Neutral Citation Number: [2019] EWCA Civ 1796

Case No: C5/2015/0972

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Deputy Upper Tribunal Judge Lindsley
Appeal Number AA/04981/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2019

Before:

LORD JUSTICE FLOYD
LADY JUSTICE KING
and
LORD JUSTICE HENDERSON

- -

Between:

RS (SRI LANKA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Patrick Lewis (instructed by **Birnberg Peirce**) for the **Appellant**
Claire van Overdijk (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date: 15 October 2019

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Approved Judgment

Lord Justice Floyd:

1. RS is a Sri Lankan citizen who came to the UK in May 2013 and immediately claimed asylum. He had been detained in Sri Lanka from shortly after the civil war ended in May 2009. Whilst in detention he had been tortured on account of his association with the Tamil separatist organisation, the LTTE. In December 2010, after 18 months in detention, he escaped by concealing himself in a removable cesspit with the aid of those responsible for emptying it. He went into hiding, but eventually succeeded in traveling to the UK via India on forged papers.

2. On 8 July 2014 RS's asylum application was refused. The following day the Secretary of State issued a "notice of refusal of leave to enter" which, it is common ground, amounted to an appealable immigration decision under the Nationality, Immigration and Asylum Act 2002. RS appealed to the First-Tier Tribunal (FTT), but in a decision issued on 22 August 2014 FTT Judge Rose dismissed his appeal. He then appealed further to the Upper Tribunal (Immigration and Asylum Chamber) ("UT") where Deputy UT Judge Lindsley affirmed the decision of Judge Rose and dismissed his appeal. The final determination of his application for permission to appeal to this court was stayed because it was thought that his appeal involved an issue which was to be considered by the Supreme Court in the case of *MP (Sri Lanka)*. On 22 June 2016 the Supreme Court decided to refer the question in *MP (Sri Lanka)* to the Court of Justice of the European Union: see [2016] UKSC 32. Subsequently it was appreciated that the issues in the present case would not be affected by the decision in *MP (Sri Lanka)* and the stay was lifted. Permission to appeal was ultimately granted by Sir Patrick Elias at an oral hearing on 4 February 2019. The grant of permission was limited to two specific grounds, only one of which was developed in any detail before us. The issue raised by that ground is whether the FTT and UT made a material error of law in failing to give weight to the fact that RS had escaped from custody.

The facts in more detail

3. The following facts were found by the FTT or were common ground before it:

   i) RS was a member of the LTTE between 1995 and 2009, although in the peaceful period from 2004 to 2006 he worked for an engineering company.

   ii) He was a low-level member of the LTTE. He worked for the finance division, undertaking vehicle maintenance. The work involved sending food, weapons and supplies with vehicles, arranging transport within the LTTE, picking up damaged vehicles and maintaining them and making armoured trucks for the LTTE. He also helped injured civilians by taking them to medical institutions for treatment.

   iii) In 2009 he was captured by the Sri Lankan army.

   iv) Whilst in detention he was tortured.

   v) Although many detainees were being released in the period before and after January 2011, RS could not reasonably be expected to have known that there would be a progressive release of detainees.

vi) RS had given a credible account of how he escaped from the camp in which he was being held in December 2010 by concealing himself in a cesspit. He had been assisted by the cesspit emptier who was responsible for emptying the cesspits at several camps. His uncle, who had visited him in the camp, had assisted him and had been in contact with the cesspit emptier.

vii) Whilst he was staying with relatives in July 2011 army officers from a nearby camp came to search for "escapees", but he was not found. The account given by RS did not indicate that army officers had identified RS in particular as the object of their search before they came.

4. The FTT did not make findings about the extent of injury which RS suffered at the hands of his torturers, but had before it a detailed report of a medical practitioner which expressed the view that his multiple scars were highly consistent with having been inflicted by blows from an iron bar, a long wooden stick, a thick cable, a rifle butt, a fall and shrapnel wounds. The medical practitioner's view was that the overall picture presented by RS's scars was strong evidence of the trauma and torture which he had described. The Secretary of State accepted in her refusal letter that this report "holds a lot of weight". She accordingly accepted that RS was tortured by the Sri Lankan army due to his being a member of the LTTE.

