IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07489/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 15th February 2022	**On the 21 March 2022**

Before

THE HONOURABLE MRS JUSTICE ALISON FOSTER
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
and
UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ML
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr N Paramjorthy, Counsel instructed via Direct Access

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department ("the appellant"), against a decision of Judge of the First-tier Tribunal Anthony Higgins ("the judge"), promulgated on 3rd August 2021,

allowing the appeal of ML ("the respondent") against the appellant's decision of 19 June 2017 to refuse his protection claim.

Background

2. The respondent is a national of Sri Lanka. He is a Tamil. He arrived in this country on 27th October 2009 as a student with leave valid until 21st January 2013. He made a protection claim on 18 January 2013 on the basis that he would be perceived by the Sri Lankan authorities as someone who was involved with the Liberation Tigers of Tamil Eelam ("LTTE"). His protection claim was refused and an appeal against that refusal was dismissed by Judge of the First-tier Tribunal Cohen on 25th March 2015. Judge Cohen did not find the respondent to be a credible witness and concluded that he fabricated his protection claim. Judge Cohen found that the respondent's motivation in coming to the UK was likely to have been economic betterment. The respondent's attempt to appeal the decision of Judge Cohen were unsuccessful.

3. On 9th July 2014 the respondent was convicted of offences relating to theft from a person, attempted theft from a person, and going equipped for theft. This last offence related to his possession of a device for 'skimming' (harvesting data from) credit cards. The respondent received a sentence of nine months' imprisonment suspended for two years. On 9th December 2016 the respondent was found guilty of a similar offence and was sentenced to fifteen months' imprisonment. The previous suspended sentence was activated.

4. In light of the respondent's convictions a decision to make a deportation order was issued against him on 4 January 2017. In response to this the respondent made further representations based on his sur place political activities in the UK that were eventually treated by the appellant as a fresh protection claim. That fresh claim was however refused, and a deportation order was made on 20 June 2017. The appellant did not accept that the respondent's participation in various demonstrations associated with the Transnational Government of Tamil Eelam ("TGTE") and an organisation called 'Parai - Voice of Revolution' ("Parai") would expose him to a real risk of persecution if he were deported to Sri Lanka. The respondent exercised his right of appeal against the refusal of his protection claim pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The decision of the First-tier Tribunal

5. The appeal was heard remotely by CVP on 26 July 2021. The sole basis advanced by the respondent before the First-tier Tribunal was that his removal would breach the UK's obligations under the Refugee Convention based on his sur place activities. The judge had before him bundles of documents provided both by the appellant and the respondent. The judge heard oral evidence from the respondent and from Mr Yogalingam, who was one of the TGTE's 'MPs' in the UK and

formerly a Deputy Minister responsible for Sport and Community Health within the TGTE.

6. The judge summarised the evidence from Mr Yogalingam at paragraphs 19 and 20 of his decision. This included evidence, *inter alia*, that the respondent had been a member of Parai in 2014, that he was involved with the TGTE as a coordinator at various events, that he helped the organisation in relation to blood donation campaigns, that he oversaw the efforts of volunteers who collected signatures for a petition that Sri Lanka be referred to the International Criminal Court, that he had been involved as a coordinator of civil protests including an infamous protest on 4th February 2018 outside the Sri Lanka High Commission, that the respondent had distributed leaflets in support of the TGTE, and that he had been the principal organiser of a protest at the Oval cricket ground against the Sri Lankan cricket team where he (the respondent) had addressed a crowd of 100 or so demonstrators.

7. The judge then referred to the relevant Country Guidance ("CG") case, **KK and RS (Sur place activities: risk) Sri Lanka CG [2021] UKUT 00130 (IAC)**. The judge accurately set out the relevant headnotes in **KK and RS** that gave guidance on the factors that would need to be considered when determining whether a returnee would face at real risk of persecution in Sri Lanka. In particular, at paragraph 38 the judge set out the factors identified in **KK and RS** that were relevant when determining whether a returnee would face a real risk of persecution because they would be perceived as having a 'significant role' in an organisation that espoused a separatist ideology. Under the heading "Findings of Fact" the judge accurately directed himself in respect of the relevant burden and standard of proof and then, although without making express reference to **Devaseelan [2002] UKIAT 00702**, he approached the decision of Judge Cohen as his starting point. The judge noted both the adverse findings by Judge Cohen and that Mr Paramjorthy, who represented the respondent, was not inviting the judge to depart from Judge Cohen's findings.

