Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/09492/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 24 August 2015	**On 22 September 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

MT
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Sellwood, Counsel, instructed by Crimson Phoenix
For the Respondent: Mr Stephen Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make the order because the appellant is a young asylum seeker who might be at risk just by reason of being identified.

2. The appellant appeals against the decision of the First-tier Tribunal dismissing the appellant's appeal on asylum and human rights grounds against a decision taken on 6 November 2014 refusing to grant him further leave to remain and to remove him to Sri Lanka.

Introduction

3. The appellant is a citizen of Sri Lanka born in 1988. It is not disputed that he entered the UK lawfully on a student visa on 16 October 2010 but then overstayed from 5 June 2013. He then claimed asylum on 21 October 2014 and was detained under the fast track process. A medical assessment was carried by a consultant psychiatrist, Dr S, on 10 September 2014 and a report was produced on 23 October 2014. The appellant also submitted a medical report from Dr O.

4. The appellant claims that he was a victim of torture and rape by the Sri Lankan authorities, was released on a bribe, has engaged in diaspora activities in the UK and is at risk on return. He is also a suicide risk.

The Appeal

5. The appellant appealed to the First-tier Tribunal and attended a hearing at Hatton Cross on 15 May 2015. The judge found that the appellant was generally credible regarding his allegations of torture from 2007-2010. It was highly likely that his injuries were caused by torture – including being pistol-whipped, struck by a knuckle duster, pushed to the ground and raped, kicked by soldiers wearing boots, struck with a bayonet, dragged along a road and struck with an iron rod. The appellant was ill-treated because of his believed social connections with a member of the LTTE. He was first detained during September 2007 and then again in July 2009 until May 2010. He was raped on at least two occasions because of his imputed political affiliations to the LTTE. He has been receiving mental health treatment since September 2014. The appellant's treatment during his second period of detention was because of the perception of the Sri Lankan authorities that his family's business was involved in money-laundering for the LTTE in order to fund its resurgence. The appellant was moved to his final detention location because it was believed that he could identify former LTTE members as part of a vetting process.

6. The judge further found that the appellant was released in 2010 upon payment of a bribe, left Sri Lanka on his own passport having obtained a visa to study in the UK; his step-father was reported missing by his mother in August 2014, the appellant attended a demonstration in May 2014 but he had never previously supported the LTTE. The appellant did have serious mental health conditions but was not at risk on return. His mental health would need careful support on return but that would be assisted by his continuing family network and the relevant state mental health services. His name was not on a stop list and there were no outstanding warrants or court orders.

The Appeal to the Upper Tribunal

7. The appellant sought permission to appeal on 11 June 2015 on the basis that the judge failed to make findings on relevant matters which were material to whether the appellant was on a stop list, the decision that he was not on a stop list was Wednesbury unreasonable, the judge also failed to properly consider the evidence relating to suicide risk and failed to apply the six stage test in Y & Anor (Sri Lanka) v SSHD [2009] EWCA Civ 362.

8. Permission to appeal was granted by First-tier Judge Andrew on 23 June 2015 on the basis that it was arguable that the judge failed to properly apply GJ (post-civil war returnees) [2013] UKUT 319 both in relation to the stop list and the suicide risk. All grounds were arguable.

9. In a rule 24 response dated 7 July 2015, the respondent sought to uphold the judge's decision on the basis that there was no evidence that the appellant was on a stop list there being no extant court order or arrest warrant. The judge made full and clear findings on the medical reports and concluded that return would not breach obligations under Articles 3, 5 or 8.

10. Thus, the appeal came before me.

Discussion

11. Mr Sellwood submitted that the appellant was informed that he would be recorded as an escapee, he was detained twice and his father and stepfather are missing. Records are kept of those detained. Those released on a bribe are normally listed as absconders (paragraph 146 of GJ). Those with the appellant's profile who are told that they will be recorded as an escapee are reasonably likely to be on a stop list. There were three medico-legal reports before the judge. Dr S cross-references the appellant's account against his behaviour during the consultations. The appellant suffers from pain and severe depression. The judge failed to apply the six stage test in relation to suicide risk. It is difficult to see how the judge could have avoided the conclusion that there was a risk of breach of Article 3 rights. The appellant's case is strikingly similar to that of Y.