GJ and others

5. In *GJ and others (post-civil war returnees) Sri Lanka* [2013] UKUT 319 (IAC) ("*GJ*") the Upper Tribunal gave country guidance on the risk of persecution or serious harm on return to Sri Lanka. It did so on the basis of extensive consideration of expert evidence and documentary material. The guidance is recorded in paragraph 356 of the decision as follows:

> "(1) This determination replaces all existing country guidance on Sri Lanka.
>
> (2) The focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009. The LTTE in Sri Lanka itself is a spent force and there have been no terrorist incidents since the end of the civil war.
>
> (3) The government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state enshrined in Amendment 6(1) to the Sri Lankan Constitution in 1983, which prohibits the 'violation of territorial integrity' of Sri Lanka. Its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka.
>
> (4) If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.

(5) Internal relocation is not an option within Sri Lanka for a person at real risk from the Sri Lankan authorities, since the government now controls the whole of Sri Lanka and Tamils are required to return to a named address after passing through the airport.

(6) There are no detention facilities at the airport. Only those whose names appear on a "stop" list will be detained from the airport. Any risk for those in whom the Sri Lankan authorities are or become interested exists not at the airport, but after arrival in their home area, where their arrival will be verified by the CID or police within a few days.

(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 [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.

(b) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government.

(c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.

(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.

(8) The Sri Lankan authorities' approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and

> also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war. In post-conflict Sri Lanka, an individual's past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government.
>
> (9) The authorities maintain a computerised intelligence-led "watch" list. A person whose name appears on a "watch" list is not reasonably likely to be detained at the airport but will be monitored by the security services after his or her return. If that monitoring does not indicate that such a person is a Tamil activist working to destabilise the unitary Sri Lankan state or revive the internal armed conflict, the individual in question is not, in general, reasonably likely to be detained by the security forces. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual.
>
> (10) Consideration must always be given to whether, in the light of an individual's activities and responsibilities during the civil war, the exclusion clauses are engaged (Article 1F of the Refugee Convention and Article 12(2) of the Qualification Directive). Regard should be had to the categories for exclusion set out in the "Eligibility Guidelines For Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", published by UNHCR on 21 December 2012."

6. Amongst the evidence which the UT heard in *GJ* was that of Mr Anton Punethanayagam who was a barrister who had practised at the Sri Lankan Bar in both Colombo and Vavuniya. He had represented over 3000 detainees over a period of 20 years. He was Vice-Chairman of the Vavuniya branch of the Sri Lankan Red Cross, President of the Vavuniya Bar Association, a Member of the Bar Council and the Legal Aid Committee of the Sri Lankan Bar Association, President of the Vavuniya Prison Welfare Association, a magistrate and a Justice of the Peace. His standing in the legal community in Sri Lanka was described by the UT as "high". The UT recorded at [275] that his evidence on the process of bribery was particularly useful. The UT did not hear Mr Punethanayagam give oral evidence, and stated that, in its view, some of his evidence went beyond what he could be taken to know for himself. Not surprisingly, however, given his status and experience, they said that "where his evidence concerns the criminal processes in Sri Lanka, we consider that it is useful and reliable". At paragraph 27 of his evidence he said this:

> "27. The bribery is very common in the IDP camps as well as the detention centers from which even known LTTE leaders have managed to escape on payment of bribes. Hence it cannot be argued that only people of low interest to the authorities are able to secure their release through a bribe. In my opinion, it is plausible that the detainee was released following the payment of a bribe, even if of significant adverse interest to the authorities. It is unlikely that the person who accepts the bribe would access the detainee's record and change them as released

> or no longer wanted. **Hence such cases would normally be recorded as escaped from detention in the database of the Police. Subsequently an absconder action will be commenced and the detainee's details would be passed to the National Intelligence Bureau.**" (emphasis added).

7. The UT observed at [147] that Mr Punethanayagam's opinion that absconder action would be commenced after a person was released on payment of a bribe "was not sourced". This is explained further at paragraph 16 of Appendix K to the decision, where the UT describes the reference in paragraph 27 of Mr Punethanayagam's evidence to the actions of the person obtaining the release of the detainee as "speculation". In other words, Mr Punethanayagam was not in a position to say whether those who accepted bribes would or would not be in a position to alter the records of the absconder. Nevertheless, given the weight which the UT attached to Mr Punethanayagam's opinion as to "criminal processes" and his extensive experience of acting for detainees (including acting for 30 clients who had contacted him after having left Sri Lanka when of adverse interest using bribery), I do not read these observations of the UT as casting significant doubt on the proposition that persons who are recorded as having escaped detention would be the subject of absconder action. That, after all, is exactly what one would expect.

