



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/05516/2011

Heard at Field House
on 2nd July 2013

Determination Sent
On 19th August 2013

THE IMMIGRATION ACTS

Before

UPPER TRIBUNAL JUDGE HANSON

Between

N M (Sri Lanka)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Allen instructed by Vasuki Solicitors

For the Respondent: Ms Everett Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant was born on the 25th March 1989 and is a citizen of Sri Lanka. His appeal against the direction for his removal to Sri Lanka was dismissed by First-tier Tribunal Judge Molloy in a determination dated 29th September 2011 which was set aside by the Upper Tribunal, following a hearing at Field House on 22nd February 2012, as it was found the Judge has erred in failing to consider the medical evidence with the degree of care required in an appeal of this nature.
2. The appellant's representative on that occasion, Ms Allen, also sought to argue that the adverse credibility findings should be set aside as the contradictions in the evidence upon which they are based could be directly attributable to mental health and other issues. No decision was made on the application as the

Tribunal was unable to proceed further for the reasons set out in the error of law document. A direction was given for the case to be listed for a 'for mention' hearing after 18th April 2012 with the parties being in a position to review the medical evidence and discuss the scope of any future hearing.

3. On 23rd May 2012 the Tribunal was advised that the appellant had been referred for a brain scan which it was anticipated would be completed within six weeks. The case was adjourned for a further CMR hearing. The appeal was listed before another UT Judge on 25th February 2013 but no progress was made as it is a 'part-heard' matter. On 17th April 2013 Mr Paramjorthy appeared for the appellant 'Pro Bono'. He advised the Tribunal that the appellant had been 'evasive' for the past six months. He had not engaged with his father, had failed to keep appointments made within the NHS, and had not been compliant at all. As a result of the considerable period of time that has elapsed since the 'error of law hearing' and the fact amply opportunity has been provided to allow any further reports to be obtained, the lack of any such additional evidence, and the failure of the appellant to engage with services made available to him, it was directed that the matter be listed for a final hearing as there was no basis for further delay.
4. The remaining issues before the Upper Tribunal are agreed as follows:
 - i. The risk of return in light of the preserved findings.
 - ii. Article 3 and 8 in relation to the risk of suicide.
 - iii. Article 8 family life and the issue of the need for support in light of his mental health issues.

The preserved findings

5. Notwithstanding the failure of the appellant to cooperate and the lack of any further medical evidence, bar a report from a psychotherapist Antonia Kreeger, Ms Allen renewed her application for the adverse credibility findings of Judge Molloy to be set aside on the basis that the discrepancies relied upon by the Judge could be attributable to mental health and other issues.
6. I accept this submission may be made in an appropriate case as illustrated by the case of SM (Iran) v SSHD [2010] EWCA Civ 371 in which an Immigration Judge found that the appellant's evidence was not credible, but made no finding in respect of her claim to have PTSD. The Court of Appeal said that whilst it may be difficult to postulate that all the unsatisfactory elements of the Appellant's evidence might be explained by a PTSD diagnosis, it was not possible to know what the Tribunal's approach to the evidence might have been had it accepted that the Appellant had PTSD. The claimant was entitled to a

clear decision on whether she had PTSD and what effect that disorder had on her evidence.

7. In this appeal there was a finding by Judge Molloy in relation to the medical evidence. Ms Allen specifically referred me to paragraph 84 of the determination in which Judge Molloy states:

84. Noting that behaviour, noting the limited time, observing the appellant's prior immigration history and willingness to deceive an Entry Clearance Officer as to his true intentions when claiming to visit the United Kingdom as a tourist, noting the other evidential issues, discrepancies and inconsistencies already referred to at length, noting that at least three if not four of his brothers have successfully fled Sri Lanka and have obtained sanctuary elsewhere, noting that his parents are currently in the United Kingdom after his father claimed asylum and then withdrew his appeal against an adverse decision upon the same, the Tribunal is not persuaded that this appellant's account as given to the respondent and as given to Dr Raj Persaud is anything other than a stage managed concoction of events whose genesis lies in an attempt made by the appellant to create not only a fictitious claim to asylum but also to invent a fictitious mental illness so that he can re-join some members of his family.

8. Ms Allen's sought to persuade the Tribunal that as it has been found the Judge had made a material error of law in his treatment of the medical evidence [para 16 Error of law finding] the adverse findings should be set aside.

