Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11145/2014

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 9th March 2016	**On 11th April 2016**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

C R
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr J Edwards instructed by Kesar & Co Solicitors

DETERMINATION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order in order to protect the anonymity of the respondent (CR) who claims asylum. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the respondent.

Introduction

2. The Secretary of State appeals against the decision of the First-tier Tribunal (Judge Callow) allowing CR's appeal against the Secretary of State's decision taken on 21 November 2014 that the automatic deportation provisions in the UK Borders Act 2007 (the "2007 Act") applied. The Secretary of State made a deportation order against CR on that date also.

3. For convenience, although this is an appeal by the Secretary of State I will hereafter refer to the parties as they appeared before the First-tier Tribunal.

Background

4. The appellant came to the United Kingdom on 29 January 2001. He is a national of Sri Lanka and claimed asylum on the basis that he had been detained and ill-treated by the Sri Lankan army on suspicion that he had worked for the LTTE in Sri Lanka. On 2 March 2011, his asylum application was refused. He was, however, granted exceptional leave to enter the UK until 2 March 2005. Then, on 9 July 2005 he was granted indefinite leave to remain in the UK.

5. On 13 June 2012, the appellant was convicted at the Harrow Crown Court on two counts: one of false imprisonment and the other of wounding with intent to do grievous bodily harm and was sentenced to concurrent terms of seven years' imprisonment on each count.

6. On 25 July 2012, the appellant was served with notice of his liability to deportation and, thereafter, submitted a questionnaire in which he claimed that his deportation would breach the Refugee Convention. On 1 May 2014, the appellant was served with a warning letter from the respondent that the respondent was minded to apply s. 72 of the Nationality, Immigration and Asylum Act 2002 ("NIA Act 2002"). The appellant failed to complete a screening interview but on 19 May 2014, further representations were made on his behalf.

7. On 21 November 2014, the Secretary of State refused the appellant's claim for asylum on the basis that he had failed to establish that he would be at risk because of his past involvement with the LTTE applying the country guidance case of GJ and Others (post-civil war; returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). Given the seriousness of his offending and in the light of all the evidence, the Secretary of State issued a certificate under s.72 of the NIA Act 2002 on the basis that he had been convicted of a particularly serious offence and his continued presence in the UK constituted a danger to the community.

8. In addition, the Secretary of State refused the appellant's claim under Arts 2 and 3 of the ECHR on the basis that he had not established either a risk

based upon his past history or that he would, as a result of his mental health problem including PTSD, be at real risk of serious harm on return to Sri Lanka. Finally, the respondent refused the appellant's claim under Art 8 of the ECHR. As a result, the Secretary of State concluded that the appellant did not fall within any of the exceptions set out in s.33 of the 2007 Act which would prevent the application of the automatic deportation provisions.

The Appeal to the First-tier Tribunal

9. The appellant appealed to the First-tier Tribunal. He relied upon the Refugee Convention and also upon Art 3 of the ECHR, particularly in respect of the claimed impact upon his mental health if he were returned to Sri Lanka which, he claimed, would result in him committing suicide.

10. Judge Callow did not accept that s.72 of the 2002 Act applied because, although the appellant had been convicted of a particular serious crime, the appellant had rebutted the presumption that he constituted a danger to the community in the UK. That decision is not challenged in these proceedings and I say no more about it.

11. Judge Callow went on to consider the merits of the appellant's asylum claim. He accepted the core claim of the appellant that he had been a low-level member of the LTTE and that he had been detained and assaulted in detention before being released on payment of a bribe. However, applying GJ and Others, Judge Callow concluded that that factual matrix did not establish a real risk of persecution by the Sri Lankan authority if the appellant returned to Sri Lanka. The appellant has not challenged that adverse finding in these proceedings which, therefore, stand.

12. Finally, Judge Callow found that the appellant had established a breach of Art. 3 based upon the impact to him as a result of his mental health problem. Consequently, on that ground Judge Callow allowed the appellant's appeal on the basis that he fell within Exception 1 in s.33(2)(a) of the UK Borders Act 2007.