8. The UT in *GJ* also received evidence from a Dr Chris Smith, who was an Associate Fellow of the Royal Institute for International Affairs, Chatham House, London; a Visiting Fellow at the Institute of Commonwealth Studies, London and a Visiting Fellow in the Department of Politics at the University of Bristol. Until January 2005 he was the Deputy Director at the International Policy Institute, King's College London where he worked predominantly on security issues in South Asia over the past two decades. He had delivered many academic papers and lectures on Sri Lanka and in particular on the security sector there. Between 1992 and 2005 Dr Smith advised policy makers on Sri Lanka, including the Foreign and Commonwealth Office, the British High Commission in Sri Lanka, the Ministry of Defence and the Department for International Development. In 2002 Dr Smith was a technical advisor to the Government of Sri Lanka's Defence Review Committee. He had given evidence in previous country guidance cases. He had visited Sri Lanka on five occasions since October 2009, for a month or more on each occasion. He last visited Sri Lanka in November and December 2012 in preparation for his evidence in *GJ*.

9. Dr Smith gave evidence that the recording of a person as having escaped would lead to the issue of an arrest warrant: see paragraph 13 of his evidence in Appendix J. The UT did not comment on this aspect of his evidence, but it is, again, no more than one would ordinarily expect.

The Country of Origin Information Report

10. Paragraph 25.32 of the March 2012 Country of Origin Information (COI) Report for Sri Lanka issued by the UKBA contains extracts from a Foreign & Commonwealth Office (FCO) Report on the FCO information gathering visit to Colombo in August 2009. The extracts relate to whether specific factors would affect the way in which an individual is treated at the airport. One of the extracts reads:

> "If an individual has jumped bail/escaped from custody. The senior intelligence official said that the person would be produced at Court. The Superintendent Police, Criminal Investigations Department (CID) agreed. The representative from Centre for Policy Alternatives said that the individual would definitely be stopped."

11. This material was not drawn to the attention of the FTT or the UT. It plainly should have been. The relevant authorities were summarised in *UB (Sri Lanka) v SSHD* [2017] EWCA Civ 85 at [15] to [22]. The duty to ensure that such material is before the decision-maker is a duty which falls on the Secretary of State. It applies whether or not the material is available to the public, because the question of whether a person should be returned to a country where he or she may face a risk of persecution or serious harm should not depend on the diligence of legal representatives.

The decision of the FTT

12. The FTT directed itself by reference to *GJ*. At paragraph 22, the FTT recorded RS's case as including the following:

> "The Appellant would be of interest to the authorities, and he would not be able to move freely around Sri Lanka without detention. There was a risk that, because of his past and his profile, he would be detained. He came within the criteria set out in subparagraph 356(7)(a) of the determination in *GJ (Sri Lanka)*, as an individual who was or would be perceived to be a threat to the integrity of Sri Lanka as a single state. It was also relevant to have regard to subparagraph 356(8). If questioned, the Appellant's views would become known. The appellant was an escapee, and he was effectively a wanted man. He had been sought in July 2011, even though the Sri Lankan government had previously said they were releasing LTTE fighters and members. If he was on a watch list, he would be monitored and detained."

13. The FTT (at [43] of its decision) rejected the suggestion that RS, as a low-level member of the LTTE, would be of continuing interest to the authorities, notwithstanding that he had escaped from detention. The FTT said:

> "Whilst it is plausible that he escaped from detention in 2010 as he maintained, **it does not follow that he would now be of interest to the authorities in consequence of that escape**, having regard to the country evidence as to the release of many of those detained because they were members of the LTTE, and the country guidance as to the present focus of the Sri Lankan government's concern." (emphasis added).

