Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07956/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 5 January 2016	**On 15 January 2016**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

TSNP
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Benfield instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the Appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Sri Lanka who born on 23 January 1979.

3. The appellant first arrived in the United Kingdom on 17 February 2010 with entry clearance as a Tier 4 Student valid until 30 September 2011. On 29 July 2010 the appellant returned to Sri Lanka, using her own passport, as her father was unwell.

4. On 8 August 2010, the appellant returned to the United Kingdom. On 5 November 2010, the appellant's husband joined her in the UK as a Tier 4 dependant with entry clearance valid until 30 September 2011.

5. The appellant applied for an extension of her leave on 1 July 2011 but that was refused on 14 October 2011 on the basis that she had submitted false documentation and previously sought to obtain leave to enter through deception. Her subsequent appeal to the First-tier Tribunal (Judge Sethi) was dismissed on 14 December 2011 on the basis that she had, as the respondent alleged, previously submitted false documentation and used deception. The appellant, thereafter, remained in the UK without leave.

6. On 1 June 2013, the appellant's husband claimed asylum with the appellant as his dependant. However, following the appellant's arrest on 24 May 2013, after she was discovered working illegally, on 14 June 2013 the appellant claimed asylum in her own right with her husband as her dependant.

7. Looking at the chronology submitted by the appellant (at pages 1 – 4 of the FTT's bundle), the appellant was initially placed within the Detained Fast Track procedure ("DFT"). A screening interview took place on 5 June 2013. On 17 June 2013 the asylum claim of the appellant's husband was refused. Thereafter on 19 and 25 June 2013, the appellant had full asylum interviews. On 26 June 2013, the appellant was referred to and accepted by the Helen Bamber Foundation ("HBF") for assessment and a Medico-Legal report. As a result of this, the appellant was taken out of the DFT and both she and her husband were released from detention.

8. On 3 October 2013 the appellant attended the HBF for initial assessment. But, at that stage, no report was produced by the HBF.

9. On 21 September 2014, the Secretary of State rejected the appellant's claim for asylum, humanitarian protection and under Arts 3 and 8 of the ECHR. At this point, the report from the HBF had still not been provided.

10. On 9 October 2014, the appellant appealed to the First-tier Tribunal. The appeal was initially listed for hearing on 13 January 2015 but was adjourned to await the report from the HBF.

11. On 23 March 2015, the appellant was seen by the Consultant Clinical Psychologist, Dr Katy Robjant at the HBF. Her full report was provided dated 5 June 2015.

12. On 17 June 2015, the appellant's appeal was heard by the First-tier Tribunal (Judge L Murray).

The First-tier Tribunal's Decision

13. At the hearing before Judge Murray, the respondent was not represented but the appellant was represented by Counsel (not Ms Benfield). The appellant relied upon the report from Dr Robjant (at pages 32 – 42 of the bundle).

14. Judge Murray accepted that the appellant was a "vulnerable witness" within the Joint Presidential Guidance Note 2 of 2010 on vulnerable adults. The appellant gave oral evidence before the judge but, in the absence of a Presenting Officer, was not subject to cross-examination.

15. Judge Murray dismissed the appellant's appeal on all grounds. First, she accepted the appellant's account that she had been raped in Sri Lanka by a friend of her husband's. Secondly, she rejected the appellant's account that she had been ill-treated by the Sri Lankan authorities because of her political opinion due to her involvement with the Democratic National Alliance Party ("DNAP"). Thirdly, the judge rejected the appellant's evidence that she had been ill-treated by her family because of her marriage which, she claimed, was "culturally disapproved". Finally, the judge found, despite accepting that the appellant suffered from mental health problems, that the risk to her mental health, included the risk of suicide if she returned to Sri Lanka had not been established so as to breach Arts 3 or 8 of the ECHR.

The Appeal to the Upper Tribunal

16. The appellant sought permission to appeal to the Upper Tribunal. On 24 September 2015, the First-tier Tribunal (Judge Simpson) granted the appellant permission.

17. Thus, the appeal came before me.

The Appellant's Challenge

18. The appellant's grounds upon which permission was sought and granted set out in form only two grounds. First, there was procedural impropriety and fairness. Secondly, the judge's reasoning was inadequate and she failed properly to consider the material evidence.

19. The first ground appears to be based upon an argument by analogy to the case law that has led to the suspension of the DFT procedure and that this tainted the respondent's decision as the appellant was interviewed whilst part of that process and before her subsequent release.

20. The second ground contains a myriad of challenges to the judge's factual finding and her approach to the evidence, in particular that she failed properly to take into account the Medico-Legal report from the HBF in assessing credibility and also that the appellant was a vulnerable adult. It is also argued that the judge was wrong to take into account the judge's finding in the appellant's earlier appeal where he had found that she had

used deception in seeking to obtain leave. The judge, it is said, failed properly to apply the approach in Devaseelan [2002] UKIAT 00702.

21. The 25 paragraphs pleaded under "ground 2" also include a challenge to the judge's finding that the appellant could not succeed under Arts 3 and 8 based upon the impact upon her mental health, in particular the risk of suicide if she were returned to Sri Lanka.