9. It is settled jurisprudence that a party is entitled to retain the benefit of a finding made in his or her favour unless there is good reason to set it aside. Had Judge Molloy gone no further there may have been merit in Ms Allen's submissions but in paragraphs 85 and 86 Judge Molloy sets out findings in the alternative in the following terms:

85. In the alternative the Tribunal might just have been persuaded that the reasonable degree of likelihood is that the appellant does suffer from some mental health issues. However, these could have been hereditary if it is reasonably likely be the case that the appellant's mother also has mental health issues. Alternatively, and noting that the appellant claims to have worked on a family farm on and off over the years, it considers that he might have had an accident there and suffered an injury to his head and that this caused his mental health issues. Then again he could have had any other type of accident involving injury to his head.

86. However, and because of all the issues noted herein at length, the Tribunal is not persuaded that the reasonable degree of likelihood is that a true account has been given to it by this appellant with reference to what he says happened to him in Sri Lanka.
10. The Court of Appeal in SM (Iran) were concerned that it was not possible to know what the Tribunal's approach to the evidence might have been had it accepted that the Appellant had PTSD, in this case we do. The primary finding is that the mental health problems are fictitious but, in the alternative, when considering the elements referred to by the Judge the appellant's account had not been shown to be credible.
11. The medical evidence available to Judge Molloy was the report from Dr Persaud. It is noted in the report that the appellant's mother is said to have 'completely lost her mind' and exhibits signs of severe mental illness. His mother has been admitted to a psychiatric hospital in Sri Lanka in the past and received medication from her GP in the United Kingdom. The appellant provided Dr Persaud with his history and claimed to have been detained for a week in May 2009 during which time he was beaten extensively and tortured. It is noted that the appellant's memory of events around the time of the beatings is very poor as it is of events since.
12. In his summary Dr Persaud states:

SUMMARY

This man exhibits many symptoms of psychiatric disorder and the constellation would most likely suggest diagnosis of Depression, PTSD and brain injury. He is also at suicide risk given his hopelessness about the future.

13. Dr Persaud's opinions is stated to be as follows:

OPINION

In my opinion given the caveats of the limited time I have had to make an assessment of this man combined with his getting very upset and being unable to properly answer some questions as well as the lack of informants to corroborate his testimony as to events that befell him, it is possible to form an opinion to the extent of the following.

- (1) This man appears from his account to have suffered multiple life events of an extreme nature which would qualify the kind of event which would be regarded as severe and extraordinary. These are the kinds of events required for a diagnosis of Post Traumatic Stress Disorder to be considered.

- (2) These life events include the receipt of experiences which would amount to torture by most understandings of that term.
- (3) He has, according to his account, also suffered loss events of a psychologically complicated nature due to his separation from key members of his family who he was very close to when he left Sri Lanka. Several brothers are scattered across the world as a result of fleeing Sri Lanka. He has also lost his mother to severe mental illness.
- (4) He appears extremely fearful for his life, should he return to Sri Lanka given the series of extraordinary and severe life events he experienced and the implications of the torture he received and his subsequent actions in fleeing from Sri Lanka.
- (5) A factor in his suicidality is despair over separation from his brothers with whom he was close. Another factor is his memory loss and disorientation due to the beatings to the head that he sustained. He appears befuddled and worried about his newly developed incapacity.
- (6) His decision making ability having been called into question, possibly secondary to a brain injury, there is a real question about his ability to make decisions in his own best interests and therefore at present given his present mental state satisfactory instruct legal representation. In particular his upset about his predicament and its implications affects his decision making ability. He has also never received any specialist treatment at all for his significant psychiatric and neurological symptoms. For example he has never been prescribed an antidepressant or had a brain scan.
- (7) It follows from paragraphs five and six above that there is a real question about his psychological and neurological fitness to attend legal proceedings. I understand he has not received any specialist NHS psychiatric or neurological assessment or treatment.
- (8) He exhibits symptoms of Post Traumatic Stress Disorder, a psychiatric diagnosis recognised by all the major psychiatric classification systems. He also shows memory loss or recent onset, i.e since his beating to the head, which are cardinal signs of brain disorder or damage.

(9) He also exhibits symptoms of severe clinical depression. He scored 48 on the Beck Depression Inventory - a standard tool or questionnaire used to screen for depression. This score is consistent with the very severe end of clinical depression. He scored 66 on the Impact of Events Scale commonly used to measure PTSD. This is a very high score indeed.

