision to remove [the Applicant] and her family from the UK at this stage would have devastating effects on her mental health and her risk of suicide would greatly increase. She needs on-going psychological help, ongoing medication and close monitoring"

32. However, as the Respondent noted in his decision that the report did not establish that she would be at risk from the authorities on return to Sri Lanka. Counsel for the Applicant submitted that the fact that she was psychologically vulnerable would place her at risk on return. However, he based his concerns on information provided by the expert about returnees being questioned on return at the airport. However, this information has now been superseded by the evidence provided to the Upper Tribunal in *GJ and Others.* In addition, there was no evidence to suggest that she was of any current interest to the Sri Lankan authorities and would be detained and ill-treated.

33. Counsel for the Applicant also relied on paragraph 51 of Dr. Smith's report where he stated that "scarring is an issue for returned asylum seekers". However, the basis of this assertion was information given to Dr. Smith in May 2004 and since then case law has found that this is not necessarily the case. The current risk categories are

those contained in *GJ and others.*

34. For all of these reasons, I find that the Respondent had considered the Applicant's further representations in detail and with anxious scrutiny and that it was not irrational or unlawful to find that she had not provided any new material which taken together with that previously considered would create a realistic prospect of success before another First-tier Tribunal Judge for the purposes of paragraph 353 of the Immigration Rules was not irrational or unlawful.

Order

(1) The Applicant's claim is refused.

(2) The decision will be formally handed down and, therefore, the attendance of counsel is not required.

Permission to appeal to the Court of Appeal

(3) I refuse permission to appeal to the Court of Appeal because there is no merit in the grounds in the Applicant's claim form or in the oral submissions made at the oral hearing on behalf of the Applicant.

Costs

(4) The Applicant do pay the Respondent's costs in the sum of £4,833 to be assessed in default of agreement.

Nadine Finch

Signed: ______________________________

Upper Tribunal Judge Finch

Dated: 22 **February 2019**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to the above parties on:.

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only.** Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 7 Days** of the date the Tribunal's decision on permission to appeal was given (Civil Procedure Rules Practice Direction 52D 3.3(2)).