22. In her oral submissions, Ms Benfield sought to focus the challenges to the judge's decision and, to no little extent, to significantly reformulate the challenge under ground 1. In respect of that ground, Ms Benfield no longer placed any reliance upon an argument based upon the court's views about the DFT procedure. Instead, she submitted that the judge had erred in law by failing to apply the API "Medico-Legal reports from the Helen Bamber Foundation and the Medical Foundation Medico-Legal Reports Service" (July 2015). She submitted that the Secretary of State had failed to apply this policy in proceeding to make a substantive asylum decision in respect of the appellant without waiting for the report from the HBF.

23. In respect of ground 2, Ms Benfield maintained that the judge's adverse credibility finding was flawed in that the judge had failed to take into account the vulnerability of the appellant and the HBF report. In addition to that principal submission, Ms Benfield also sought to challenge the judge's adverse credibility finding on a number of discrete grounds – to which I shall return below. She also placed continuing reliance upon the Devaseelan point. She also challenged the Judge's decision that the impact upon the appellant's mental health on return to Sri Lanka would not breach Arts 3 or 8 of the ECHR.

Discussion

24. I deal first with ground 1 as formulated by Ms Benfield.

1. The Policy Argument

25. Ms Benfield drew my attention to the API (Version 4, July 2015) relating to Medico-Legal reports from, for example, the Helen Bamber Foundation. She placed relied upon two passages in this document. First, she relied upon the paragraph at 2.4 of the document which stated that:

> "Where the caseworker is informed in writing by the applicant's legal representative that the case has been accepted for a pre-assessment appointment, they should normally suspend a substantive decision if they are not minded to granted any leave ...".

26. Further, at 3.3 of the document Ms Benfield placed reliance upon the following:

> "It is important that reports prepared by the Foundations are understood fully and given proper weight in the consideration process".

27. Ms Benfield submitted that the respondent had failed to apply this policy and had therefore acted unlawfully. When the respondent was informed that a report from the HBF was sought, the appellant was withdrawn from the DFT procedure. However, the respondent went on to make a decision on the appellant's asylum claim on 21 September 2014 before a report had been provided by the HBF. That, Ms Benfield submitted, was contrary to the passage at 2.4 that the procedure should normally be suspended and, contrary to the requirements at 3.3, led the respondent to reach a decision without considering the report from the HBF. Ms Benfield submitted that this failure prejudiced the appellant because the judge, in the absence of a Presenting Officer, did not have the respondent's reasons for reaching an adverse credibility decision in the light of the report.

28. There is no doubt that a decision maker may act unlawfully by failing to take into account a relevant published policy (see, R (Lumba) v SSHD [2011] UKSC 12). Equally, it is clear that the First-tier Tribunal has jurisdiction to determine that a decision is "otherwise not in accordance with the law" under s.84(1)(e) of the Nationality, Immigration and Asylum Act 2002 on the basis of a failure to apply a relevant published policy (see, for example e.g. SSHD v Abdi [1994] Imm AR 402 and AG (Kosovo) [2007] UKAIT 00082).

29. I am, however, unable to accept Ms Benfield's submission that Judge Murray erred in law in failing to conclude that the respondent had acted unlawfully by failing to apply the API relied on by Ms Benfield.

30. First, the API relied upon was submitted by Ms Benfield to the Upper Tribunal on the day of the hearing. I note that it is dated July 2015. It is stated to be "Version 4.0". I was not provided with the policy which was in force at the date of the respondent's decision in September 2014 or, indeed, at the time of the First-tier Tribunal's hearing in June 2015. Clearly a version of this policy was likely to be in force in June 2015 but the relevant date must be the date of the respondent's decision in September 2014. Any argument that the Secretary of State acted unlawfully by failing to take account of a relevant policy must be by reference to the policy in force at the date of that decision. Without more, I cannot assume that the terms of any policy in force in September 2014 were necessarily in the same term as the "Version 4.0" placed before me. However, in light of the reasons I am about to give, I am content to assume the policy is in the same terms.

31. Secondly, looking at the terms of the policy, the passage relied upon at 2.4 does not impose an obligation or duty upon the respondent to suspend the decision making process until a report from the HBF is provided. It merely states that the respondent "should normally 'suspend' the substantive decision" (my emphasis). This undoubtedly confers a discretion upon the Secretary of State to suspend the making of the substantive decision albeit that "normally" that discretion will be exercised so as to suspend the process. Ms Benfield did not make any submissions to me that the Secretary of State, if she had a discretion, had acted unlawfully on public law principles in not suspending the process. Ms Benfield's submission

was baldly that the policy had not been applied because the process had to be suspended because of the terms of the policy.

32. In this case, the appellant was referred to the HBF and taken out of the DFT process on 26 June 2013. It was almost fifteen months later that the respondent took the substantive decision to refuse the appellant asylum on 21 September 2014. In the absence of any concrete submissions that it was irrational or otherwise unlawful for the respondent, having waited fifteen months for a report, to make a decision I am simply unable to conclude that having initially suspended the procedure it was irrational or otherwise unlawful fifteen months later despite the absence of a report for the respondent to make a substantive decision.