8. At paragraph 42 the judge commenced his assessment of the respondent's sur place activities and, in so doing, took account of the respondent's dishonesty, making reference again to his criminality. The judge noted however that the respondent's evidence was supported by other evidence, including that of Mr Yogalingam. The judge referred to a large number of photographs showing the respondent at various demonstrations and the evidence from by Mr Yogalingam as to his personal knowledge of the respondent's activities with the TGTE. At paragraph 43 the judge accepted that the respondent had been a member of Parai. The judge also accepted that the respondent had attended the events that Mr Yogalingam said he had attended. The judge had no reason to doubt Mr Yogalingam's evidence that the respondent was a coordinator or sub-coordinator at

a significant number of events and that he was a regular attendee at the TGTE Sunday meetings until they were suspended in early 2020 due to COVID. Mr Yogalingam again confirmed, as noted by the judge, that the respondent had been present at the demonstration on 4th February 2018 and that he made a brief speech to other demonstrators outside the Oval.

9. At paragraph 44 the judge noted that the respondent's passport was likely to have expired given that he was last admitted to the UK in 2009 and that the respondent would consequently be expected to attend for interview at the High Commission in order to obtain a Temporary Travel Document ("TTD"). There has been no challenge to this finding. At paragraph 45 the judge found it reasonably likely that, if the respondent did have to attend an interview, he would be asked about activities he undertook in the UK or about organisations with which he had been involved. The judge properly noted that the respondent would be expected to answer any such questions truthfully. At paragraph 46 the judge concluded, having regard to the evidence of the respondent's sur place activities and the guidance in **KK and RS**, that there was a real risk that the respondent's name or details would already exist in a database held by the Sri Lankan authorities and that the Sri Lankan authorities would consequently perceive him as having a significant role with the TGTE.

10. At paragraph 47 the judge rejected the respondent's claim that the Sri Lankan authorities had been to his family's home after December 2017. The judge found this aspect of the respondent's evidence to be an embellishment. At paragraph 48, under the heading "The appeal on the ground that the appellant's removal would breach the UK's obligations under the Refugee Convention", the judge asked himself whether there was a real risk that the respondent would be perceived by the Sri Lankan authorities as having a significant role in Tamil separatism with the consequence that his name would be added to the 'watch list' and he would be arrested and ill-treated after negotiating the airport. At paragraph 49 the judge applied the guidance set out in **KK and RS** to the facts of the instant case. The judge found that four of the six relevant risk factors were present. These concerned the nature of the organisation to which the respondent belonged, the type of activities he had undertaken in its name, the extent of those activities and the duration of those activities. The judge found, bearing in mind that the respondent had demonstrated involvement with the TGTE since 2014, the fact that it was a proscribed organisation, and the fact that the respondent had coordinated the efforts of other volunteers and had therefore outwardly demonstrated commitment to the cause of Tamil separatism, that there was a real risk that he would suffer persecution at the hands of the Sri Lankan government if deported.

11. At paragraph 50 the judge indicated, in the alternative, that if he was wrong in his previous assessment the respondent would nevertheless

face a real risk of persecution on the basis of the principles established in **HJ (Iran) [2010] UKSC 31**. This was because the judge was in no doubt as to the strength of the respondent's commitment to the separatist cause and that he would be reluctant to espouse his commitment in Sri Lanka for fear of being persecuted. The appeal was allowed.

The challenge to the judge's decision

12. The appellant's challenge to the judge's decision is essentially based on two grounds. The first ground challenges the judge's finding that the respondent had a genuine interest in separatism and that he would therefore be at risk on **HJ (Iran)** principles. The appellant contends that, in finding that the respondent has a genuine commitment to Tamil separatism, there was insufficient consideration by the judge of the respondent's proven dishonesty, the fact that he fabricated events in his first asylum claim, that he had criminal convictions in relation to his dishonesty, and that the judge himself rejected as incredible aspects of the respondent's evidence not considered by Judge Cohen.

13. The second ground of challenge contends that the judge erred in his approach to the evidence from Mr Yogalingam. It asserts that the judge "has simply accepted the evidence of Mr Yogalingham, who gave evidence in the recent Country Guidance appeal of **KK and RS**, that the [respondent] was a committed activist and organiser." The second ground contends "… that it would follow that if the Sri Lankan authorities had any interest in this [respondent] they would have contacted his family members within Sri Lanka." This ground cites two extracts from **KK and RS**, at paragraphs 308 and 468 of the CG decision. At paragraph 308 the CG panel found there was a lack of anecdotal evidence to support an assertion by Mr Yogalingam that anyone attending TGTE events who was then returned to Sri Lanka would be at risk. At paragraph 468 the CG panel referred to the evidence from two experts, Dr Nadarajah and Professor Gunaratna, who were unaware of examples of returnees who might have been linked to the TGTE being targeted. Permission to appeal was granted by the First-tier Tribunal on those grounds.