12. Mr Whitwell submitted that the scrutiny of the judge's decision was very high to the point of being unfair. The grounds amount to no more than disagreement. Paragraph 33 of the decision is key – there is no confirmed prosecution or arrest warrant. There is no evidence that the appellant is on the watch list let alone the stop list. It is clear that the judge is well aware of the suicide case law. The judge had to decide how much weight to give to the medical evidence and gives reasons. The references to the evidence before the judge amounts to an attempt to re-litigate the issue.

13. Mr Sellwood submitted in reply that the cause of concern is failure to make findings. Anxious scrutiny was required and submissions were made on that basis. The stakes could not have been higher. The judge referred to Y at paragraph 11 but there is no evidence of application of the six stage test. There is no requirement for a signed confession or a prosecution to be on the stop list. The judge failed to take into account material facts in relation to the psychiatric report. The judge reached a completely opposite conclusion about adequacy of medical facilities from GJ at paragraph 447 onwards.

14. I find that the decision includes a number of clear findings of fact which are soundly based upon the evidence. They are set out at paragraphs 31 to 33 of the decision. However, a number of key issues are not mentioned in the decision. The judge has not determined or taken into account the following issues;

    (1) The evidence that the appellant was informed that he would be recorded as an escapee upon release; his stepfather having secured his release through bribing an official.

    (2) The objective evidence from GJ that the Sri Lankan authorities hold electronic records and every detention of a suspect by the security forces results in a record being raised.

    (3) The appellant's profile as a person who has been detained and tortured on two occasions on suspicion of working for or assisting the LTTE.

    (4) The evidence that the appellant's biological father has not been heard of since he was detained with the appellant.

    (5) The implications of the appellant's stepfather having been reported as missing in August 2014, having previously bribed an official to secure the appellant's release.

    (6) The risk implications of the finding at paragraph 33 that the appellant was ill-treated during his second period of detention because of the authorities' perception that his family's business was involved in money laundering for the LTTE in order to fund its resurgence, combined with the disappearance of the father and stepfather.

15. I find that the failure to make findings or to take account of those issues means that the judge has not properly engaged with the principles set out in GJ in terms of assessment of future risk for the appellant, particularly as to whether he is on the stop list at the airport or whether he is at risk of further detention and ill-treatment in his home area. The judge has also failed to refer to paragraph 339K of the Immigration Rules which states that;

"*The fact that a person has already been subject to persecution or serious risk of harm … will be regarded as a serious indicator of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated*"

16. I find that the judge has not applied the six stage test approved in Y when determining whether the appellant's mental health gave rise to a real risk that his protected rights under Articles 3 or 8 would be breached by return to Sri Lanka. The judge did give three reasons for attaching less weight to the report from Dr S at paragraph 37 of the decision but did not consider where the appellant would access mental health services in Sri Lanka and whether there was a realistic possibility that the appellant would venture into proximity with officialdom (paragraph 47 of Y).

17. Thus, the First-tier Tribunal's decision to dismiss the appellant's appeal involved the making of errors of law and its decision cannot stand.

Decision

18. Mr Sellwood invited me to order a rehearing in the First-tier Tribunal if we set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. There are a number of factual issues to be resolved, there may be further medical evidence and the appellant may give evidence at the rehearing.

19. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined by a judge other than the previous First-tier judge. The findings at paragraphs 31 to 33 of the decision and the finding at paragraph 34 that the appellant left his final detention by means of financial payments from his family are **preserved**.

Signed  Date 18 September 2015

Judge Archer

Deputy Judge of the Upper Tribunal