33. On that basis, I am unable to conclude that the respondent breached the policy set out in the API and, even if Judge Murray erred by failing to consider it, that failure could not have affected her decision.

34. Thirdly in any event, even if the policy applied it is clear to me that Judge Murray was not referred to it at the hearing. Ms Benfield, who was of course not Counsel at the hearing, was unable to say whether the policy had been provided to the judge. However, having examined the Tribunal file carefully, there is no copy of any such policy in the Tribunal file. None is included in the Appellant's 138 page bundle or a further bundle of 147 pages. Indeed, it is clear to me that Counsel for the appellant at the hearing placed no reliance upon the policy now relied upon by Ms Benfield on behalf of the appellant. No mention of it is made in the 22 page and 52 paragraph skeleton argument of Counsel. That skeleton is wholly directed to the merits of the appellant's appeal on asylum, humanitarian and human rights grounds. Likewise, the record of Counsel's submission at para 23 of the determination (reflected in the judge's Record of Proceedings) again focuses upon the merits of the appellant's appeal. There is no reference to reliance upon the policy or that the judge should allow the appeal not on its merits but because the respondent's decision was not in accordance with the law.

35. The only reference to the respondent reaching a decision without the report is that: "the respondent rushed in making the decision. They knew that a Helen Bamber report was awaited." That submission made by Counsel (also recorded in the Record of Proceedings) is not in any way linked to the ground upon which Ms Benfield now relies to establish that the judge erred in law by failing to consider whether the respondent had failed to apply her policy.

36. Ms Benfield pointed out that the "grounds of appeal" (at pages 5 – 11 of the second bundle before the FTT) did raise the issue now relied upon in ground 1 before me. In particular, at para 2 it is contended that the respondent's decision was "wrong, unfair and unreasonable" and "otherwise not in accordance with the law". I should set out in full para 2 of the grounds of appeal which are in the following terms:

> "The Respondent's decision is wrong, unfair and unreasonable and it is not in accordance with the Immigration Rules or

> otherwise not in accordance with the law. The Appellant also will argue that the Respondent failed to apply proper discretion or policy in deciding to make a decision and refuse the Appellant's asylum claim when an assessment and report were being awaited from the Helen Bamber Foundation (HBF). This failure makes this decision flawed and unreliable as the Respondent has failed to properly and adequately look at the Appellant's circumstances as revealed in the HBF medical report."

37. Whilst I accept that there is a passing reference to a "policy" the content of that policy is not referred to and, at best, the focus of this paragraph is on the contention that it was not a proper exercise of discretion to reach a substantive decision in the absence of the HBF report. That was, of course, as I have already indicated not an argument pursued by Ms Benfield before me.

38. Likewise, at para 1 of the "grounds of appeal" reference is made to "the published Home Office Asylum Policy Instruction on Discretionary Leave" but that is not a reference to the policy which Ms Benfield now relies upon. Rather, as para 1 of the grounds themselves makes clear, it is to the "discretionary leave" policy as to whether an individual should be granted humanitarian protection or limited leave rather than the process for making an asylum decision where the HBF has been approached for a report.

39. It is also worth noting that the drafter of the "grounds of permission" to the Upper Tribunal in "ground 1" although, again referring to the "respondent's own policy", fails to identify any relevant policy or its terms. Indeed the focus of paras 3 – 7 of the "grounds for permission" under the heading "Ground 1 – Procedural Impropriety and Unfairness" is directed to an argument that the respondent's decision was unlawful by analogy to the higher court decisions in respect of the legality of the DFT process. That, of course, was a ground not pursued by Ms Benfield before me. It is difficult to see, on reading the terms of paras 3 – 7 of the grounds of permission, that the drafter had in mind the submission now made by Ms Benfield under this ground. The shift in the argument is, in effect, to an entirely different point to that raised in the grounds.

40. In my judgment, it cannot be said that Judge Murray erred in law in failing to consider whether the respondent had acted not in accordance with the law by failing to apply the policy now relied on when: (1) she was not provided with a copy of that policy; and (2) Counsel for the appellant at the hearing did not pursue or reply upon this as a basis of challenge to the respondent's decision.

41. Finally, I do not accept Ms Benfield's submission that the appellant has been prejudiced even if the policy should have been applied. Her contention that the prejudice flows from the fact that the judge did not have the benefit of the respondent's view, in assessing the appellant's credibility, of the impact of the HBF report is, with respect, wholly unsustainable. The judge had the report and, subject to what is argued

under ground 2, took that report into account. The fact that she did not know what view the Secretary of State would take including any reasons for rejecting reliance upon the report does not create any prejudice to the appellant. It comes close to implying that the judge's role was simply to decide whether the respondent' reasons were defensible. That was not her role in deciding on the merits whether the appellant had established her claim including her credibility. Providing the judge properly approached the issue of credibility (including taking into account the HBF report) she was entitled to reach findings even though the respondent in reaching her decision in September 2014 had not taken into account the report. The position would be no different if the appellant had produced, for the first time, an expert report at a hearing on any issue. A judge's obligation is to take into account all relevant evidence and any submissions made by the parties. It is simply not the legal position that a judge can only consider evidence that was considered by the respondent. The only prejudice suggested by Ms Benfield was the absence of the respondent's view on the HBF report.

