



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

Appeal Number: AA047632015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 10<sup>th</sup> February 2016 and 4<sup>th</sup> May 2016**

**Decision & Reasons  
Promulgated  
On 26<sup>th</sup> May 2016**

**Before**

**UPPER TRIBUNAL JUDGE D E TAYLOR**

**Between**

**MHP  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: (On 10.05.2016) Mr Worthington, Parker Rhodes Hickmotts  
Solicitors

(On 4.5.2016) Mr O Ryan, Parker Rhodes Hickmotts  
Solicitors

For the Respondent: (On 10.5.2016) Mrs R Pettersen, HOPO

(On 4.5.2016) Mr M Diwnycz, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the appellant's appeal against the decision of Judge Saffer made following a hearing at Bradford on 12<sup>th</sup> August 2015.

## **The History of these Proceedings**

2. The appellant is a citizen of Sri Lanka. He claimed asylum on 4<sup>th</sup> November 2011 and was refused on 26<sup>th</sup> March 2012. His appeal came before Judge Hemingway on 11<sup>th</sup> June 2012 and was dismissed. A number of further submissions were made and ultimately, on 5<sup>th</sup> March 2015 the Secretary of State considered the submissions under paragraph 353 of the Immigration Rules refusing them by letter of 5 March 2015. Judge Saffer dismissed the appeal on 14<sup>th</sup> August 2015.
3. The appellant suffers from psychiatric difficulties and was unable to give evidence but the judge did hear from his wife and from two other witnesses. He relied on the previous determination and the adverse findings of the previous judge. He dismissed the appeal on the grounds that there were a number of inconsistencies and discrepancies in the evidence, and he did not accept that his wife had been raped as claimed.

## **The Grounds of Application**

4. The appellant sought permission to appeal on five grounds, in particular that the judge had erred in his approach to the medical evidence, had failed to consider relevant evidence, in particular relating to his mental health, had reached flawed conclusions in respect of the claimed rape, had failed to consider relevant country evidence postdating GJ and had generally erred in his consideration of the appellant's mental health.
5. Permission to appeal was initially refused by Judge of the First-tier Tribunal Verity on 9<sup>th</sup> September 2015 but subsequently granted by Upper Tribunal Judge Eshun on 8<sup>th</sup> October 2015.

## **Consideration of whether there is an error of law**

6. Mr Worthington submitted that the medical evidence, set out in great detail by the judge at paragraph 18, deserved more consideration than was given in his conclusions at paragraph 32.
7. He wrote as follows:

“I note the findings made in his previous appeal. It was accepted that he may have been ill-treated in the recent past. Dr Eisner's report confirms that. The issue was and is not what had happened. It was who was reasonably likely to have done it, why they did it, what the family's reason for coming here was, and whether there was any real risk to them from the authorities on their return, or in the alternative from someone other than the authorities but where there was no effective protection or internal relocation option. Dr Eisner is unable to help on those issues.”

8. The judge set out the medical evidence at paragraph 18 from Dr Eisner, a GP from the Medical Foundation for the Victims of Torture. The report is much more detailed than that which was before the original judge who determined the appeal. He also considered the psychiatric evidence from Dr Cowan and from his GP.
9. In the ordinary course of events that would have been a perfectly reasonable way to deal with the medical evidence, to consider it in the round, and put it against the discrepancies outlined by the judge in the determination.
10. However in this case the medical evidence is absolutely compelling and required significant engagement since the injuries described are extensive. Dr Eisner sets out forensically the individual scars, evidence of male rape, evidence of having toenails pulled out, evidence of beating, and evidence of being kept in insanitary conditions for a prolonged period.
11. In these circumstances it was not sufficient to merely state that the doctor was unable to help on the issue of how the injuries were caused when it is hard to imagine how they could be caused otherwise than by deliberate act.
12. This is an appellant who was too mentally disturbed to give oral evidence. Furthermore, the judge acknowledges at paragraph 45 that he has a subjective fear of a return to Sri Lanka. In placing weight on the discrepancies in the account, the judge did not properly bear in mind the fact that the appellant was unfit to attend court because of his mental health and his inability to give an accurate account of events. There was also evidence that his memory difficulties were characteristic of trauma survivors and that an imperfect chronological memory may account for his difficulty in sequencing events.
13. There is also merit in the criticism of the judge's dismissal of the wife's claim of rape mainly on the grounds that she did not disclose it at screening or at the earlier hearing when there was evidence of the impact of the late disclosure on the appellant himself by a friend of the family as set out in the psychiatrist's report.
14. Although Mrs Pettersen initially sought to defend the determination and relied upon her Rule 24 response, having heard the submissions from Mr Worthington she did not seek to argue that the judge's reasoning was adequate.
15. Accordingly the decision is set aside.

