



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

Appeal Number: PA/11697/2017

**THE IMMIGRATION ACTS**

**Heard at Field House via MS Teams  
On 15 November 2021**

**Decision & Reasons  
Promulgated  
On 23 November 2021**

**Before**

**UPPER TRIBUNAL JUDGE KAMARA**

**Between**

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

Appellant

**And**

**GV**

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer

For the Respondent: Mr J Metzger, counsel instructed by Raj Law Solicitors,

**DECISION AND REASONS**

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Scott Baker, promulgated on 3 June 2021. Permission to appeal was granted by First-tier Tribunal Judge SPJ Buchanan on 22 June 2021.

Anonymity

2. An anonymity direction was made previously and is reiterated below because this is a protection matter.

### Background

3. The respondent entered the United Kingdom during 2009 and applied for asylum shortly after arrival. His claim was refused however he was granted discretionary leave until March 2011. He applied, in time, for further leave to remain but on 19 December 2011 he was convicted of the first of a series of offences. This led to a decision to deport him. The respondent's protection and human rights appeal was rejected as a fresh claim and his judicial review application was refused on 12 May 2017. The previous decisions were withdrawn following *Kiarie & Byndloss* and the respondent was provided with a further decision on 23 October 2017, refusing his protection and human rights claim.

### The decision of the First-tier Tribunal

4. Following the hearing before the First-tier Tribunal on 9 March 2021, the appeal was allowed on protection as well as Article 3 grounds. The decision was signed off on 26 May 2021 but not promulgated until 3 June 2021.

### The grounds of appeal

5. The grounds of appeal argued that the judge made a material misdirection of law and or failed to give adequate reasons for findings on a material matter. The grounds contend that the judge failed to resolve a discrepancy in the evidence; that the judge erred in finding that the appellant had a profile with the Sri Lankan government; in relying on the report of Dr Smith, in finding that the respondent's scarring would arouse the suspicions of the Sri Lankan government. In addition, the judge failed to have regard to the recent Sri Lankan Country Guidance case, *KK & RS (Sur place activities: risk: Sri Lanka) CG [2021] UKUT 00130 (IAC)* and had made no separate findings in respect of Article 3.
6. Permission to appeal was granted on the basis sought, with the judge granting permission noting that the Country Guidance case was reported on 27 May 2021, prior to the promulgation of the decision and reasons of the First-tier Tribunal.
7. The respondent did not file a Rule 24 response however, a detailed skeleton argument was submitted on 11 November 2021 which asserted that permission to appeal was granted on only a limited basis.

### The hearing

8. On behalf of the respondent, Mr Metzger accepted that the grant of permission to appeal was not restricted and that he would address the additional points in his oral submissions.

9. Mr Whitwell made the following points. He relied on the grounds of appeal, noting that paragraphs 2-6 had not been addressed in the respondent's skeleton argument. It was accepted that the First-tier Tribunal was seized of the matter when *KK* was promulgated, and the real argument was the extent to which *KK* could have a bearing on the outcome of the appeal. The findings of the judge included that the respondent came from the northern Sri Lanka, that he undertook no activities there and that his activities in the UK were unlikely to have brought him to the attention of the Sri Lankan authorities. In looking at the documentation issue, the judge found that owing to scarring, the convictions for credit card fraud and having family from the north would bring the respondent to the adverse attention of the authorities.
10. Mr Whitwell contended that if the respondent were asked about the scarring, he could be truthful and say it occurred when he was aged 6. *KK*, at [535] made the point that there were changes to the country guidance regarding sur place activities; at [536(4)] it was found that while the Sri Lankan authorities viewed the Tamil diaspora with an adverse mindset, it did "*not regard the entire cohort as either holding separatist views or being politically active in any meaningful way.*" As for the ten factors mentioned at [536(10)] of *KK* regarding sur place political activity, the only one which applied was the respondent's attendance at Heroes' Days. The appeal was allowed under *Gj*, as the judge found that the respondent was likely to be on a stop list. He submitted that the respondent would not be on the general database and would be able to pass through unhindered according to [536(17)] of *KK*. As for the remainder of risk factors, as set out in [536[19-21]], the only relevant one was familial connections. The judge might or might not have come to the same conclusion had *KK* been considered.
11. In response, Mr Metzger commented that the real argument in this appeal related to the country guidance issue and the other grounds were ancillary points, which were more appropriately dealt with under materiality. Addressing those points, Mr Metzger explained that the alleged discrepancy in the evidence mentioned in paragraph 2 of the grounds had been resolved by the judge at [145-148] and she had preferred the appellant's evidence that his father was killed in 2001. The claim made in paragraph 3 of the grounds, that the judge placed weight on Dr Smith's assertions was inaccurate. At [134], the judge noted that Dr Smith's report contained evidence relating to a person other than the respondent and did not place any weight on Dr Smith's views of the respondent's profile. That she reached conclusions which differed to Dr Smith's confirmed that she did not refer to Dr Smith's opinion in relation to the respondent. Addressing paragraph 4 of the grounds, Mr Metzger confirmed that it was not the respondent's case that his sur place activities brought him within a *Gj* category. An attendance at Heroes Day did not give rise to any risk. The core issue in the grounds was set out in paragraphs 5-6, that *KK* was not considered. That this was so did not give rise to a material error. *KK* only tweaked the country guidance, the only change being that if a person had a passport they would not be interviewed. The respondent did not have a

passport and therefore he would be at risk for the same reason under either country guidance case.