(10) He has suicidal thoughts.

(11) Given paragraphs eight, nine and ten of above it follows that he would be regarded as a candidate for urgent psychiatric and psychological treatment and neurological assessment by most health services and that he should receive such treatment and a reassessment made about his ability to attend legal proceedings.

(12) The treatment he would require should involve specialist intervention - in particular treatment which is based on expertise on the aftermaths of torture, complex loss, depression and brain injury.

(13) It does not appear from the information we have that this man is receiving the correct treatment or indeed any treatment at all.

(14) It follows from the paragraph above that if he continues not to receive the correct intensive treatment that his prognosis must be regarded as guarded at best.

(15) I am in particular concerned by the particular toxic combination of events - legal proceedings with their inevitable stresses and the possibility of unfavourable catastrophic outcome, plus ongoing severe untreated psychiatric disorder.

This combination is likely to dramatically elevate the chances of suicidal behaviour.

14. The adjournment of the proceedings and referrals made thereafter, with which the appellant did not cooperate, were made as a result of the above diagnosis.

15. On the issue of preserved findings: in light of the lack of evidence establishing that the findings made by Judge Molloy in relation to the core elements of the claim are infected by any arguable legal error they shall stand. They are summarised in paragraph 92 of the determination as follows:

92. In short, the Tribunal is not persuaded that the reasonable degree of likelihood is that this appellant has a bother, Kantharuben, who had

associations with the LTTE. It is not similarly persuaded that this appellant himself had any associations with the LTTE. It is not similarly persuaded he assisted the LTTE with maps, with the location of the Sri Lankan army forces personnel and with telling the LTTE where to plant claymore bombs. It is not similarly persuaded that this appellant was detained for either one week, six or seven months, or for approximately one and one half years or so commencing May 2009 and, at the latest estimate coming from the appellant, ending 2011. It is not similarly persuaded that at any time the appellant was beaten or otherwise suffered physical abuse..... It is not similarly persuaded that his father and his other named brothers had any association with the LTTE themselves, nor is it similarly persuaded that any of them suffered in Sri Lanka whether this be by way of detention and/or physical abuse.

Discussion

16. There is no statement from the appellant who was not tendered to give oral evidence and so the issues are to be considered on the basis of the written material before the Tribunal only.
17. For the purpose of the proceedings before the Upper Tribunal a second report has been produced, dated the 26th June 2013, written by Antonia Kreeger who describes herself as a psychotherapist with a Postgraduate Diploma in psychodynamic counselling, in addition to other qualifications in cognitive behavioural therapy, counselling, and psychotherapy. She states in the report that her qualifications have given her the knowledge to be able to assess how severe an applicant's distress is and whether their symptom show signs of PTSD.
18. Ms Kreeger refers to the report of Dr Persaud and states that the purpose of her report is to assess the appellant's psychological distress due to events and torture in Sri Lanka and to assess the best possible chance of his continued recovery and prevention of relapse. Having undertaken various assessments Ms Kreeger sets out her opinion/recommendation/advice in section 4 of the report, where she states that the appellant will return to a state of the loss of all consciousness, as he did when he came to the United Kingdom, if returned to Sri Lanka. If his symptoms worsen he will become extremely vulnerable causing a potential risk as it was likely that he would again attempt suicide. Ms Kreeger refers to the appellant's symptoms "increasingly and worsening so rapidly" and states that in her opinion it is in his best interests to stay where he feels safe and secure and where he can continue the progress he has made in the UK to give him a greater chance of recovery; together with psychological and family support. The recommendation is for involvement of visits from a mental health team to monitor his symptoms, consistent family support, and further counselling.