14. At the 'error of law' hearing before us Mr Melvin made submissions on behalf of the appellant in reliance on both the grounds upon which permission was granted (which he settled), and also in reliance on a skeleton argument settled by another Presenting Officer and filed on 3 February 2022. We expressed our concern at the outset of the 'error of law' hearing that the skeleton argument effectively advanced two further self-contained grounds that were not identified in the initial grounds. The first challenged the weight that the judge attached to photographs showing the respondent at certain events in circumstances where the judge had observed that it was rarely apparent when and where the events took place. The second

additional ground related to comments made by the judge in respect of his own knowledge of Parai which were based upon previous Sri Lankan protection cases heard by him. There was no application to amend the original grounds.

15. Mr Melvin submitted that the further grounds advanced in the skeleton argument were merely an extension of what was already contained in the original grounds. We do not accept that submission. They are self-evidently new and independent challenges that could have been contained in the original grounds but were not. No explanation was advanced as to why there had been no application to amend the grounds. In these circumstances the Tribunal refused to allow the appellant to amend her grounds. The Tribunal must once again deprecate the practice of parties of advancing new grounds in skeleton arguments that are not contained in the original grounds. The Tribunal reminds all parties of the need for procedural rigour in public law litigation, see **Talpada v Secretary of State for the Home Department [2018] EWCA Civ 841**.

Discussion

16. The first ground of appeal relates to the alternative finding by the judge that, if he was wrong in finding that the respondent would be at risk after his arrival in Sri Lanka because of a perception held by the Sri Lankan authorities that he had a significant role in Tamil separatism, then he would be at risk on **HJ (Iran)** principles. Any challenge to that alternative finding will however fall away if the judge was entitled to his principal finding. It is therefore appropriate to consider whether the judge's principal finding involved the making of an error on a point of law.

17. In assessing the approach of the judge to the evidence from Mr Yogalingam we first note that there has been no challenge in the grounds of appeal to the judge's findings as to the actual nature and extent of the respondent's sur place activities and involvement with the TGTE, as opposed to the issue of whether that involvement was genuinely motivated by a desire to see a separate Tamil homeland. We find the assertion in the grounds of appeal that, if the Sri Lankan authorities believed the respondent was a committed activist and organiser then they would have contacted his family in Sri Lanka, to be wholly speculative and without evidential foundation. There is nothing in **KK and RS** to support the appellant's assertion. The two appellants in the CG decision were found to have well-founded fears of persecution despite the absence of any evidence that their respective family members had been contacted by the Sri Lankan authorities.

18. In making his argument that the judge had accepted the evidence of Mr Yogalingam uncritically, and that such evidence was in any event not reliable, or did not support the appellant's case, Mr Melvin relied

on an extract from paragraph 308 of **KK and RS** where the CG panel commented on certain of the evidence given by Mr Yogalingam in that case. This passage reads in full:

> "We accept his evidence that the TGTE does not maintain any records of supporters who have been returned to Sri Lanka. The organisation (at least in respect of its operations in the United Kingdom) simply does not know how many, if any, supporters have in fact been returned. Our initial reaction to this evidence was one of surprise: collecting some form of information on the fate of its supporters would seem to be an exercise that the TGTE would wish to engage in. On reflection, our initial response is somewhat tempered by Mr Yogalingam's explanation that people would be afraid of contacting his organisation from within Sri Lanka, a consideration that found support from Dr Smith. Although individuals had contacted Dr Smith from Sri Lanka, he stands in a different position to that of a proscribed organisation. The same is true of Dr Nadarajah who has confirmed that he remains in communication (using WhatsApp) with contacts in the country in order to keep abreast of developments. Notwithstanding this, it is relevant that the TGTE has not even sought to make contact with returnees or their families (whether in Sri Lanka or the diaspora) by using, for example, encrypted communication platforms such as WhatsApp or Signal in order to obtain information. In turn, the lack of anecdotal evidence undermines Mr Yogalingam's assertion that anyone attending TGTE events who is then returned to Sri Lanka will be at risk."

19. In that case the CG panel had found Mr Yogalingam's evidence to be candid in respect of KK and RS's involvement with the TGTE (paragraph 307), and that there had been no attempt by Mr Yogalingam to exaggerate their involvement (paragraph 308). In paragraph 308 the CG panel were making a general point on the absence of evidence from the TGTE itself in respect of returnees who were associated with the organisation, the TGTE's explanation being that people would be afraid to contact it. This was one of a number of material elements that the CG panel took into account. The extract does not support the proposition advanced in the grounds that the Sri Lankan authorities would communicate with a person's family if they considered that person to have a significant role in pro-separatist organisations.

20. Likewise, the appellant's reliance in isolation on the extract of paragraph 468 of **KK and RS**, dealing with the evidence of Dr Nadarajah and Professor Gunaratna, must be considered in its proper context. Read properly and in full, the material the appellant relied on does not support the case she advances. Paragraph 468 reads:

> "Dr Nadarajah's lack of information on what may have in fact happened to returnees was, he told us, based on the absence of data. Professor Gunaratna accepted that he was unaware of any examples of returnees who might have been linked to the TGTE, which is consistent with the general absence of evidence on this important issue."

