Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13713/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 March 2019	**On 1 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

J A M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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.

Representation:

For the Appellant: Ms D Revill, Counsel, instructed by MTC & Co Solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is a challenge by the Appellant, a Sri Lankan national, against the decision of First-tier Tribunal Judge M R Oliver (the judge), promulgated on 24 January 2019, in which he dismissed the Appellant's appeal against the Respondent's refusal, dated 29 November 2018, of his protection and human rights claims.

2. The Appellant had made a previous protection claim in 2014. An appeal against the refusal of this claim was dismissed in 2015. It is right to say that the previous First-tier Tribunal Judge had comprehensively disbelieved the Appellant's account in every material respect. That account had been based on a claim that the Appellant had held a position at the airport in Sri Lanka, a position which he used, albeit unwittingly, to facilitate the departure of LTTE operatives from the country. He had claimed that his role in this had come to light and that he had been detained as a result.

3. Following the dismissal of his appeal, further representations were submitted to the Respondent in October 2018. These relied on the essential assertions put forward in the original claim but raised three additional issues: first, that the Appellant had mental health problems and that evidence relating to these was relevant to whether the findings of the previous judge in 2015 should be departed from; second, that the Appellant had been engaged in diaspora activities in the United Kingdom which would place him at risk on return to Sri Lanka; finally, it was said that the Appellant had provided written evidence to the International Centre for Prevention and Prosecution of Genocide (ICPPG) about his experiences in Sri Lanka, and that this evidence was to be submitted to the United Nations and/or other bodies. In turn, this would place him at risk on return as well.

The judge's decision

4. In essence the judge concluded that the previous findings of the First-tier Tribunal in 2015 stood as the authoritative consideration of the Appellant's original protection claim having regard to the well-known principles set out in Devaseelan. The judge deals with a psychiatric report produced in June 2018, but concludes that this evidence did not have any material bearing on the Appellant's case as a whole. The claimed diaspora activities were regarded as inconsequential.

5. Finally, and importantly in the context of the appeal before me, the judge had regards to a letter from the ICPPG but concludes that there was a considerable difference between any evidence submitted to this organisation and that which might have been presented to the Lessons Learned and Reconciliation Commission (LLRC). On this last point the judge had been referred to the grant of permission by the Court of Appeal in KK (Sri Lanka) [2017] ECWA Civ 2412 in which it was said

that there was force in the argument that individuals who had submitted relevant evidence to United Nations OHCHR Investigation on Sri Lanka (UNOSIL) may fall within a risk category.

The grounds of appeal and grant of permission

6. Three grounds were put forward: that the judge had erred in his consideration of the psychiatric report; that he had erred in his approach to the diaspora activities in the United Kingdom; that the judge had erred in concluding that there was a considerable difference between evidence given to the ICPPG and that presented to the LLRC.

7. Permission was granted by First-tier Tribunal Judge Boyes on 19 February 2019. Significantly, the judge expressly restricted the grant of leave. Whilst grants of leave are sometimes said to be restricted only by reference to comments made in the body of the reasons for the decision, in the present case Judge Boyes clearly stated, above the horizontal line in the decision notice that "Permission to Appeal is Granted on Ground 3 only".

The hearing before me

8. At the outset of the hearing I raised with Ms Revill the issue of the scope of the grant of permission. I indicated that in my view the restricted grant of leave was effective, so to speak, in light of the guidance provided in Safi and others (permission to appeal decisions) [2018] UKUT 00388 (IAC). In addition, it appeared as though there had been no application directly to the Upper Tribunal in respect of the grounds on which Judge Boyes had not granted permission.

9. Ms Revill accepted that the grant of leave was indeed restricted and that there had been, and was, no application to renew grounds 1 and 2. In light of this, she accepted that she was only able to rely on ground 3.

10. However, as Ms Revill acknowledged, the Court of Appeal gave its judgment in the substantive appeal in KK (Sri Lanka) on 1 February 2019 (the full citation being KK (Sri Lanka) [2019] ECWA Civ 59). In light of the Court's conclusions on the question of risk created to individuals who are said to have given evidence to UNOSIL, Ms Revill accepted, with consummate professionalism, that she could not properly offer any arguments in support of ground 3.

11. She confirmed that she had explained the situation to the Appellant in advance of the hearing and that he understood the situation.

12. In light of this stated position I did not need to call on Mr Tarlow for submissions.

Decision on error of law

13. As I announced to the parties at the hearing, there are no material errors of law in the judge's decision.

14. As noted earlier, the grant of leave was properly restricted and the appeal before me could only have ever been argued on the basis of ground 3, namely whether the Appellant would be at risk on return to Sri Lanka on the basis of evidence purported to have been submitted through the ICCPG to the UNOSIL, and whether the judge had erred in his approach to that issue.