42. For these reasons, I reject ground 1.

2. Ground 2: Credibility

43. Ms Benfield's principal argument under ground 2 was that the judge had failed properly to assess the appellant's credibility having regard to her acceptance that the appellant was a vulnerable adult and in the light of the HBF report. That report noted that the appellant:

> "… has concentration problems that were evident during the assessment session and she frequently lost the thread of the conversation and had to be reminded about what we were discussing" (para 34 of the report).

44. Ms Benfield submitted that the judge had, in effect, determined the appellant's credibility without adopting a holistic assessment contrary to the approach mandated by the Court of Appeal in cases such as Mibanga v SSHD [2005] EWCA Civ 367. Ms Benfield submitted that in effect the judge had made a credibility finding and had then looked at the medical evidence to see if her view should shift.

45. Likewise, in identifying inconsistencies in the appellant's account and rely on them the judge had failed to take into account the appellant's vulnerability. Ms Benfield, in particular, drew my attention to para 34 of the judge's determination referring to inconsistent parts of the appellant's evidence given in interview and subsequently as to the number of men who had raped her. The judge had failed to take into account the expert's view that the appellant suffered from PTSD caused by her experience as described of being multiply raped.

46. It is clear from cases such as Mibanga and SA (Somalia) v SSHD [2006] EWCA Civ 1302 that a judge in assessing the credibility of an appellant or her account should take into account supportive medical evidence either as to her mental state or corroborative of what the individual claimed occurred. It would be wrong for a judge to reach a finding in respect of an

appellant's evidence and its credibility in the absence of considering the expert or other evidence relied upon and relevant to the individual's credibility or which support of her account.

47. In Mibanga, the judge had fallen into error by reaching a conclusion on the credibility of the appellant without considering at all the medical evidence concerning the causation of the individual's injuries. In SA, the Court of Appeal identified the "the force of the decision in Mibanga" at [32] as follows:

> "... where there is medical evidence corroborative of an appellant's account of torture or mistreatment, it should be considered as part of the whole package of evidence going to the question of credibility and not simply treated as an 'add-on' or separate exercise for subsequent assessment only after a decision on credibility has been reached on the basis of the content of the appellant's evidence or his performance as a witness."

48. In this case, it is clear to me that the judge did not fall foul of the prohibited approach set out in Mibanga and SA.

49. As Ms Benfield candidly acknowledged, the judge specifically directed herself to adopt a holistic approach taking into account the vulnerability of the appellant and the HBF report relevant to the assessment of her evidence and account.

50. Consequently at para 25, the judge said this:

> "25. The assessment of credibility is a holistic exercise of judgment which requires the Tribunal to consider all the relevant evidence in reaching a conclusion. An assessment of credibility can only be properly made against the background evidence. An individual's account must also be assessed on the basis of its cultural and societal context."

51. Then at para 32 the judge again brought home the point as follows:-

> "32. It is clear from the case of **M (DRC) 2003 UKIAT 00054** that it is wrong to make adverse findings of credibility first and then dismiss an expert's report. In **Ex parte Virjon B [2002] EWHC 1469**, it was held to be an error of law to use adverse credibility findings as a basis for rejecting medical evidence without first considering the medical evidence itself. I have therefore considered the medical evidence as part of my credibility assessment. I have also taken account of the Joint Presidential Guidance Note 2 of 2010 on vulnerable adults. In relation to the question of fitness to give evidence, Dr Robjant concludes that the Appellant may have difficulty answering questions in cross-examination if she perceived the process of recounting her history to be adversarial and may have already done so in her asylum interview. I have taken this into account in assessing the answers given in interview."

52. Of course, it is not sufficient for the judge correctly to direct herself if, in fact, she then did not apply that approach. However, a careful and fair reading of the judge's determination and her reasons for her findings at

paras 33 – 55 demonstrates clearly that she did not fail to consider the appellant's vulnerability or the expert report in assessing the appellant's credibility for her claim.

53. So, at paras 35 – 37 the judge explicitly dealt with the expert's report particularly as regard the appellant's mental health including that her PTSD was consistent with her claim:

> "35. I have considered conclusions the expert's report in relation to her claim to have been raped by a police officer. The Appellant was interviewed by Dr Robjant on 23 March 2015. The conclusions were based on the history provided directly by the Appellant. Dr Robjant does not appear to have regard to the Appellant's GP records as she states in her report that she does not rely on material from any other source unless specifically stated. Although she states that paragraph 41 that the Appellant is currently receiving anti-depressant medication and has been referred to a psychiatrist by her GP there is no evidence before me that she was receiving any medical treatment or had been diagnosed with depression prior to her asylum claim.
>
> 36. At paragraph 39, Dr Robjant concludes that the Appellant's PTSD was caused by the experiences she describes of being multiply raped. She states that this is her opinion because her symptoms are directly related to the experience of rape (for example she had intrusive memories of these events and avoids have intimate relations with her husband because it reminds her of the rape, even though she wants to have a baby). She concludes that her depression is caused in part by her sense of worthlessness since the rapes and her guilt about being able to tell her husband about the rapes.
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> 37. The report is highly probative of the Appellant's account to have been raped. However, it is the Appellant's case that she was raped on a number of occasions by both her friend's husband Janaka and by the police."