21. Paragraph 468 appears in a section under the general heading "The assessment of an individual's profile" (see paragraph 433 et seq). In this section the CG panel considered in detail the nature of the sur place activities that are likely to lead to the Sri Lankan authorities perceiving a returnee as having a significant role in Tamil separatism. In the paragraphs preceding paragraph 468 the CG panel considered the nature and degree of involvement in sur place activities that may establish a real risk of persecution.

22. From paragraphs 473 onwards of **KK and RS** the CG panel identified both the contextual factors and the specific factors relevant to determining the substance of the phrase 'significant role'. This included the nature of the organisations involved (paragraph 477), the type of activities undertaken by the person (paragraph 482), the extent of the person's activities including the number of demonstrations attended and the person's role at the demonstrations (paragraph 486), and the duration of the person's activities (paragraph 493). These specific factors were to be considered in the context of the CG panel's earlier findings that the Tamil Diaspora is heavily penetrated by the security forces in Sri Lanka and that that Sri Lankan authorities operate an extensive intelligence-gathering regime (paragraphs 403 to 410), and in light of the fact that interviews will be conducted in the UK with those needing a TTD (paragraphs 411 to 416). (We note again that there was no challenge to the judge's finding that the respondent would need a TTD and would need to attend an interview).

23. The judge however approached this material correctly. At paragraph 48 of his decision the judge asked himself the correct legal question, and at paragraph 49 the judge properly applied the guidance set out in **KK and RS**, as summarised above, to the facts found by him. In her grounds of appeal the appellant is essentially trying to side-step the assessment made in **KK and RS** or to re-argue the CG case by relying on a few select excerpts where the CG panel was critical of some of the elements of the evidence before it. The appellant has not done what the judge demonstrably did do, which was to rely on the actual CG elements to evaluate whether this particular individual would face a real risk of being perceived as having a significant role in Tamil separatism. We find there is no merit in the second ground of challenge. That being so, the challenge to the judge's alternative finding can have no material bearing on his decision to allow the appeal.

24. Although we have refused the appellant permission to amend her grounds to include the additional discreet grounds of challenge contained in her skeleton argument, we will nevertheless, for the sake of completeness, consider those additional grounds.

25. In relation to the first additional ground, in our judgment the judge was rationally entitled to rely on the photographic evidence showing

the respondent attending demonstrations even if it was rarely apparent when and where the events took place. This is because the judge found that the respondent's evidence was independently supported by that of Mr Yogalingam, including Mr Yogalingham's evidence relating to demonstrations and events that he himself attended. We note that the appellant had already accepted the respondent's presence at TGTE gatherings as she referred to this in her Reasons for Refusal Letter, and we note that no challenge was made to Mr Yogalingam's personal credibility. The appellant also contends that the judge failed to consider the previous adverse credibility findings made against the respondent and the judge's own findings rejecting the respondent's claim that the Sri Lankan authorities had visited his family. The judge however demonstrably took account of the respondent's dishonesty in assessing the nature and extent of his sur place activities (paragraph 42).

26. In her second additional ground the appellant contends that the judge impermissibly relied on evidence from other cases in which he had been involved in respect of the nature and activities of the organisation Parai. The appellant has not however suggested that the judge's description of Parai was inaccurate, and she has not produced any evidence to this effect. The appellant's bundle of documents prepared for the First-tier Tribunal contained several Internet screenshots relating to Parai that clearly indicated that the group had aligned itself with Tamil separatism. The appellant has not shown that the judge's comments in relation to this organisation were arguably capable of materially undermining the sustainability of his decision. In any event, the judge found that the respondent had been involved with the TGTE to a significant extent as a coordinator of events, as a regular attendee at meetings and demonstrations and, on one occasion, as a speaker (paragraph 43). At paragraph 46 the judge found there was a real possibility that the respondent was already on a Sri Lankan government database given the degree of his involvement with the organisation and bearing in mind that the TGTE is a proscribed organisation. The judge noted that the respondent had been active on behalf of the TGTE for seven years and had played a part of organising and stewarding its public events. This finding is entirely separate from the question of whether the respondent was genuinely motivated by a desire to see a Tamil homeland. This assessment was based on the respondent's TGTE involvement, not on any involvement with the organisation Parai. In these circumstances any error in the judge's observations relating to his knowledge of Paria gained through previous cases could not have materially affected his ultimate decision.

27. For these reasons, we find that the appellant has not identified any material legal error that would require the First-tier Tribunal's decision to be set aside, and we dismiss the appellant's appeal.

Notice of Decision

The appeal by the Secretary of State for the Home Department is dismissed

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.

D.Blum
Signed

25 February 2022
Date

Upper Tribunal Judge Blum