### **The resumed hearing**

### **The appellant's case**

16. MHP is Sinhalese. He worked as a branch manager for a company, Browns, which dealt in both motors, tractors and electrical goods. One of

his friends, M, assisted him in selling boat engines to Tamil customers from an area up the west coast called Udappu. He sold goods, including both motors, to Tamils from Udappu who had been introduced to him by M who got a 1% commission on sales.

17. On 3<sup>rd</sup> May 2009 he visited India on a trip financed by M who had asked him to pass some money to a man named Moorthy. Moorthy asked him to bring back a bag of clothes and a bundle of documents for M.
18. Shortly after returning to Sri Lanka he was arrested and accused of supplying goods to the LTTE; he was told that M was linked to them. He was severely tortured.
19. Three days later his wife was arrested and mistreated.
20. On 16<sup>th</sup> September 2009, the appellant's father arranged for his release by payment of a bribe on a condition that he report fortnightly at Negambo Police Station.
21. After his release the authorities went to his home on two occasions to see where he was living, although he did not actually stay in the same place after his release. On 15<sup>th</sup> November 2009 he went to India, on the advice of his friend S who said that it would be preferable to see whether he was on a watch list by himself rather than risking the whole family.
22. On 15<sup>th</sup> December 2009 the appellant, his wife and child applied for entry clearance as Tier 4 Students and dependants and were granted entry clearance on 5<sup>th</sup> January 2010. They arrived in the UK on 13<sup>th</sup> January 2010.
23. Since his arrival here the authorities visited the appellant's family home several times and in August and September 2011 his father was mistreated and his mother had a heart attack. The visits prompted the appellant to claim asylum on 4<sup>th</sup> November 2011.
24. In January 2012 the appellant's father was assaulted again. In July 2012 members of the Sri Lankan Army approached his mother at her home and broke her arm. Since then she has moved away and stays with relatives. In January 2015 she noticed that stones had been thrown at the house and damage done to the walls. His wife's mother was taken to hospital after the authorities came to her home and attacked her in April 2015.
25. On 16<sup>th</sup> May 2012 the appellant's wife disclosed to her community development worker that she had been raped in Sri Lanka whilst in custody. She subsequently received counselling from the Barnsley Sexual Abuse and Rape Crisis Service but did not feel able to disclose the full extent of what had happened either to her husband or to the solicitor acting on her behalf.
26. After the appellant's appeal had been dismissed for a second time the appellant asked his father to prepare a statement confirming his ill

treatment by the Sri Lankan authorities. An envelope arrived from his father but it only contained blank sheets of paper and appeared to have been opened. The appellant's father said that he had included a signed document and not blank pages. He had been arrested and detained for two days and questioned. In March 2016 his father went to his MP who reported to him that there would be an investigation into the appellant's escape from Sri Lanka and he advised that his father ought to leave the country, which he is planning to do.

### **The respondent's case**

27. The respondent's position, as set out in the reasons for refusal letter dated 5 March 2015, is that there is no truth in the appellant's claim, that he does not fall within any of the risk categories set out in the current country guidance case law of GJ and Others (post civil war returnees) Sri Lanka CG [2013] UKUT 00319, that the medical evidence now relied upon by the appellant is not wholly objective, and that he has not established a well-founded fear of persecution on return and would be provided with support on return by his family.

### **The oral evidence**

28. The appellant was too unwell to give evidence. His wife, CA, adopted her witness statements to stand as her evidence-in-chief. The only questions which she was asked by the Presenting Officer concern the letter said to have been sent by her husband's father in November 2015. Initially Mr Diwnycz considered that the blank pages contained an imprint of the address, suggesting that the appellant's father had put them in himself. However, upon closer examination, he accepted that, from the indentations, that this was not the case and conceded that when the envelope was addressed and stamped the blank sheets were not inside.