15. The relevant passages from KK (Sri Lanka) state:

> "34. Ms Harrison's submissions on this ground can be simply stated. There was no evidence before the F-tT to show the detail of what the Appellant said or wrote to the ICPPG. However, Ms Harrison submits that it would be obvious that the content of anything supplied by the Appellant would in broad terms be hostile or condemnatory of the Sri Lankan authorities and their actions in 2009-10. Although it is impossible to be more specific, I accept that broad proposition. However, it must be qualified by the consideration that the Appellant (and his brother) were found to lack credibility about the traumatic events they say they themselves experienced. That factor might reasonably be thought to reduce the likelihood, at least for the future, that their evidence will be adduced or relied on by anyone.
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> 35. Further, Ms Harrison concedes that even now there is no clear evidence that anything the First Appellant wrote or said will be known or will become known to the Sri Lankan authorities. She emphasises that the "primary purpose" of giving such evidence must be to stimulate further action. However, as will be clear from the passage from *GJ* quoted above in relation to the LRRC, it is only when the identity of the witnesses is known to the Sri Lankan authorities that the relevant risk arises. In the absence of any direct evidence, Ms Harrison's submission was that the known degree of penetration of Tamil opposition groups means that the Government of Sri Lanka would be likely to be aware of the content of anything that the Appellant said or wrote. She was frankly unable to go beyond that broad proposition.
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> …
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> 39. In the course of his judgment in *MP and NT* [2014] EWCA Civ 829, Maurice Kay LJ noted that similar risks to those arising for witnesses to the LLRC might arise for those who wish to or do in fact "give evidence to any future inquiry or investigation", see paragraph 36.
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> 40. He went on to observe:
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> > "37. At the moment, the evidence about these circumstances is understandably vague and speculative. It may well be that, if international pressure were to lead to the establishment of a different form of inquiry, the position would call for further consideration in a case **in which appellants could give and adduce evidence about specific difficulties**." [emphasis added]

> 41. At paragraph 38, Maurice Kay LJ recognised that this might mean that a further potential risk category should be recognised. He took the view that at that stage "The position is either hypothetical, un-evidenced, or both. It may need to be revisited by the UT in the future". I agree with this view. There is material included in the UN OISL report capable of the inference that identified witnesses to the UN inquiry, and potentially to criminal prosecutions or other inquiries, will be at risk. There exists other evidence which might possibly bear the inference that such a risk will persist beyond the recent change of government in Sri Lanka. I stress the word "identified" since that aspect of risk would be consistent with the ruling in *GJ* and accords with common sense. It would seem inherently unlikely that anonymised evidence channelled through one or more submissions from organisations feeding information to such an inquiry as the UN OISL could be a proper basis for establishing the necessary level of risk. I acknowledge that the UN OISL report itself emphasises a continuing risk for those who give such evidence and are identified. That appears to have determined their approach in declining to take evidence from those still in Sri Lanka and in maintaining strict confidentiality and anonymity for those who provided evidence whilst outside the country. However, all of this is for the future if a suitable case or cases arise."

16. It is quite clear that the arguable point offered up in ground 3 is no longer so in light of the Court of Appeal's judgment in KK (Sri Lanka). This is so for a number of reasons, amongst which are the following.

17. First, there was clearly no evidence before the judge to show that any information that may have been provided by the Appellant to ICCPG had *in fact* then been submitted to the UNOSIL.

18. Second, there was nothing to suggest that, even if such evidence had been submitted, that it either appeared in the final report of UNOSIL, or that the Appellant's name was ever stated therein. Indeed, Ms Revill accepted that the relevant report was not even before the judge.

19. Third, any evidence the Appellant might have submitted would of course have had to be assessed in light of the fact, and fact it remained, that his original account of past events in Sri Lanka had been found to be untruthful.

20. Fourth, and in light of the above, even if the judge might potentially have been wrong to believe that evidence submitted to the ICCPG could never lead to a risk on return (if that is indeed what he was concluding), on the facts of the Appellant's case any such error could not have made any material difference to the outcome.

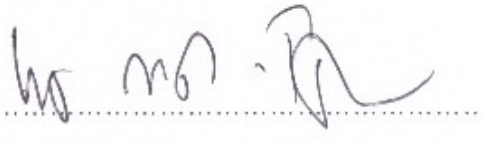
21. Notwithstanding the fact that the substantive judgment in KK (Sri Lanka) postdated the judge's decision, there is clearly no material error in his consideration of this aspect of the Appellant's case.

22. I wish to emphasise my appreciation of Ms Revill's conduct in this appeal.

Notice of Decision

The decision of the First-tier Tribunal does not contain material errors of law and it shall stand.

The Appellant's appeal to the Upper Tribunal is therefore dismissed.

Signed  Date: 28 March 2019

Deputy Upper Tribunal Judge Norton-Taylor