The Appeal to the Upper Tribunal

13. The Secretary of State sought permission to appeal that decision to the Upper Tribunal on two grounds. First, the judge had wrongly found against the Secretary of State on the certification under s.72 of the NIA Act 2002. Secondly, in allowing the appeal under Art 3, the judge had failed to give adequate reason for his finding and had also misapplied the leading decision of the Court of Appeal in respect of claims under Art 3 based upon a risk of committing suicide in J v SSHD [2005] EWCA Civ 629.

14. Initially, the First-tier Tribunal (Judge Pooler) refused the Secretary of State permission to appeal on 23 July 2015. However, on 4 September 2015 the

Upper Tribunal (UTJ Plimer) granted the Secretary of State permission to appeal on ground 2 alone.

15. Before me, Mr Richards who represented the Secretary of State accepted that he could only rely upon ground 2 and his oral submissions were, as a consequence, wholly focused on that ground.

The Submissions in Summary

16. Mr Richards made two submissions. First, he submitted that the judge had failed properly to apply the expert report of Dr Richard Bailie, a Clinical Psychologist (dated 22 April 2014 and at pages L63-L121 of the respondent's bundle). Mr Richards submitted, in essence, that Dr Bailie had nowhere in his report diagnosed that the appellant was suffering from severe mental illness which created a real risk that he would commit suicide if returned to Sri Lanka. At best, Mr Richards submitted that Dr Bailie referred to an "elevated risk" at para 3.6.10 of his report but that did not explain the level of risk which could remain "low" having begun from a base of "no risk". Mr Richards submitted that there was no evidential basis for the judge's conclusion that the appellant had established a breach of Art 3.

17. Secondly, in relying upon the ground upon which permission was granted, the Secretary of State also contends that the judge had failed to apply the "fifth principle" in J at [30] that:

> "if the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of Art 3."

18. The Secretary of State contends that the judge failed to take into account his finding, in respect of the appellant's asylum claim, that his fear of persecution was not well-founded.

19. On behalf of the appellant, Mr Edwards relied upon the appellant's rule 24 reply and a skeleton argument.

20. First, he submitted that the judge had fully taken into account Dr Bailie's report including his diagnosis that the appellant suffered from PTSD and that there was a "elevated risk" to the appellant of committing suicide if he returned to Sri Lanka. Mr Edwards relied upon a number of passages in Dr Bailie's report which, Mr Edwards submitted, had been summarised in para 33 of the judge's determination. Mr Edwards submitted that there was a sound factual basis for the judge's finding that there was a risk of the appellant committing suicide if returned to Sri Lanka based upon Dr Bailie's evidence, the appellant's own evidence and the background evidence that the sources available for treating mental health, including PTSD were not adequate in Sri Lanka.

21. Secondly, Mr Edwards submitted that the Secretary of State's second ground relying upon the "fifth principle" in J had to be read in the light of

the subsequent Court of Appeal decision in Y and Z (Sri Lanka) v SSHD [2009] EWCA Civ 362 and, in particular, passages in the judgment of Sedley LJ at [14]–[16]. In particular, at [16], Sedley LJ said:

> "One can accordingly add to the fifth principle in J that what may nevertheless be of equal importance is whether any genuine fear which the appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return."

22. Mr Edwards submitted the "fifth principle" in J had been effectively amended by the Court of Appeal's decision in Y and Z. He submitted that the judge had taken into account the appellant's subjective fear, which the judge had found to be genuine, even though based upon GJ and Others the fear was not well-founded.

Discussion

23. In considering the application of Art 3, Judge Callow at para 34 of his determination summarised the six principles identified by the Court of Appeal in J applicable when Art 3 is relied upon based upon a risk of suicide or other self-harm. Those principles are found in the judgment of Dyson LJ at [26]-[31] as follows:

> "26. First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of severity. The court has said on a number of occasions that the assessment of its severity depends on all the circumstances of the case. But the ill-treatment must "necessarily be serious" such that it is "an affront to fundamental humanitarian principles to remove an individual to a country where he is at risk of serious ill-treatment": see Ullah paras [38-39].
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> 27. Secondly, a causal link must be shown to exist between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's article 3 rights. Thus in Soering at para [91], the court said:
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> > 'In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing contracting State by reason of its having taken action which has a direct consequence the exposure of an individual to proscribed ill-treatment." (emphasis added).
> >
> > See also para [108] of Vilvarajah where the court said that the examination of the article 3 issue "must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka …'
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> 28. Thirdly, in the context of a foreign case, the article 3 threshold is particularly high simply because it is a foreign case. And it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental. This is made clear in para [49] of D and para [40] of Bensaid.
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> 29. Fourthly, an article 3 claim can in principle succeed in a suicide case (para [37] of Bensaid).