19. The assessment of whether an individual is telling the truth is made more difficult if their own evidence is that they suffer mental illness or other issues affecting not only their ability to recall events but also the accuracy of their recollection. Judge Molloy was faced with this issue but it is clear from the determination and he clearly weighed up the evidence in the round and concluded that the core of the claim was not credible. As such it was found that he faced no risk on return to Sri Lanka and was not entitled to grant of international protection.
20. If the appellant's account was taken as being credible he is still not able to prove that he is entitled to any form of international protection. The appellant's account, set out in detail in paragraph 3 of the refusal letter of 23rd November 2010, is that he was a supporter of the LTTE to whom he gave food, money, and gold. In April or May 1980 he was identified by a masked man and taken to an internally displaced peoples camp in Point Pedrop where a number of other people, including his whole family. He was detained at the camp five days during which time he was threatened and questioned at gunpoint on seven or eight occasions for five or ten minutes each time. He was asked why he had given food to the LTTE to which he replied that as he was asked for food he gave it to them. He was threatened but not harmed. During the detention his identity was checked and returned to him and he was told to report, on release, once a week to the camp for five weeks. The appellant experienced no further problems following his release from the camp.
21. In 1997 his oldest son claimed to have experienced problems with the LTTE and the army and so he came to the United Kingdom to claim asylum. Every month in his village the Sri Lankan Army would round up individuals and during three such roundups the appellant was stopped: in 2000, February 2003 and in 2004. He was arrested and taken before a masked man but not identified and so was released and allowed to go free. The appellant claims he moved to another location in 2003 although in 2005 returned to his native home area.
22. In 2005 two of his sons who supported the LTTE joined the organisation but due to fear of arrest disappeared in 2005. As a result of this his wife became mentally ill. One son came to the UK in 2006 to study and stay with his brother. The appellant travelled to the UK in 2008 to visit his son and stayed for three months before returning to Sri Lanka. He returned to the UK in February 2010 with his wife and claimed asylum because he alleged he and his wife were sick and there was no one to look after them in Sri Lanka and he was frightened of the Sri Lankan Army.
23. The refusal letter records a number of discrepancies in the evidence of concern to the Secretary of State and the Judge Molloy in relation to his account.
24. The appellant claims to have assisted the LTTE but not to have held any position or rank within that organisation. He may have had family members who joined

but even if he was detained from May 2009 to 2011 and beaten whilst being questioned in detention, it is clear that he was released. A letter from his uncle in Sri Lanka suggests that the appellant's father asked him to assist with the release and there is no credible evidence that the appellant is subject to an arrest warrant or that he was a put before the courts, even at the height of the troubles in Sri Lanka. A substantial number of individuals were rounded up or detained by the authorities in camps as a result of the military operation against the LTTE in 2009 and were later released. This does not in itself create a risk for the appellant on return.

25. The question one has to consider is whether the appellant's profile at the point of return to the airport is such so as to bring him to the adverse attention of the authorities in Sri Lanka. Those currently facing a 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.
 - (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.
26. Even taking his case at its highest I find the appellant has failed to discharge the burden of proof upon him to the required standard show that his profile (actual or perceived) fits any of the above categories such as to place him at risk on return, even when considering the issues and factors set out in cases such as LP (LTTE area - Tamils - Colombo - risk?) Sri Lanka [2007] UKAIT 00076. I find the

appellant has failed to discharge the burden of proof upon him to the required standard to show that he is entitled to be recognised as a refugee, entitled to a grant of humanitarian protection, or able to succeed under Articles 2 and 3 ECHR so far as they relate to his claim to be at risk from the Sri Lankan Authorities or the army in his home state.

27. In relation to the medical evidence, taking the appellant's claim at its highest, he is suffering from a potential mental illness, suffering from PTSD and depression, and there is a realistic prospect of attempted suicide.
28. The appellant currently has the support of his family in the United Kingdom and it appears that his coming to this country is part of a pattern of family migration. I do not accept that he has no relatives in Sri Lanka as there is in the file a letter from an uncle who stated that, at the request of the appellant's father, he obtained the appellant's released from detention and helped him find an agent and to come to the United Kingdom. There is no evidence that such family connections would not be able or available to assist the appellant on return. I do not find it prove that he would therefore be abandoned.
29. In relation to Article 3 ECHR and the appellant's mental health issues the threshold is a very high one. On appeal to the EctHR in N v UK Application 26565/05 the Grand Chamber upheld the decision of the House of Lords and said that in medical cases Article 3 only applied in very exceptional circumstances particularly as the suffering was not the result of an intentional act or omission of a State or non State body. The EctHR said that Article 3 could not be relied on to address the disparity in medical care between Contracting States and the applicant's state of origin. The fact that the person's circumstances, including his or her life expectancy, would be significantly reduced was not sufficient in itself to give rise to a breach of Article 3. Those same principles had to apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which might cause suffering pain or reduced life expectancy and required specialist medical treatment that might not be readily available or which might only be available at considerable cost.
30. In J v SSHD [2005] EWCA Civ 629 the Court of Appeal said that in a foreign case the Article 3 threshold would be particularly high and even higher where the alleged inhuman treatment was not the direct or indirect responsibility of the public authorities in the receiving state and resulted from some naturally occurring illness whether physical or mental.
31. In Balogun v United Kingdom (Application no. 60286/09) ECtHR (Fourth Section), May 2012, the Nigerian applicant submitted a report from a specialist psychiatric registrar which stated that he had attempted suicide after being notified of the refusal of his human rights claim. Nonetheless, it was held that the Applicant's complaint under Article 3 against deportation was manifestly ill-