12. Responding directly to Mr Whitwell's submissions on *KK*, Mr Metzger argued that there were other reasons why the respondent would be at risk which had not been addressed. These were that the respondent would disclose his political activities to an interviewer, the shrapnel would be a problem in that the inference may be drawn that it arose from involvement in conflict and given that the Sri Lankan authorities operate an authoritarian regime, the respondent might not be believed. Regarding sur place activities, *KK* provided further clarification of a significant political profile at [498] which was relevant, but not determinative in this case. At [499] there is reference to familial connections with the LLTE. Scarring was not considered in *KK*, but it was not disproved as contributing to risk. The judge made core findings that show the appeal would be allowed under *KK*. As for the *HJ (Iran)* principle, addressed at [538] of *KK*, at [163-164] the judge found that the respondent would disclose that he was been involved in anti-government protests in the UK because that history would be discovered upon questioning.
13. Mr Whitwell wished to make no response to Mr Metzger's submissions.
14. At the end of the hearing, I reserved my decision.

#### Decision on error of law

15. I will briefly address the contentions in paragraphs 2 to 4 of the grounds. It suffices to say that the claims therein are inaccurate for the reasons explained by Mr Metzger during his submissions. I note that Mr Whitwell had no further submissions on those, or any other, points. As for paragraphs 5 and 6, regarding the respondent's scarring, the grounds relied on [267] of *GJ*, with reliance on the evidence of Dr Smith that scarring was only relevant when a person was detained for other reasons. This argument failed to address the fact that the scar is on the respondent's head and thus immediately visible whether, or not he was detained for other reasons.
16. As accepted by both representatives, the real argument in this case is regarding the country guidance decision of *KK* which was promulgated during the short delay between the First-tier Tribunal judge signing off the decision and reasons and it being promulgated. *NA (Libya)* [2017] EWCA Civ 143 is authority for the proposition that it is an error of law not to follow a new country guidance decision which is promulgated before that of the First-tier Tribunal. The question here is therefore, whether the decision of the First-tier Tribunal disclosed a material error of law. I find that it did not for the following reasons.

17. The starting point is that the new country guidance in *KK* confirmed that GJ still accurately reflected the situation facing returnees to Sri Lanka, but that clarification and supplementation of the existing guidance with particular reference to sur place activities was required. It is the respondent's case that no strong reliance is placed on his minimal diaspora activities which appear to go no further than occasional attendance at demonstrations and protests in the UK. As can be seen from [159] of the decision under appeal, the judge found that it was unlikely that the respondent's activities had come to the attention of the Sri Lankan authorities.
18. *KK* (headnote 9) confirmed that interviews at the Sri Lankan High Commission continue to take place for those requiring a Temporary Travel Document. The First-tier Tribunal found, at [161], that the respondent entered the UK using a false identity and that he would be required to attend the Sri Lankan High Commission for a travel document. The judge concluded that there were sufficient factors in the respondent's circumstances that would place him at risk if returned to Sri Lanka. Those factors included the following. The respondent's place of birth which is in Valvettithurai the area where Prabhakaran and other LTTE leaders were born. The involvement of the respondent's sisters in the LTTE (they were inspired to join after the death of the respondent's father who was himself implicated in the LTTE [144-156]). There was a large scar on the respondent's head because of a childhood shrapnel injury and that an adverse inference might be drawn that it occurred while he was fighting for the LTTE.
19. It is worth mentioning at this stage that the unchallenged medical evidence before the First-tier Tribunal showed that the respondent has epilepsy, PTSD, depression, frontal lobe syndrome as well as an organic personality disorder and is thus particularly vulnerable. The judge took into consideration that the respondent had twice been convicted of credit card fraud and there might be suspicion on the part of the Sri Lankan authorities that he was raising funds for the LTTE. It was likely that the respondent would be asked what he had been doing in the UK and would disclose that he has been involved in protests against the Sri Lankan government. The judge considered that the aforementioned factors would mean that there would be a considerable amount of information about the respondent which would be available in Sri Lanka and that the fact that the respondent was being deported rather than merely removed would increase the risk of questioning.
20. The judge found that the risk to the respondent would materialise immediately upon his removal to Sri Lanka where he was likely to be detained based on a perception of links to the LTTE and thereafter he would be at risk of persecution. Headnote 1 of *KK* states that the "*core focus*" of the Sri Lankan government is to prevent any potential resurgence of a separatist movement and that it remains an authoritarian regime with an extensive intelligence-gathering capability.

21. The judge's findings were consistent with *KK* and even had the guidance in *KK* been considered by the First-tier Tribunal, the appeal would have been allowed in any event. As confirmed in the headnote of *KK*, *GJ* remains an accurate reflection of the situation facing returnees in Sri Lanka. The judge's finding that the respondent would be questioned by the Sri Lankan High Commission is not disturbed by any of the findings in *KK*. Nor are the factors mentioned above which the judge found gave rise to a risk in this case. The inclusion in *KK* of the *HJ(Iran)* principles would have made no difference in this case because the judge considered, in detail, what the respondent would be expected to state in an interview.
22. This was a careful, thorough, and highly detailed decision by the First-tier Tribunal, which contains no material error of law.

### **Decision**

**The making of the decision of the First-tier Tribunal did not involve the making of an error of on a point of law.**

**The decision of the First-tier Tribunal is upheld.**

### **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 their 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:

Date 17 November 2021

Upper Tribunal Judge Kamara

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#### **NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the

Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).**

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

**5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**

**6. The date when the decision is “sent’ is that appearing on the covering letter or covering email**