54. At para 38, the judge cited background evidence concerning the approach of the Sri Lankan state to the victims of sexual violence.

55. At paras 39 – 47 the judge set out a number of reasons for rejecting the appellant's account that she had been politically involved in Sri Lanka with the DNP party and, as a result, was at risk on return:

> "39. In this context, and in view of the fact that it is the Appellant's account that the rape was perpetrated by a police officer, I accept that the Appellant would have been unlikely to report it. I have also taken account of the case of **PS (Sri Lanka) v SSHD 2008 EWCA Civ 1213** which was a case where the appellant had been repeatedly raped by soldiers. Sedley LJ held that whole point was that, unlike ordinary criminals, the soldiers were in a position to repeat their crime with no apparent prospect of detection or punishment and found the Appellant to be to risk on return. I have also considered the case of **PP (Sri Lanka) v Secretary of State for the Home Department [2014] EWCA Civ 1828** where it was held that in finding that a female Tamil asylum seeker, who had been raped whilst detained the Sri Lankan

authorities, would not be at risk if returned to Sri Lanka, the Upper Tribunal had not given sufficient consideration to the issue of whether women in certain circumstances should be treated as falling within a particular risk category.

40. It is the Appellant's case that she fears that she would be kidnapped as a result of her involvement with the DNA party because this is what happened to her friend. However, the Appellant has provided no supporting evidence in relation to the kidnap or the existence of her friend. There is no supporting evidence to show that her friend's mother reported her disappearance. She has also provided no evidence of the many emails she said she sent to her friend from the UK in relation to the activities of the Sri Lankan authorities that she was able to ascertain whilst being in the UK. I find this surprising in view of fact they were sent from the UK.

41. Further, the Appellant asserts that she was raped in January 2010 and that the risk to her arose at this point. She asserts in her witness statement at paragraph 42 'knowing the behaviour of Sri Lanka's military intelligence.. I knew it was dangerous to stay on'. She states that she acquired a student visa and 'discretely' left Sri Lanka. She does not assert that she used an agent to exit.

42. Notwithstanding the fact that is her case that her fear existed when she arrived in the UK she did not claim asylum on arrival. She also had an appeal in 2011 when she was represented by a solicitor in relation to her application to extend her student leave. It is the Appellant's case, as set out in interview, that she did not know she could claim asylum until after her arrest for working illegally in the UK. She states at paragraph 56 of her witness statement that after her appeal in 2011 was refused, her solicitor told her that there was nothing more he could do. She then states that because she could not return to a country where her life was in danger, her husband and she remained in the UK illegally.

43. I do not find it credible that the Appellant's solicitor who represented her in 2011 would not have explained the contents of the 'one-stop' notice and impressed upon the Appellant the importance of advancing all claims she had to remain in the UK. Further, the Appellant is an educated individual and I do not accept that if she were in fear of returning to Sri Lanka that she would not have voiced this fear to her solicitor. Not only did the Appellant fail to mention any fear at her appeal in 2011 she also only made protection based claim after she was arrested for working illegally. Whilst I accept that it may well be difficult to tell her husband that she had been raped, she could nevertheless have approached her solicitor in her husband's absence and explained why she was unable to return to Sri Lanka.

44. However, what I find most difficult to accept in the context of her claim to be in fear of the authorities is that she returned voluntarily to Sri Lanka 29 July 2010 some 6 months after the alleged rape because her father was unwell. At paragraph 47 she states in relation to this visit that she was informed that her father was seriously ill. She then states that she was very attached to

her father and was devastated and could not eat or sleep properly when she heard he was ill. This does not lie entirely comfortably with her evidence in interview at question 10 that 'I am scared of my dad he is very strict ... he is like Hitler he is very strict'. However, even accepting that the Appellant has a close relationship with her father I do not believe she would have returned if he believed she would be at risk of persecution for her political beliefs by the authorities. The Appellant states at paragraph 48 of her witness statement that she entered 'discreetly' with the help of a relative. It is unclear that she means by this but there is no suggestion that she used an agent to enter or exit. It is clear also that she saw her family and friends.

45. It is the Appellant's case as set out at paragraphs 28 to 37 of her witness statement that she was involved with the Democratic National Alliance Party and in exposing war-crimes committed during the last stages of the war. She states that she was very much involved in the grass root business of business of the party including distribution of party leaflets and propaganda materials as well as mobilizing party members for meetings.

46. I have considered the Appellant's claim in the context of the risk categories as set out in **GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319** (IAC). The Tribunal held that 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 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.

47. It is not the Appellant's case that there is an extant court order or warrant out but it is her case that she has criticised the Sri Lankan government's human rights record and been detained, raped and released with threats as a result. I do not accept that the

> Appellant would have returned to Sri Lanka openly and been able to visit her family in circumstances where she had been previously detained on the basis of human rights activities and brutally raped and feared that this would be repeated. I do not accept that she was politically involved in Sri Lanka or raped by one or two police officers."

56. Clearly, in reaching this conclusion the judge, having directed herself as to the correct approach, had in mind what she had said in paras 35 – 37 concerning the expert report and her view stated at para 21 that the appellant was a vulnerable witness. Bearing that in mind, I see no basis upon which it can be said that the judge was not entitled to reach the finding that she did on this aspect of the appellant's claim.

57. Further, at para 48, the judge dealt with the appellant's claim to be at risk from her family and the local community as a result of her "culturally unacceptable marriage" as follows:

> "48. The Appellant also claims that if she returned to Sri Lanka she would be mistreated by her family and local community. She claims that her brothers beat her because of her relationship with [DG] who she subsequently married when she returned to Sri Lanka in 2010. The Respondent produced evidence cited in the RFRL that the relationship is not prohibited by law. The Appellant has not produced any evidence to show that a marriage to her brother's wife's nephew would be culturally unacceptable. I do not find the Appellant's evidence that he would be at risk of persecution by her brothers as a result of her marriage to be credible. The reason that the appellant provided for her fear in interview was 'in our country they don't accept marriages like this because in theory I am auntie to my husband and they will not accept this marriage'. No support for this contention that the marriage would be culturally disapproved or has been provided. I do not accept that her brother has threatened to kill her. The Appellant was able to return to her family in July 2010. I do not consider that she would have done so if she were in fear. Further, she has been found to have used deception in a previous application for entry clearance. Further, she failed to claim asylum despite having the opportunity to do so and having previously been represented by solicitors in a 'one-stop' appeal. There is no supporting medical evidence in relation to any ill-treatment. The Appellant's husband also came to the UK in 2010 and he made no claim for asylum at this point or in the appeal in 2011 in relation to the refusal to vary leave. I do not find the Appellant's account to be in fear of her brothers and local community as a result of her relationship to be credible."

58. Again, nothing in this reasoning demonstrates that the judge failed to take into account the medical evidence and the appellant's vulnerability. There was no evidence that her marriage would be "culturally disapproved" such that her brother would threaten to kill her or that she would be at risk otherwise because of that marriage.

59. Then, at paras 49 – 51, the judge dealt with the part of the appellant's claim based upon future risk as a result of being raped by her friend's

husband in 2009. As the judge made clear in para 49, the appellant's Counsel did not specifically rely upon this aspect of her claim but nevertheless the judge dealt with it as follows:-

> "49. Mr Simmonds does not rely in his skeleton argument on the Appellant's claim to have been raped by a friend's husband as a basis of her claim to be in need of international protection. However, since she clearly advances it is a reason for not being able to return both in her interview and her witness statement I have considered it.
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> 50. The Appellant gave a detailed account in interview in relation to how her friend's husband drugged her drink and she awoke to find herself naked. Her account of to his subsequent attempt to blackmail her with the naked pictures of herself has also been consistent as between her interview and witness statements. Although she has provided no proof of the numerous emails she said that he sent her through Facebook it is understandable that she may have deleted them in the circumstances. The expert concludes that the likelihood is that she has been raped. She has given a detailed, consistent and credible account of why she did not tell the police or her family. I accept on the lower standard of proof that she was raped by her friends' husband Janaka.
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> 51. However, I do not consider that she would be at risk from him on return. Firstly, in view of the fact that the incidents happened in 2009, had he wanted to show the photographs to the Appellant's family or anyone else he could have done so. Further, on the Appellant's evidence, the rapes took place on the second and third occasions when she went, alone, to see him to obtain the pictures. In view of the fact that he did not return them to her and she was abused again I consider it unlikely that she would be likely to arrange to see him on her own again. I also consider that it is unlikely that Janaka as a married man and father would want to reveal the fact that he has in his possession photographs of the Appellant naked. I also find that if the Appellant had believed that she was at risk on return from Janaka she would not have returned to Sri Lanka for 10 days in July 2010. Whilst I accept for the reasons stated in the Respondent's OGN, that effective state protection is unlikely to be available to the majority of women fearing sexual and gender based violence, the Appellant would be returning to Sri Lanka with her husband and would be unlikely to put herself in a situation where she was alone with Janaka The Appellant has not asserted in her interview or in her witness statement that he has threaten to rape her if she returns to Sri Lanka and she has not argued in her skeleton argument that she is at risk on return from him."

60. Here, consistent with the expert evidence, the judge accepted that the appellant had established on the lower standard of proof that she had in the past been raped by her husband's friend. However, in para 51 the judge gave a number of reasons why she did not accept the appellant would be at risk in the future as a result.

61. Ms Benfield submitted that the judge had failed to take into account the appellant's vulnerability in her reasons in para 51 and had speculated on

what might occur if the appellant returned. Again, reading the judge's determination as a whole there is no reason to believe that she did not have well in mind the appellant's circumstances and I see no basis upon which it can be said that the inferences she draws in para 51 were not reasonably open to her on the evidence.

3. Ground 2: Mental Health Issues

62. Finally, at paras 52 – 55, the judge dealt with the appellant's claim that her return would breach Art 3 of the ECHR because of her mental health and its deterioration if she returned. The judge said this

> "52. The Appellant also argues that if she returns to Sri Lanka she would be at risk of committing suicide and that this would amount to a breach of Article 2, 3 and Article 8 ECHR. In **J v SSHD 2005 EWCA Civ 629** the Court of Appeal set out the test in Article 3 cases regarding suicide as follows: firstly the ill treatment must be of a minimum level of severity; secondly a causal link must be shown between the act or threatened act of removal and the inhuman treatment relied on; thirdly, in a foreign case the Article 3 threshold will be particularly high; fourthly in principle it was possible for an Article 3 case to succeed on the basis of a risk of suicide and fifthly in a foreign case of suicide risk it would be relevant to consider whether the fear of ill treatment in the receiving state was objectively well founded; if not, that would tend to weigh against there being a real risk of there being a breach; and sixthly it would also be of considerable relevance to consider whether the removing and/or the receiving state had effective mechanisms to reduce the risk; if here were, this would also weigh against there being a real risk of a breach. In relation to the risk of suicide in Sri Lanka the Tribunal was entitled to take into account the evidence that there would be family support on return, that the claimant would have access to medical treatment, and that his fears of persecution were not objectively justified. In **Y and Z (Sri Lanka) v SSHD (2009) EWCA Civ 362** the Court of Appeal said that even where there was no objective risk on return, a finding that an appellant had been tortured and raped in captivity had to be related to credible and uncontradicted expert evidence that the likely effect of the psychological trauma, if return was enforced, was suicide.
>
> 53. According to the expert's report at paragraph 47, if the Appellant were removed from the UK and returned to Sri Lanka her mental health will deteriorate. She states that it is important that the therapy she is offered as a result of the referral the psychiatrist is not interrupted. Dr Robjant states that she is very fearful about being arrested by the authorities on return and of being killed by her brother and would be unlikely to access services in Sri Lanka. If her medical health deteriorated as a result then the risk of suicide would also increase. She states at paragraph 43 that she is currently a moderate risk of suicide because of the frequency and intensity of suicidal ideation.
>
> 54. I have not been referred to any evidence in relation to the medical facilities available for mental health in Sri Lanka. In **RA (Sri Lanka) v SSHD 2008 EWCA Civ 1210** the Court of Appeal

considered a case where the appellant suffered from severe depression and history of suicide. The Court of Appeal concluded that the First-tier Tribunal were not in error in relying on the ability of the claimant's mother and sister to provide support entitled to conclude that the government was committed to achieving high standards in mental health care. The claimant would be able to obtain hospital admission and necessary treatment, particularly as he had financial resources to use in the private sector. With regard to the Article 3 threshold, in in **N v UK Application 26565/05** and **IAS 1.7.08**, the Grand Chamber upheld the decision of the HL and held that in medical cases Article 3 only applied in very exceptional circumstances.

55. I have not found the Appellant's claim to be in fear of arrest by the authorities or at killed by her brother to be credible. In the circumstances, do not accept Dr Robjant's conclusion that she would not access services because she fears being found. She has been assessed as a moderate risk of suicide and in the circumstances I do not find that the high threshold required for Article 3 has been made. It has not been argued on her behalf that medical treatment is not available in Sri Lanka or that she would not be able to access it. In view of my findings I do not consider that her risk of suicide would increase if she were returned to Sri Lanka. She has not demonstrated that she is at risk of inhuman and degrading treatment on return."

63. Ms Benfield submitted that the judge's analysis again failed to take into account what was said by Dr Robjant in the HBF report. Clearly, that submission is unsustainable. The judge expressly refers to the report and its contents at para 53. She correctly directs herself in accordance with the Court of Appeal's decisions in J v SSHD [2005] EWCA Civ 629 and Y and Z (Sri Lanka) v SSHD [2009] EWCA Civ 362 at para 52 of her determination. Ms Benfield did not seek to take issue with the judge's self-direction. The expert's view was, of course, based upon the appellant's fear from the Sri Lankan authorities or her family if she returned. Objectively, the judge had determined that those risks did not arise. In addition, there was no evidence before the judge that medical treatment for the appellant's mental health would not be available in Sri Lanka. In her submissions, Ms Benfield referred to the evidence in the Upper Tribunal's decision in GJ and Others [2013] UKUT 00319 (IAC) at [453] – [456]. However, she was unable to confirm that the judge had even been referred to this evidence. No reference is made to it in the skeleton argument of Counsel for the appellant at the hearing at paras 38 – 48 when dealing with the appellant's claim based upon her mental health.

64. In my judgment, the judge was entitled to find that the appellant had not established that medical treatment for her health would not be available. The judge was entitled to take into account that her objective fear was not well-founded and also that she would return with support from her family, in particular her husband would return to Sri Lanka with her. In those circumstances, I am unable to conclude that the judge's finding that the

appellant had not established a breach of Art 3 based upon a real risk of suicide was irrational or otherwise unsustainable in law.

65. Ms Benfield made no separate argument in relation to the judge's dismissal of the claim under Art 8 and her reasons in paras 56 – 57 including based upon her mental health problem. I see no basis upon which her finding that no breach of Art 8 has been established could be said to be unsound.

4. Ground 2: Other Points

66. In addition, drawing on some of the paragraphs pleaded under ground 2, Ms Benfield raised a number of other points.

67. First, she submitted that the judge had paid "too much weight" to the earlier decision of Judge Sethi in which he had found that the appellant had used deception in seeking to gain entry to the UK. At para 29, the judge summarised the guidelines set out in Devaseelan and then at para 30 concluded as follows:-

> "30. The Appellant and her husband made an application to vary their leave in October 2011 which was refused and the Appellant gave evidence in her appeal on 1 December 2011. She was served a one-stop notice in relation to that appeal. Judge Sethi found, at paragraph 25 of his determination, that the Appellant had knowingly submitted false documents and had knowingly used deception in an attempt to gain leave to the UK. He also doubted her general credibility. Whilst the same issues are not raised in this appeal, it is of relevance to my assessment of the Appellant's credibility that she has been found to use deception previously."

68. Ms Benfield frankly accepted that the judge had made no further reference to Judge Sethi's finding and, when I raised the point directly with her, she accepted that the appellant's history of deception was a relevant factor in assessing the appellant's credibility in this appeal. That, in my judgment, is undoubtedly correct. But, it is only a relevant factor. There is simply no basis to sustain the submission that the judge placed "too much weight" on Judge Sethi's finding of the appellant's previous use of deception. It was a relevant factor and in paras 31 – 57, without making further reference to that, the judge in a series of reasons, found against the appellant including that her claim was (apart from accepting she had previously been raped by a friend of her husband) not credible.

69. For these reasons, I reject Ms Benfield's submission wrongly placed too much weight upon the previous judge's finding of deception and, as a consequence, failed to consider the "new" evidence in accordance with the approach in Devaseelan.

70. Secondly, Ms Benfield drew my attention to para 34 of the determination which is in the following terms:

> "34. I have found the Appellant's evidence in relation to both her political activities and he rape inconsistent in a number of material respects. In answer to question 31 of the interview the Appellant said that she was raped by 'a man'. In answer to

> question 142 of her subsequent interview she said that she was raped by two men. In answer to question 144 she said that only one man raped her. The Respondent raised this inconsistency at paragraph 44 of the RFRL. The Appellant does not specifically address this inconsistency in her witness statement. She states at paragraph 38 that she was raped by one man but does note explain why she gave inconsistent evidence in her interview."

71. Ms Benfield submitted that the judge had given no example of an "inconsistency" relevant to the appellant's "political activities" as she claimed in the first sentence of that paragraph.

72. As Mr Richards submitted, in fact Judge Murray does not make any credibility finding in para 34 but, it has to be accepted, does point out inconsistencies in relation to the appellant's evidence concerning her claim to have been multiply raped. It is not entirely clear why in the first sentence at para 34 the judge refers to inconsistencies in relation to the appellant's evidence about her "political activities". It is certainly the case that she identified none in para 34 itself. In truth, the point is an entirely inconsequential one and not material to the judge's extensive reasoning, particularly at para 39 onward rejecting the appellant's account and the risk to her based upon her political opinion. There is, in my judgment, nothing in this point.

73. Finally, Ms Benfield did not seek to make any other explicit challenges to the judge's reasoning based upon the grounds upon which permission was sought. I would simply say, therefore, that having read and considered them in carefully, nothing in these grounds persuades that the judge's decision was flawed in law. The judge's reasons were entirely sustainable having taken into account all the evidence including the expert report from the HBF and the background evidence to which she was referred.

74. Although not relied upon in Ms Benfield's submissions, I reject the contention in paras 19 – 20 that the judge was not entitled to take into account that, in assessing the claimed attitude of the appellant's family to her marriage, there was no evidence that her marriage was "culturally unacceptable". The customary law referred to in the ground was not in evidence before the judge.

75. Further, contrary to what is contended in para 21 of the grounds, in para 48 of her determination the judge was entitled to take into account that the appellant had safely returned to her family in July 2010. The point made by the judge was that she was able to do so despite the fact that her family already disapproved of her relationship with her soon to be husband. In assessing whether the appellant's brother had threatened to kill her, the judge was entitled to take into account that despite their disapproval of their relationship, she safely returned to Sri Lanka prior to her marriage and before her brother, as she claimed, threatened her because of the family's disapproval of the relationship.

76. Finally, even if the judge was wrong to state that it was surprising that the appellant could not provide evidence of e-mails upon which she relied when they had been sent from the UK given that they had been deleted,

this was only one of a number of reasons (otherwise sustainable) given by the judge for her adverse credibility finding and was not, in my judgment, material to that overall finding against the appellant.

77. For these reasons, I reject Ms Benfield's submissions based on ground 2 that the judge's adverse findings were flawed in law.

Decision

78. For these reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal on asylum and humanitarian protection grounds and under Arts 3 and 8 of the ECHR did not involve the making of an error of law.

79. The First-tier Tribunal's decision, therefore stands.

Signed

A Grubb
Judge of the Upper Tribunal