14. At [44] the FTT observed that the only evidence of any weight that the authorities were attempting to find RS was the search made at the house of his relatives, which was based on information that "escapees" were living there. The FTT had already

found that this incident did not show that the "Sri Lankan authorities were actively seeking [RS] or that he was a person of interest to them". The FTT continued:

> "I was given no reason to find that there is any reasonable likelihood that a Court order or arrest warrant has been issued, and that accordingly his name would be on a "stop" list at the airport. Even if he were on a "watch" list on the airport computers, that would not prevent him from passing through the airport on his return, and, as noted in *GJ (Sri Lanka)* at paragraph 431, the fact that he would subsequently be monitored does not of itself engage international protection."

15. The FTT recorded at [45] that RS had no history of other political involvement in Sri Lanka and (with one exception) had not engaged in any political activities in the UK.

16. On this basis the FTT concluded at [48] that it was not satisfied that there was any reasonable likelihood that the Sri Lankan authorities would now regard RS as a threat to the integrity of Sri Lanka as a separate state, or that he has been or would be perceived as having a significant role in relation to post conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka. He had not therefore established that there were substantial grounds for believing that he qualified as a refugee.

The decision of the UT

17. RS's appeal to the UT was argued, amongst other grounds, on the basis RS would be perceived to be of interest:

> "due to his significant period of detention and torture; that he had been informed against; that he was never considered for release; **and that he had escaped from detention**." (emphasis added)

18. At [17] of its short decision the UT said:

> "It was open to Judge Rose to find that escape from detention in 2010 would not necessar[il]y lead to interest in him given that many other LTTE members who had been detained were released. It is certainly the case that many other LTTE members had been released. All that Judge Rose says at paragraph 43 of the determination is that this is a neutral factor: he does not say all those released or who escaped were of no further interest but that the fact of the escape did not mean there would necessarily be further risk. This was a finding he could reasonably make."

The appeal

19. Mr Patrick Lewis, who appeared on behalf of RS in this court, submitted that neither the FTT nor the UT had given proper consideration to the fact that RS had escaped from detention when assessing whether he would be at risk on return, and in particular

whether he would be on a stop list as described in paragraph 356(7)(d) of *GJ*. It was obvious that escape from custody would, in the normal course and absent steps being taken to falsify records, lead to an arrest warrant being issued. If an arrest warrant is issued, the fact of its issue would be passed to the National Intelligence Bureau and the escapee's name would find its way onto the stop list at the airport, rather than merely appearing on a watch list. Mr Lewis relied on the evidence of Mr Punethanayagam and Dr Smith given in *GJ*, and the COI Report. When seen against the background that RS was arrested after the end of the war and had been detained for a period of 18 months thereafter, during which time he had been tortured, it was plain that there was a real risk that RS would be stopped at the airport on return, taken into detention and be subject again to ill treatment. He observed that it was established by *GJ* that those taken into detention in Sri Lanka were at risk of physical abuse: see paragraphs 168 and 356(4).

20. Mr Lewis continued that the FTT had been wrong to place reliance on the fact that some LTTE members were being released. In fact, RS's case was fortified by that fact, because he had not been released. That demonstrated that he was of more interest to the authorities than those who had been released. Plainly RS did not believe that he was about to be released, as he had escaped.

21. Ms Claire van Overdijk, who appeared for the Secretary of State, submitted that the FTT's decision should stand, as it betrayed no error of law. The FTT had not recorded any submission by RS that he would be included on a stop list within paragraph 356(7)(d) of *GJ* by reason of the issue of an arrest warrant. RS's case thus depended on showing that he remained of interest to the Sri Lankan authorities because he posed a threat to the integrity of the Sri Lankan state. The FTT judge had been right to reject that case, and the UT right to dismiss the appeal from the FTT's decision.

Discussion

22. I start by observing that the computerised stop list held at the airport is "a list of those against whom there is an extant court order or arrest warrant": *GJ* paragraph 356(7)(d). It follows that the existence of an unexecuted arrest warrant is likely to lead to the person who is the subject of the warrant being included on the stop list. The Secretary of State's refusal letter of 8 July 2014 stated that it was not accepted that RS fell within paragraph 356(7)(d) of *GJ* because it was not accepted that RS had escaped from detention. The Secretary of State did not at that stage suggest that those who gave a credible account of escape from detention were not likely to be the subject of an arrest warrant and, as a consequence, be on the stop list.