### **The documentary evidence**

29. Since Judge Hemingway's determination there has been further extensive medical evidence, specifically a report from the Medical Foundation dated 14<sup>th</sup> June 2013 from Dr Maggie Eisner, a report from Dr Cowan, Consultant Psychiatrist dated 2<sup>nd</sup> July 2015, letters from the Barnsley Sexual Abuse and Rape Crisis Services, from Mind and Homestart, and letters from Solace who are treating the appellant and his wife for their mental health problems. There are also letters from Mr Lorenz Fernando confirming the appellant's account of arrest and ill-treatment.
30. The appellant also relies on background evidence from a number of different sources relating to illegal detention in Sri Lanka and an expert report from Dr Chris Smith.

### **The medical evidence**

31. Dr Eisner recorded that the appellant often repeated himself and often digressed when re-telling his story. He also became extremely upset and on a number of occasions was tearful.
32. The doctor recorded a very detailed account of the ill-treatment which the appellant says he received during his detention in 2009. She recounted a number of physical assaults including being stabbed and slashed with a knife, being beaten with batons, having his right toenail pulled out, and being sexually assaulted. He was made to kneel on a rough concrete floor and men would stand on the backs of his lower legs to prevent him moving. She concluded as follows at paragraph 136:

“The overall pattern of all his scars and other injuries, assessed in accordance with this paragraph, is typical of the sequelae of sustained, repeated physical assault by a variety of methods.

There are a variety of injuries, each at least consistent, some highly consistent and some typical, with his attribution of ill-treatment. Other causes of such a picture, such as multiple assaults unrelated to ill-treatment, or multiple accidents, are unlikely. I have considered the possibility of self-infliction, but the variety and pattern of the injuries, some of which are inaccessible positions make this unlikely. The psychological findings further support the overall clinical picture of ill-treatment.

The summary of the injuries making up the overall picture is as follows:

- a. eight scars consistent with blunt trauma from objects such as gun butts, batons and motorcycle chains;
- b. six scars consistent with injuries from a knife;
- c. one area of dark lichenified skin on each knee, typical of injury from grazes when forced to kneel repeatedly on a rough surface;
- d. ten areas of hypo pigmentation consistent with injury from superficial grazes when the skin was forced into contact with a rough surface for short periods;
- e. physical findings highly consistent with the sequelae of repeated beatings on the soles of the feet;
- f. physical findings consistent with having his great toenail pulled out;
- g. physical findings with x-ray and MRI confirmation of a right clavicular fracture with associated injuries, consistent with injury from a gun butt;
- h. physical findings with x-ray confirmation of a left elbow fracture consistent with injury from deliberate forcible twisting of the arm;
- i. deformities of both his little fingers consistent with having his hands hit with batons;

- j. physical findings of a soft tissue injury to his ankle, consistent with injury from a blow from a motorcycle chain;
  - k. physical findings of a chronic skin infection, consistent with prolonged detention in insanitary conditions.”
33. Dr Eisner also agreed with the diagnosis made by a consultant psychiatrist of post traumatic stress disorder and depression. She said that he had memory difficulties characteristic of trauma survivors and his imperfect chronological memory as well as the effect of being interviewed in different settings could account for his difficulty in sequencing his account of events.
34. Her overall conclusion was that her physical and psychological findings were consistent with his account of alleged ill-treatment and there was nothing in the clinical picture to suggest a false allegation of ill-treatment.
35. Dr Eisner has received specific training from the Medical Foundation who have responded specifically to the criticisms made of Dr Eisner in a letter dated 29<sup>th</sup> May 2015. The letter confirms that the medico-legal report referred to is expert evidence signed by a doctor with an understanding of their duty to provide their expert objective and impartial opinions. The Foundation is accepted by the Home Office as having recognised expertise in the assessment of physical, psychological psychiatric and social effects of torture. Clinicians from the Foundation are objective and unbiased. Doctors do not accept a patient’s history at face value but routinely assess a number of different factors before making findings on fabrication, and Dr Eisner’s findings do not in any way demonstrate a lack of objectivity but a correct application of the Istanbul Protocol principles and relevant case law.
36. Dr Cowan lists in her report the frequency of the appellant’s visits to his GP and his contact with Mental Health Services which are extensive. She concludes that the appellant’s account was plausible and the emotions he displayed were consistent with the events he related. In particular his emotional response to his account of hearing about his wife’s rape and his reaction to it came across as totally authentic. He felt deep guilt and shame that somehow he had inflicted it upon his wife. It was her opinion that the appellant’s fear of a return to Sri Lanka was genuine and that he was at real risk of suicide

### **Conclusions on the Appellant’s account of events in 2009**

37. The starting point for my determination is the decision of Judge Hemingway, since the decision of Judge Saffer has been set aside, and he concluded that, whilst he could accept that the appellants were of Sinhalese ethnicity and from Sri Lanka, none of the rest of their story was true. Judge Hemingway recorded that there were a number of inconsistencies in the appellant’s evidence, specifically in relation to when his father was in hiding in Sri Lanka and he stated that his evidence lacked

clarity as to whether the father was in hiding or whether he was living with his wife.

38. Judge Hemingway also said that the first appellant was seeking to understate the work he did in the UK, and there was evidence that there had been manipulation in order to satisfy the financial requirements of the student entry clearance Rules. He concluded that there had never been a genuine intention that the second appellant would study and this was simply a device to gain admission to the UK.
39. Judge Hemingway did not accept the appellant's account of why he had undertaken the trip to India and concluded that he had returned to Sri Lanka in November 2009 because he had no genuine fear of persecution. He also held it against the appellant that there was a significant delay between his arrival in the UK in January 2010 and claiming asylum in November 2011.
40. The delay in claiming asylum is a matter which potentially falls within the scope of Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and is potentially damaging to the appellant's credibility. A variety of explanations have been given at an earlier stage none of which were accepted by Judge Hemingway.
41. I also agree that there are a number of discrepancies in the appellant's account.
42. On the other hand I have the clear diagnosis of PTSD and two medical reports, one from a consultant psychiatrist agreeing with that diagnosis. Dr Eisner provided a clear explanation for the appellant's difficulties in accurately recording traumatic events and there is no reason not to rely on her evidence.
43. Indeed there is absolutely no basis for impugning the objectivity of Dr Eisner. She has impressive academic qualifications and is an experienced general practitioner in a practice which cares for asylum seekers from many countries. I accept that the level of detail which is recorded in the report is supportive of the appellant's story. For example, at paragraph 27 Dr Eisner records that the authorities told him that they knew he had sold equipment to the LTTE because they could compare the serial numbers of items they had seized with the records in the shop he had managed. His description of the cell he was kept in at paragraph 29, is graphic. He described seeing what he took to be drug taking paraphernalia. Mr Diwncyz made no reference to the medical evidence in his submissions. I accept Mr O'Ryan's submissions that her report needs to be given considerable weight.
44. It is plausible that, as a Sinhalese suspected of supporting the LTTE, the appellant would have been seen as a traitor which could account for the level of ill-treatment. The appellant's explanation of his return to Sri Lanka in November 2009 is that he wanted to see whether he was on a



watch list and did not want to put his family at risk. That is not in itself unreasonable.

45. Accordingly I conclude that, whilst there is no satisfactory explanation for the delay in claiming asylum, the strength of the medical evidence is such that the only reasonable inference is that the appellant was tortured as claimed by the authorities in 2009.
46. I also accept that his wife was raped, that she disclosed the rape in 2012 to her community development worker, and that she did not feel able to tell her husband or the solicitor until relatively recently before the hearing in 2015.

### **Assessment of risk on return**

47. Mr O'Ryan's submission that the appellant is at risk on return relies on his being able to bring himself within paragraph 7A of GJ which states that:

“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 postconflict Tamil separatism within the Diaspora and/or a renewal of hostilities within Sri Lanka.”

48. He accepted that the appellant had had no role in the UK but argued that because of his former significant role, as a Sinhalese, involved in the supply of boat engines to the LTTE he had a significant previous role which explained the continued interest in him. He did not dispute that the appellant had been released after detention but said that his explanation, given in his asylum interview, was that still intended to kill him and make it look like an accident. Moreover, the visits to the family home showed a continued interest in him.
49. Alternatively, he submitted that GJ was out of date and had presented an overly optimistic view of the situation in Sri Lanka. He relied on reports from 2013 of Tamils being raped and tortured in Sri Lanka from Human Rights Watch and from Amnesty International. There were more recent reports from 2014 of ongoing human rights abuses and a more up-to-date report from the Secretary of State General of the UN in March 2015 of an increase in sexual violence against Tamil women and girls in the context of the ongoing militarisation of their areas of residence. He cited a report from the Immigration and Refugee Board of Canada which reports that a non-Tamil supporter of the LTTE would very likely face harassment and use of force and would be shown no mercy by the government. The most recent reports continue to disclose human rights abuses of a person suspected of involvement with the LTTE.
50. He relied particularly on the report of Dr Smith who states that the authorities have increased their surveillance of the Tamil Diaspora to acquire intelligence. but as the appellant has not been active within the

Tamil Diaspora the appellant is not reasonably likely to be at risk on that account. Dr Smith says:

(i) "It is certainly impossible to say without equivocation whether the appellant or any other person of adverse interest is on the wanted list. However, I have made clear in this report that the appellant has been and will continue to be of adverse interest on account of his claims and that he is known to the authorities. As such he may have been placed on the stop list since leaving Sri Lanka.

51. Dr Smith believes that the appellant would continue to be of adverse interest because of his past connection with the LTTE and he says that even if the detainee was released without charge the system will identify him on return. If the entry includes mention of an arrest warrant they will be placed on the stop list and detained immediately.
52. GJ referred to two lists accessible at the airport. Any person whose name appears on a computerised stop list accessible at the airport will be handed over to the appropriate Sri Lankan authorities. It is a list of those against whom there is an extant order or arrest warrant. The authorities also maintain a computerised intelligence-led watch list. A person whose name appears on that is not reasonably likely to be detained 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.
53. GJ remains the present country guidance case and should be applied. There is nothing in the objective evidence to suggest that it is out of date. There is no specific challenge to the conclusions in GJ in the report relied upon by Dr Smith and indeed he refers to its conclusions.
54. The appellant has produced evidence of continued interest in him. It is said that his father was beaten up in 2011 which triggered the asylum claim and that his mother-in-law's arm was broken in 2012. However there is no reason why the authorities would break the appellant's mother-in-law's arm or why the army would throw stones at his parents' window. The appellant's wife in her later statement refers to visits by the authorities to her sister's house in 2014 and again there would appear to be absolutely no reason why these attacks should be taking place. It is the appellant's own evidence that he is not an LTTE supporter but only supplied the equipment in the course of his work unwittingly. He was released from detention and then left Sri Lanka on two occasions without being stopped by the authorities, once to India and the second time to the UK. I can reach no conclusions on the evidence of a letter having been opened by the authorities but I cannot see why they would go to the trouble of inserting blank pages into the airmail envelope rather than

simply disposing of the contents if they did not wish them to reach the appellant. His father put his own address on the back. If he was being harassed and had been forced to leave his home and was now planning to leave illegally by boat, it seems unlikely that he would have done so.

55. I do not accept that there has been continuing interest in the appellant and his wife's family. The incidents described are sporadic, random in nature and unreasoned.
56. Since the events of 2009 the appellant has been able to leave Sri Lanka on two occasions without being stopped, and re-entered once. If the authorities had any interest in him on a return from India it would have been manifest at that point. There is no suggestion of a subsequent arrest warrant. Neither have there been any diaspora activities.
57. In conclusion, whilst I accept that there is a reasonable degree of likelihood that the appellant was detained and severely ill-treated in 2009, and that his wife was also severely abused, the appellant cannot bring himself within the risk categories set out in GJ because he has neither had a significant role in relation to postconflict Tamil separatism within the Diaspora nor could be perceived to have had since he has been entirely inactive.
58. I accept Dr Smith's view that it is impossible to say whether the appellant is on a wanted list or not, but I have to apply the proper standard of proof in this case and in order to allow the appeal have to be satisfied that there is a reasonable degree of likelihood that he is on such a list. I am not so satisfied, for the reasons given above.
59. Mr O'Ryan did not seek to argue that the appellant should be allowed leave to remain on any other grounds, specifically Article 3 and accepted that he could provide no evidence to show that there are no psychiatric services in Sri Lanka which could be put in place to reduce the risk.

### **Decision**

60. The decision by Judge Saffer has been set aside. It is remade as follows. The appellant's appeal 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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Deborah Taylor

Signed

Date 26<sup>th</sup> May 2016

Upper Tribunal Judge Taylor