founded and therefore inadmissible pursuant to Articles 55(3) and (4) ECHR. The UK Government had outlined appropriate steps it would take throughout the deportation process to protect the Applicant from the risk of suicide. In light of those precautions to be taken by the Government and the existence of adequate psychiatric care in Nigeria, the Court could not be persuaded that there would be a breach of Article 3 if the Applicant was deported to Nigeria (paras 29 - 34).

32. There are clearly adequate mental health services and medical facilities available in the United Kingdom and it has not been proved that such services and facilities as the appellant may require will not be available to him in Sri Lanka. There is the question of whether the appellant will engage with such services as it is clear that he has not cooperated with attempts to obtain a brain scan and other services facilitated by the adjournments. If he fails to engage his prognosis will be the same whether he is in the United Kingdom or Sri Lanka and if there is any deterioration as a result that must be a matter for which he is personally responsible and not the United Kingdom Government.
33. The case of Balogun is of particular interest as it was found that the complaint by the appellant was manifestly unfounded and therefore inadmissible before the European Court. As it has been proved that there are adequate facilities at each stage of the process to meet the appellant's needs, I do not find he has discharged the burden of proof upon him to the required standard to show that he is able to meet the Article 3 threshold.
34. In relation to Article 8, I have considered this by reference to family and private life together with the question of his physical and moral integrity. The family life element is based upon the fact there are family in United Kingdom. It is claimed the appellant needs the support of his family in the UK due to his mental health issues but I do not accept the claim there is no family in Sri Lanka available to assist and/or adequate services available to provide support if required. A local example is evidence that the appellant's mother was able to receive psychiatric care in Sri Lanka. The appellant and his wife will be returned together and if she requires ongoing care it has not been proved not to be available either. I accept that the appellant's parents, brother, and other family members are here but I do not accept that even if it is established that there is an element of dependency created as result of the appellant's personal circumstances, that this makes the decision to return disproportionate bearing in mind the appellant has no lawful right to remain in the United Kingdom, the availability of medication and support in Sri Lanka, and the legitimate aim of the need to have valid and workable immigration controls based upon the economic needs of the United Kingdom. I am satisfied that the Secretary of State has discharged the burden of proof upon her to the required standard to show that it is a proportionate decision.

- 35. Whilst I accept, as a result of events that he claims to have occurred, his mental health, or a combination of such events, the appellant has a subjective fear I find any stated fear of ill treatment in Sri Lanka is not objectively well founded which weighs against there being a real risk of there being a breach of any protected human rights. I have also found that the United Kingdom and Sri Lanka have effective mechanisms to reduce the risk, if the appellant chooses to engage with such services, which also weighs against there being a real risk of a breach. If the appellant has not engaged with services that are available they cannot be said to form part of his private life in the United Kingdom. To the extent there has been engagement I accept this will form part of his private life but I do not find it shown in the circumstances that his removal will have such an adverse effect upon his physical and moral integrity so as to make the decision disproportionate under Article 8.

- 36. Whilst I accept that the appellant wishes to remain in the United Kingdom with other family members it is established jurisprudence that Article 8 does not allow individuals to choose the country in which they wish to reside. I find the appellant has failed to discharge the burden of proof upon him to the required standard to show the United Kingdom Government will be in breach of any obligation it has under any international convention should he be returned to Sri Lanka, which he may be as he is no more than a failed asylum seeker which in itself creates no identifiable risk warranting a grant of international protection.

Decision

- 37. **The First-tier Tribunal Judge has been found to have materially erred in law and his determination set aside. I remake the decision as follows. This appeal is dismissed.**

Signed.....
Judge of the Upper Tribunal

Dated the 15th August 2013