23. Next, I would reject the Secretary of State's submission that the FTT did not have to deal with a case based on paragraph 356(7)(d) and the stop list because that had not been properly spelled out in RS's submissions. Quite apart from the fact that the point is an obvious one, it was a submission which was inherent in RS's submission to the FTT that he "was an escapee, and he was effectively a wanted man". In addition, the point had occurred to the Secretary of State in her refusal letter, albeit that it had then been rejected, incorrectly as it turned out, on the ground that his account of escape was not credible.

24. I turn therefore to the central question of whether the FTT was wrong in law in failing to find a risk on return, given in particular that RS had given a credible account of having escaped from detention. The FTT's rejection of that case is contained in the following sentence:

> "I was given no reason to find that there is any reasonable likelihood that a Court order or arrest warrant has been issued, and that accordingly his name would be on a "stop" list at the airport."

25. I have no reason to doubt that the sequence of events from escape to arrest warrant to stop list was not specifically articulated before the FTT judge. Further, I have already explained that the judge did not have the Country of Origin Information Report because of a failure by the Secretary of State to draw it to the court's attention. It also seems likely that the passages from *GJ* on which RS relies were not specifically brought to the judge's attention either. Notwithstanding these points, I consider that the FTT judge made an error of law. In looking for positive reasons to find that an arrest warrant had been issued, the judge has, in my judgment, completely overlooked the inherent probabilities of the case. RS had been arrested after the end of the war (although I would accept only shortly after) and remained of sufficient interest to the authorities to be detained for some 18 months thereafter during which time he was tortured. This period extended up to and beyond the commencement of the release of LTTE detainees. He had not been released but had escaped from custody with the help of a visiting contractor. It seems to me, based on those facts, to be inherently likely that the authorities would seek to recapture him and do so by issuing an arrest warrant.

26. The inherent probabilities are confirmed by the material to which I have referred from *GJ* and the Country of Origin Information Report. Even without these materials, however, the judge was wrong to say that there was **no** reason to find that an arrest warrant had been issued. There was every reason to expect that an arrest warrant would be issued in RS's case, given the facts to which I have referred. The authorities obviously have an interest in an LTTE member who they have kept in detention for 18 months, and are unlikely to cease to have that interest if the detainee escapes. That inference was supported by the evidence that the Sri Lankan army conducted a search for "escapees", even if the particular search in question was not targeted at RS.

27. Having reached that point it is worth reciting the test which the court must apply when deciding whether a person has a well-founded fear of persecution or serious harm. The applicant must have a subjective fear, and that fear must be objectively justified. However, the standard to which the fear must be objectively justified is low and falls well short of the balance of probabilities. In *R v Secretary of State for the Home Department ex parte Sivakumaran* [1988] AC 958, Lord Keith put the test as "a reasonable degree of likelihood".

28. Applying that standard, in my judgment the FTT was wrong in law to hold that there was not a reasonable degree of likelihood that RS was the subject of an arrest warrant and on the stop list because it failed to have regard to the fact that RS was an escaped detainee against whom it was likely that an arrest warrant would have been issued.

29. It follows that I consider that the UT was wrong not to allow the appeal. The passage from the UT's determination which I have cited in paragraph 18 above does not confront the consequences of the fact that RS had escaped from detention and the likely existence of an arrest warrant. I would make one further observation, although this was not a formal ground of appeal. The UT said "It was open to Judge Rose to find that escape from detention in 2010 would not necessar[il]y lead to interest in him given that many other LTTE members who had been detained were released." This statement reveals the application of an incorrect standard. RS did not need to show that he would necessarily be of interest to the authorities, only that this was a reasonable likelihood. Moreover, as I have already accepted, the fact that others were being released did not undermine RS's case, but strengthened it

30. Given the error of law common to the FTT and UT we could remit the case to one or other of those tribunals for a rehearing in the light of our judgment. Alternatively, we can decide the matter for ourselves if we consider that it permits of only one outcome. We were urged by Mr Lewis to take the latter course, and I consider, for my part, that we should do so. When the evidence is considered as a whole, taking account of the inherent probabilities, RS's account of his treatment and escape, the relevant parts of *GJ* and the Country of Origin Information Report, it does admit of only one answer, namely that RS had a well-founded fear of serious harm if returned to Sri Lanka.

31. For the reasons I have given, I would allow the appeal.

Lady Justice King:

32. I agree.

Lord Justice Henderson:

33. I too agree.