> 30. Fifthly, in deciding whether there is a real risk of a breach of article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of article 3.
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> 31. Sixthly, a further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her article 3 rights."

24. That approach was subsequently approved by the Strasbourg Court in Balogun v UK (2013) 56 EHRR 3 at [31]-[34]. It has been followed, and applied, by the Court of Appeal, for example in AJ (Liberia) v SSHD [2006] EWCA Civ 1736. As Dyson LJ identified in J (at [29]), an Art 3 claim may in principle succeed in a suicide case. However, it is necessary to establish that there is a real risk that the individual will commit suicide and that a causal link exists between the act of removal or expulsion and the violation of Art 3. There is a "high threshold" and it is relevant to consider whether the receiving state has "effective mechanisms to reduce the risk of suicide".

25. The Secretary of State's first ground is that the judge had an insufficient basis derived from Dr Bailie's report to found any conclusion that the appellant had established a real risk that he would commit suicide if returned to Sri Lanka.

26. In evaluating that assumption, it is helpful to begin with the judge's reasoning. At para 33 of his determination he summarised aspects of Dr Bailie's report which he considers important as follows:

> "33. I turn to consider the appellant's mental health. The appellant is apprehensive about the possibility of an enforced return and has threatened to commit suicide prior to such enforcement. He bears the scars of ill-treatment in Sri Lanka. Dr Bailie's report confirms the appellant's presentation as being consistent with a diagnosis of PTSD. At 3.6.1 and 3.6.2 of his report: '[the appellant] reported that he thought he would be killed if he was returned to Sri Lanka … if we assume that [the appellant] has experienced the events that he has described during his childhood and early adulthood then it seems reasonable to assume that he is fearful of returning to Sri Lanka and that at a rational level he does not think it is safe.' At 3.6.4 it is accepted that the appellant may well experience suicidal thoughts, feelings of hopelessness and helplessness and associated depressive symptoms in the event of being told he is to be deported. This would also exacerbate his post traumatic stress symptoms as his sense of safety would be reduced and he would experience a heightened level of fear that his life would be in danger. A number of factors heighten the risk that he would commit suicide in the event of his enforced removal. While Dr Bailie was not in a position to state that the appellant would end his life, he was of the opinion that he would be at an elevated risk of doing so."

27. Having set out the six principles in J and Sedley LJ's statement in Y and Z, relied on by Mr Edwards, the judge set out his findings concerning the appellant's mental health and the impact upon removal of him to Sri Lanka in the light of the background evidence as to the availability of mental health support in Sri Lanka as follows at [36]-[40]:

> "36. I note that the appellant has a genuine fear of return and has difficulty in trusting or interacting with official figures, even in the UK. He has suicidal ideation and plans to commit suicide rather than return, even though there have as yet been no attempts.
> 37. Although the appeal fails under the Refugee Convention and Qualification Directive, I must consider whether the suicide risk which this appellant presents is such as to engage Article 3 ECHR. Applying the *J* and *Y* principles, and reminding myself of the gravity of the appellant's past experience of ill-treatment and his current mental health problems I have considered whether returning the appellant to Sri Lanka will breach the UK's international obligations under Article 3.
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> 38. Drawing on the guidance in *GJ and Others* the evidence is that there are only 25 working psychiatrists in the whole of Sri Lanka. Although there are some mental health facilities in Sri Lanka, at paragraph 4 of the April 2012 UKBA Operational Guidance Note on Sri Lanka, it records an observation by Basic Needs that *'money that is spent on mental health only really goes to the large mental health institutions in capital cities, which are inaccessible and do not provide appropriate care for mentally ill people'* [20].
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> 39. In the UKBA Country of Origin Report issued in March 2012, at paragraph 23.28-23.29, the following information is recorded from a BHC letter written on 31 January 2012:
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> *'23.28 The BHC letter of 31 January 2012 observed that: "There are no psychologists working within the public sector although there are [sic] 1 teaching at the University of Colombo. There are no numbers available for psychologists working within the private sector. There are currently 55 psychiatrists attached to the Ministry of Health and working across the country.'*
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> Post Traumatic Stress Disorder (PTSD)
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> 23.29 The BHC letter of 31 January 2012 468 observed that:
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> *'Post Traumatic Stress Disorder (PTSD) was first recognised in Sri Lanka in patients affected by the 2004 tsunami. Many of the psychiatrists and support staff in Sri Lanka have received training in Australia and the UK for the treatment of the disorder. A Consultant Psychiatrist from NIMH said that many patients often sought ayurvedic or traditional treatment for the illness long before approaching public hospitals, adding that this often resulted in patients then suffering from psychosis.'*
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> 40. I approach assessment of the appellant's circumstances on the basis that it would be possible for the respondent to return the appellant to Sri Lanka without his coming to harm, but once there, he would be in the hands of the Sri Lankan mental health services. The resources in Sri Lanka are sparse and are limited to the cities. In the light of the respondent's own evidence that in her OGN that there are facilities only in

> the cities and that they *'do not provide appropriate care for mentally ill people'*, and of the severity of this appellant's mental illness, I am not satisfied on the particular facts of this appeal, that returning him to Sri Lanka complies with the UK's international obligations under Article 3 ECHR."

28. I do not accept Mr Richards' submission that the judge failed fully to take into account, and in effect misapplied, Dr Bailie's report.

29. Dr Bailie had the benefit of interviewing the appellant and also of seeing his health records. He clearly formed the view that the appellant was genuine in that he was not exaggerating his symptoms. At para 3.2.1 Dr Bailie concluded that the appellant met "the criteria for post-traumatic stress disorder". Mr Richards submitted that this did not amount to a "severe mental illness" and therefore did not justify the judge taking "the severity of this appellant's mental illness" into account at para 40 of his determination in concluding that there was a real risk of the appellant committing suicide. In my judgment, this is in large measure a semantic point that does not go to the substance of Dr Bailie's report. The appellant did suffer from a serious mental health condition and the Judge no more than reflected that.

30. Dr Bailie's report is, as both representatives agreed, a balanced one. At para 3.6.6 he notes that the appellant has "not planned and behaved suicidally before" and that "[t]his reduces the risk that he would do so in the future." However, at para 3.6.8 Dr Bailie notes that the appellant has not previously faced deportation and that it is "difficult therefore to predict his response to a novel stressor". Dr Bailie goes on in that paragraph to state:

> "However he is likely to perceive a move to Sri Lanka as life-threatening. He is likely to feel helpless and hopeless, which are emotions that are commonly associated with suicidal thoughts and behaviour."

Dr Bailie expresses the following opinion:

> "3.6.9. In terms of protective factors, [the appellant] is low on protective factors. He does not have close family or friends; thus he does not have thoughts about others missing him were he to end his life. He does not have children, so similarly thoughts about them do not prevent him from thinking about suicide, making plans and ending his life. Prior to being in custody, [the appellant] misused substances, these are known to be disinhibiting when it comes to suicidal behaviour. [The appellant] has been prone to impulsive behaviour, and rapid emotional dysregulation, both of which are associated with suicidal behaviour.
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> 3.6.10. Thus, while I am not in a position to state that [the appellant] will end his life or seek to end his life in the event of an enforced deportation, he is likely to be at elevated risk of ending his life given the presence of the above risk factors and an absence of protective factors."

31. That opinion was expressed in the context of accepting the appellant's past history which is precisely what Judge Callow did in his determination. The

reference to an "elevated risk" is clearly made in the context that the appellant had a risk of committing suicide at present. Whilst Dr Bailie candidly accepts that he cannot say "with any certainty" whether the appellant will attempt suicide, his recognition of an "elevated risk" given the appellant's past history (which the judge accepted and set out at para 32), the appellant's own evidence concerning his intentions and the background evidence referred to by the judge at paras 38 and 39 entitled the Judge, in my judgment, to reach the conclusion that there was a real risk that the appellant would commit suicide if returned to Sri Lanka. Mr Richards did not seek to argue that the judge had misunderstood the background evidence.

32. Subject to the second argument raised by the Secretary of State, I see no basis upon which it can be said that the evidence taken as a whole was not such as to permit the judge to reach his factual findings, applying the jurisprudence applicable to Art 3 and mental health cases, namely that it was established that there is a real risk that the appellant will attempt to commit suicide on return to Sri Lanka and that therefore his return would breach Art 3 of the ECHR. Whether couched in terms of irrationality or adequacy of reasons, I see no basis upon which the Secretary of State's submission can succeed. There was a substratum of evidence before the judge and upon which he relied; his reasons (as I have set out above) engaged with the evidence and applicable law and demonstrate adequately why he concluded that the respondent's decision breached Art 3.

33. Turning now to the second point relied upon by the Secretary of State, that point fails, in my view, properly to take account of the view expressed by Sedley LJ in Y and Z in respect of the "fifth principle" in J. At [14]-[16], Sedley LJ said this:

> "14. ... if a fear of ill-treatment on return *is* well-founded, this will ordinarily mean that refoulement (if it is a refugee convention case) or return (if it is a human rights case) cannot take place in any event. In such cases the question whether return will precipitate suicide is academic. But the principle leaves an unfilled space for cases like the present one where fear of ill-treatment on return, albeit held to be objectively without foundation, is subjectively not only real but over-whelming.
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> 15. There is no necessary tension between the two things. The corollary of the final sentence of [30] of *J* is that in the absence of an objective foundation for the fear some independent basis for it must be established if weight is to be given to it. Such an independent basis may lie in trauma inflicted in the past on the appellant in (or, as here, by) the receiving state: someone who has been tortured and raped by his or her captors may be terrified of returning to the place where it happened, especially if the same authorities are in charge, notwithstanding that the objective risk of recurrence has gone.
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> 16. One can accordingly add to the fifth principle in *J* that what may nevertheless be of equal importance is whether any genuine fear which the appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return."

34. The point made by Sedley LJ is that a genuine fear of persecution, even when it lacks an objective foundation, may have evidential weight in establishing what an individual may or may not do on return to their home country. The absence of an objective or well-founded fear will not necessarily drive a decision maker to conclude as, in its absence, an individual will not act so as to self-harm on return. Its absence is relevant, as Dyson LJ pointed out in J, but it is not conclusive. Potentially of "equal importance" is the evidence (if accepted) that the individual's fear is genuine despite the absence of objective risk. This is particularly potent in cases, such as the present, where an individual claim is factually accepted but, on the objective evidence, the risk is not well-founded.

35. In this case, the judge did not fail properly to apply the "fifth principle" in J. Having set that principle out, the judge set out what was said by Sedley LJ in Y and Z at para 35. Mr Edwards drew my attention to the appellant's account of his past history in his asylum interview particularly at questions 3, 11, 12 and 13 and accepted by the judge at para 32 of his determination. In my judgment, Judge Callow was entitled to take into account the genuineness of the appellant's fear even if that fear was not well-founded in assessing the risk that the appellant would commit suicide if returned to Sri Lanka.

36. For these reasons, I reject the Secretary of State's submissions on the two grounds upon which permission to appeal was granted. There being no other challenge in respect of the judge's decision to allow the appellant's appeal under Art 3, the decision of the First-tier Tribunal stands.

37. No other aspect of the judge's determination was challenged in the grounds.

Decision

38. The decision of the First-tier Tribunal to dismiss the appellant's appeal on asylum grounds stands.

39. The decision of the First-tier Tribunal to allow the appellant's appeal under Art 3 did not involve the making of an error of law and that decision also stands.

40. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb

Judge of the Upper Tribunal

Date: