Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03780/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 May 2017	**On 16 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

VINOTH PRIYANTHA PERERA PALLIYA GURUNGE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Seehra of Counsel instructed by Nag Law
For the Respondent: Mr K Norton, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Khawar promulgated on 17 February 2017 dismissing the Appellant's appeal against a decision of the Respondent dated 11 April 2016 refusing a claim for protection.

2. The Appellant is a citizen of Sri Lanka born on 14 May 1983. The Appellant's claimed personal history and the basis of his asylum claim

are a matter of record and are summarised in the Respondent's 'reasons for refusal' letter (RFRL) dated 11 April 2016, and in the decision of the First-tier Tribunal Judge at paragraphs 3-7 and 11-19.

3. In such circumstances I do not repeat the entirety of the history here. In any event the focus before the Upper Tribunal is not specifically in respect of the claimed history – which was rejected for sustainable reasons by the First-tier Tribunal Judge - but on the Appellant's mental health and the potential impact of removal to Sri Lanka upon his mental health. Suffice for present to offer the following summary: the Appellant entered the UK on 22 October 2012 with entry clearance as a student valid until 28 February 2016; during the currency of his leave he returned to Sri Lanka on 19 April 2014, re-entering the UK on 2 May 2014; on 24 September 2015 his student Visa was curtailed; on 18 November 2015 the Appellant claimed asylum; the application for asylum was dismissed by the Respondent for the reasons set out in the RFRL.

4. The Appellant appealed to the IAC. His appeal was heard on 16 January 2017 and dismissed for reasons set out in the Decision and Reasons of First-tier Tribunal Judge Khawar promulgated on 17 February 2017.

5. It was a feature of the hearing before the First-tier Tribunal that the Appellant did not offer oral evidence in support of his case. Paragraphs 8 and 9 of the decision of the First-tier Tribunal are in these terms:

"*8. This appeal was listed as an oral hearing. I did not hear evidence from the Appellant. I was informed by his Counsel [Ms Seehra] that he was "not very well" and that she did not propose to bring the Appellant into the Court room (even to confirm his identity), although he was in the Court building. Ms Seehra sought to rely upon a letter dated 13 January 2017 from the Appellant's solicitor, to establish the Appellant's lack of fitness to give evidence. This letter in turn refers to the Report of Dr Julia Heller dated 16 August 2016 which declares that the Appellant is unfit to give evidence.*

9. Consequently I did not hear any evidence from the Appellant in this appeal consisted of hearing submissions in relation to the documentary evidence from both representatives."

6. In his Decision Judge Khawar gave careful and detailed consideration to the materials and submissions relied upon in respect of the Appellant's fitness to give evidence (paragraphs 38-46), and reached a closely reasoned conclusion that there "*is no adequate and/or reliable evidence before me to establish that the Appellant is not fit to give evidence*", also noting that in any event the medical report relied upon was not up-to-date, preceding the date of hearing by some five months (paragraph 46).

7. Consequentially, and necessarily, the Judge observed that in the absence of oral evidence the Appellant's testimony "*can only be viewed as being untried and untested*", and in all the circumstances of the case determined that he should "*attach extremely limited weight to the evidence of the Appellant*" (paragraph 47). Thereafter the Judge gave reasons for why he was dismissive of other aspects of the available supporting evidence (paragraphs 48-49), and reasons for why he was dismissive in respect of the absence of supporting evidence that the Appellant might have been expected to provide in support of his case (paragraph 50). The Judge also gave reasons, at paragraph 51, for rejecting a core element in respect of the Appellant's account relating to the purchase of a Sim card in 2006 in the Appellant's identity which it was claimed had been given to his cousin who, unbeknownst to the Appellant was an LTTE member.

8. In addition to the Appellant's claimed fears based on the perception that he was involved with the LTTE, the Judge noted that the Appellant also maintained that he was "*now suffering from depression, post-traumatic stress disorder and is suicidal*" (paragraph 20), and that it was argued on his behalf that he was "*entitled, in any event, to succeed on the basis of the medical evidence under Articles 2 and 3 of the ECHR*" (paragraph 52). The Judge rejected this line of argument for reasons set out at paragraphs 52–54.

9. The Appellant sought permission to appeal to the Upper Tribunal, which was initially refused on 14 March 2017 by First-tier Tribunal Judge Robertson but subsequently granted by Upper Tribunal Judge Jackson on 13 April 2017.

10. The Appellant's grounds in support of the application for permission to appeal raised arguments in respect of the Judge's approach to the available medical evidence both with regards to the Appellant's fitness to give evidence and the risk on return. Complaint was also made as to the Judge's approach to other elements of the supporting evidence, and in respect of observations and findings in respect of the Appellant's knowledge of his cousin's involvement with the LTTE.

11. Upper Tribunal Judge Jackson granted permission to appeal on a limited basis only, *viz.* "*on the second part of the first ground of appeal only in relation to the claim under Articles 2 and 3 of the European Convention on Human Rights*". Judge Jackson further stated "*it is arguable that the First-tier Tribunal gave insufficient weight to the medical evidence as to the appellant's mental state when considering risk on return such that*

insufficient findings were made on the point to support the dismissal of the appeal at least on the grounds of Articles 2 and 3".

12. For completeness I observe that Judge Jackson stated in respect of the other grounds of challenge that the First-tier Tribunal Judge had concluded "*for sustainable reasons that it had not been established that [the Appellant] was unfit to give evidence. There is no arguable error of law in the consideration of the medical report in that regard*"; and "*Adequate and sustainable reasons were given as to why the appellant was not considered to have given a credible account of his claim which were open to Judge Khawar on the evidence before him. These were not based merely on speculation nor did they fail to consider all of the material evidence*".

Preliminary Matters

13. The Appellant attended the hearing centre on the morning of the hearing. However, by the time the case was called on at 3:10pm he had returned home. Ms Seehra indicated that it had not been anticipated that he would be required to give evidence today in any event, and she was content to present the case in respect of 'error of law' in his absence. In the circumstances I consider nothing turns one way or the other on the Appellant's absence, and I only mention it herein for completeness.

14. The Appellant had provided a new bundle under cover of letter dated 22 May 2017 which included evidence that postdated the hearing before the First-tier Tribunal. In particular at pages 1–7 there was a psychological report prepared by Dr Julia Heller dated 7 May 2017. Ms Seehra acknowledged that any such new evidence would only be relevant if the Tribunal were to conclude that there had been an error of law in the proceedings before the First-tier Tribunal.

15. Ms Seehra made an application for the Tribunal in effect to expand the scope of the grant of permission to appeal, and to permit argument on all grounds pleaded in the application for permission to appeal. This application was articulated in a Skeleton Argument dated 19 May 2017, and amplified by way of oral submissions.

16. It was argued that there was no limitation on the Tribunal's jurisdiction so to act. My attention was also directed to the observations of the Tribunal in **Ferrer (Limited appeal grounds; Alvi) [2012] UKUT 00304 (IAC)** as to the need for the Tribunal to consider carefully the utility of granting permission only on limited grounds. Ms Seehra otherwise argued that there was a degree of overlap or interlinking between the issue upon which permission to appeal had been granted, and the ground of

challenge in respect of the Appellant's fitness to give evidence in that both related to the supporting medical evidence. Moreover in respect of the other line of challenge Ms Seehra placed particular emphasis on incidences of the Judge's use of the phrase 'self-serving', and in this context referred to **R (on the application of SS) v Secretary of State for the Home Department ("self-serving" statements) [2017] UKUT 00164 (IAC)**.

17. Mr Norton opposed the application. He essentially argued that the Judge had given entirely adequate and sustainable reasons for rejecting the evidence in respect of the Appellant's fitness to give evidence. He also submitted that the Judge had adequately explained his reasons for attaching little or no weight to the evidence that he characterised as 'self-serving'.

18. In the premises I accept that the Tribunal has power to permit amendment of grounds of appeal, which in effect empowers it to permit argument on grounds that have already been rejected at the permission to appeal stage. However, it seems to me that some distinction is to be made between the situation where an application to amend is made on the basis of previously un-argued grounds, and where an application to amend is made in effect on the basis of renewing grounds in respect of which permission has already been refused. (Indeed, on the facts here, the grounds that are the subject of the application to amend have already been renewed once in the renewed application for permission to appeal, and so are now renewed for a second time.) Where the grounds relied upon in an application for permission to amend have already been the subject of judicial scrutiny and rejected, the Judge considering the application to amend should approach such grounds on a different basis from grounds that have not previously been raised at all. This is because the Judge is being invited to go behind a judicial decision already properly made in circumstances where he or she is not constituted to sit in appeal or review of the earlier decision. Whilst I do not suggest that this prevents the Judge from coming to his or her own independent decision on the merits of the grounds, I do suggest that a greater degree of scrutiny is required if only because the Judge must consider and address the reasoning of the previous judicial decision-maker who rejected permission on such grounds.

19. I bring my own independent scrutiny to bear on the merits of the grounds that Ms Seehra invites me to consider notwithstanding their rejection by both Judge Robertson and Judge Jackson.

20. I find that there is no merit in the argument that the First-tier Tribunal Judge fell into error in his consideration of the Appellant's fitness to give evidence. In my judgement Judge Khawar gave careful and detailed

consideration to the evidence relied upon in submissions before him on this issue, and gave entirely adequate and sustainable reasons for his conclusion. This line of challenge is unarguable.

21. I also consider that the further line of challenge pursued by Ms Seehra is unarguable. I acknowledge and entirely accept what is said in **SS** about the value (or lack of value) of the expression 'self-serving': in itself it has little meaning and is best avoided. It is unfortunate that in what is otherwise a very carefully and fully reasoned decision that Judge Khawar has used the phrase: e.g. see paragraphs 48 and 49. However, I accept the submission of Mr Norton that notwithstanding the use of such a phrase the Judge has otherwise offered detailed and sustainable reasons for marginalising the value of the evidence that he has characterised as self-serving. To that extent even if criticism is rightly to be made of the use of such a phrase, its use is ultimately immaterial to the Judge's overall evaluation of the supporting evidence.

22. The Appellant's application to expand the grounds of Appeal was refused accordingly.

Consideration of 'error of law'

23. The First-tier Tribunal Judge addressed the question of risk on return in respect of the Appellant's mental health in the following terms at paragraphs 52–54:

"52. It is also submitted in the Appellant's skeleton argument that he is entitled, in any event, to succeed on the basis of the medical evidence under Articles 2 and 3 of the ECHR as was concluded in relation to one of the appellants in GJ and others. Having considered carefully the evidence of Dr Heller, I conclude against the Appellant. It is evident from Dr Heller's Report that although she expresses her opinions as to the Appellant's suicide risk in strong terms (paragraph 6.3 of her Report) I have little option but to note that her opinion is expressed on the basis of assertions made by the Appellant, there being no history of any suicide attempts or the Appellant having any real intent to act on his "occasional suicidal ideation".

53. Further and in any event this is in the context of an Appellant who has failed to establish in my judgement that he was genuinely detained and ill treated by the army and/or the police in Sri Lanka; other than his assertion there is no objective independent evidence to establish such assertions. It is asserted that Appellant received medical treatment upon being released at a medical centre. Given the length that the Appellant appears to have gone to in order to obtain statements from members of his family and/or friends in Sri Lanka, in my judgement there was nothing to prevent the Appellant from obtaining evidence from such medical

centre of his injuries and/or treatment, he allegedly sustained during his claimed detentions. The Appellant is an intelligent man and it cannot possibly be maintained that he and/or his lawyers would not have considered the possibility of obtaining such evidence.

54. Therefore I conclude that the Appellant's case does not fall within the same category as any of the Appellants or indeed and in particular the Appellant in GJ and others who succeeded due to his medical condition on medical grounds under Articles 3 of the ECHR."

24. The Appellant now essentially challenges the Judge's marginalisation of the value of Dr Heller's report and opinion in respect of suicide risk. It is emphasised by way of the grounds of challenge and Ms Seehra's oral submissions: that there was no challenge to Dr Heller's credentials as a Chartered Clinical Psychologist with over 20 years post qualification experience; Dr Heller's opinion was not simply based on the assertions of the Appellant but was also founded upon a number of other diagnostic criteria including "*his demeanour, the psychometric test results and other behavioural indicators*" (page 4 of the report), and that there had been an incident of self-harm (page 3); the Judge failed to have regard to other supporting evidence from the Appellant's GP and a NHS care plan; the absence of a suicide attempt did not negate the notion of a suicide risk.

25. Further to the above Ms Seehra seeks to draw an analogy with one of the successful appellants in **GJ and others [2013] UKUT 00319**. She also pleads in aid **Paposhvili v Belgium**, but in light of the observations of the Upper Tribunal at paragraph 35 of **SS** (cited above) acknowledges that it is only of value as guidance rather than having any binding effect.

26. The Appellant argues that the Judge did not have regard to evidence "*separately obtained from the Appellant's GP and NHS, which showed a care plan review letter and that he had been prescribed medication since December 2015*" (paragraph 7 of the Grounds, to which Ms Seehra in turn referred).

27. In this context it is to be noted that before the First-tier Tribunal the Appellant put his case in respect of Article 3 and the 'physical and moral integrity' element of Article 8 essentially only on the specific opinion expressed by Dr Heller: see Skeleton Argument at paragraph 20 – "*she opined the Appellant is a severe suicide risk if removal is advised*". The other materials that were before the First-tier Tribunal - which I explore in further detail below - did not address the risk of suicide if returned to Sri Lanka, and at their highest only go so far as to state "*Thinks about suicide; Not acted on suicidal thoughts*". As such the other materials did

not in terms support the Appellant's case under Article 3, but at best potentially provided contextual support for Dr Heller's opinion.

28. In such circumstances it seems to me that the Judge's focus on the report of Dr Heller was not only understandable, but appropriate: it was the only document that expressly addressed the risk to the Appellant's mental health if he were to be returned to Sri Lanka, and it was the document upon which the Appellant placed express reliance on this issue.

29. Dr Heller expressed the opinion that the Appellant had a current diagnosis of 'Major Depressive Disorder' in the 'moderate to severe' clinical range, and also met the diagnostic criteria for 'Generalised Anxiety Disorder'; she did not consider that the Appellant met the full diagnostic criteria for Post-traumatic Stress Disorder. She characterised the current risk of suicide as moderate. However, having commented that the Appellant "*is of the strong opinion that he faces imminent danger (detainment and torture) were he to be removed to Sri Lanka*", she expressed the belief "*that he presents a severe risk of suicide if removal is advised*", commenting that she considered "*he would not be able to cope with the real prospect of a period of further detainment and torture*".

30. Ms Seehra accurately identifies that Dr Heller stated that her diagnoses were based on more than the Appellant's narrative account. Under the heading 'Current Diagnoses' she states: "*This is based on his self-report, his demeanour, the psychometric test results and other behavioural indicators*".

31. However, in this context it is to be noted that the psychometric test results were themselves a "*self-report measure*" (see section 5 of the Report, page 2). The 'other behavioural indicators' are not identified, nor is it explained how such factors informed the assessment. As regards 'demeanour', as the Judge observed at paragraph 44, Dr Heller amongst other things "*notes that the Appellant was "fully orientated" and... "Although there was evidence of shaking in the interview which he says is a frequent daily presentation he was however able to sit moderately still for about an hour during the interview without any notable clinically significant agitation", [and] "his concentration was generally intact and he was able to respond to questions without undue difficulty..."*". Inevitably the narrative account and the patient's description of symptoms whilst not the only basis of current diagnosis constituted a significant aspect of such evaluation.

32. Further in this context, it is to be noted that the particular focus of this aspect of the case is not specifically in respect of current diagnoses but

the likely impact of a future event, *viz.* removal to Sri Lanka. I have referred to Dr Heller's opinion in this regard at paragraph 29 above. In full, at section 6.3 of the report, page 5, under the heading 'Comment on his risk of suicide were removal to Sri Lanka be advised', Dr Heller writes:

"*[The Appellant] is of the strong opinion that he faces imminent danger (detainment and torture) were he to be removed to Sri Lanka. When asked to rate the likelihood of him being detained further he commented that this was one hundred percent.*
Based on the available evidence, I believe that he represents a severe risk of suicide if removal is advised. I consider that he would not be able to cope with the real prospect of a period of further detainment and torture. I would urge the authorities to take note of his particular vulnerabilities."

33. It seems to me that this aspect of the opinion of Dr Heller is expressed in terms that refer solely to statements of the Appellant: it is based on his opinion of facing imminent danger of detainment and torture; it is also informed by a perceived inability to cope with *further* detainment and torture - which indicates it is premised upon an acceptance of past incidents of detainment and torture.

34. The Judge, however, for sustainable reasons rejected the Appellant's past narrative account and rejected that he currently had any well-founded fear.

35. My attention has been drawn to a passage in the case of **Y (Sri Lanka), Z (Sri Lanka) [2009] EWCA Civ 362**, referenced both in the Appellant's Skeleton Argument before the First-tier Tribunal and in his Grounds of Appeal to the Upper Tribunal. Paragraph 12 in part states:

"*Similarly, where the factual basis of the psychiatric findings is sought to be undermined by suggesting that the appellants have been exaggerating their symptoms, care is required. The factual reality of an appellant's account of his or her history may be so controverted by the tribunal's own findings as to undermine the psychiatric evidence. This happens from time to time, but it did not happen here.*"

36. Whilst 'it may not have happened' in the case of either Y or Z, it happened in the case of the Appellant. In my judgement, when Judge Khawar commented in the specific context of considering the suicide risk identified by Dr Heller, that "*her opinion is expressed on the basis of assertions made by the Appellant*" (paragraph 52), and that "*this is in the context of an Appellant who has failed to establish in my judgement that he was genuinely detained and ill treated by the army and/or the police in Sri Lanka*" (paragraph 53), he was expressing sustainable

reasons on the facts and evidence of the particular case entirely consistent with the notion recognised by the Court of Appeal that the Appellant's account was so controverted by the Judge's findings that it undermined the evidence of the psychological assessment.

37. In such circumstances I detect no error of law in the First Tier Tribunal Judge's approach, reasoning, and conclusion.

38. For the avoidance of any doubt, in reaching my conclusion I have given careful consideration to the contents of the other medical evidence filed before the First-tier Tribunal. It is to be acknowledged that the First-tier Tribunal Judge did not expressly address such evidence, but I am satisfied that this made no material difference to the outcome of the appeal, and moreover in circumstances where the focus of the Appellant's submissions was in respect of the report of Dr Heller this did not arguably constitute an omission amounting to an error of law.

39. The Appellant's main bundle before the First-tier Tribunal (filed under cover of letter dated 17 August 2016) contains a number of copies of prescriptions, and a letter from his GP dated 5 August 2016 which confirms his registration with the surgery and states in material part: "*He is known to suffer from Post-traumatic stress disorder problem for which he has seen specialist in the past. He is currently on Mirtazapine, Orphenadrine and Risperidone medication for his mental health related illness*" (Bundle at page 18). There is also included in the bundle copies of 'patient information leaflets' in respect of mirtazapine and risperidone (pages 19-22).

40. A document headed 'Significant change of care/Care Plan review letter (MH4)' appears at pages 25–26 of the bundle. The author of the report is Dr Isadora Ranjit-Singh, and it is written in Dr Ranjit-Singh's capacity as a member of the Brent East Mental Health Service community mental health team ('CMHT'); in context it is apparent that the Appellant was referred the CMHT by his GP, and indeed in the index to the Appellant's bundle this document is characterised as having been issued by the "*Appellant's Consultant*". The document is based on a review when the Appellant was seen on 14 June 2016 and confirms a diagnosis of post-traumatic stress disorder with current medication of mirtazapine, and recommends commencing risperidone and orphenadrine; it details his mental state, including reference to fluctuating mood, anxiety, hypervigilance, poor concentration, and flashbacks; it is written "*Thinks about suicide; Not acted on suicidal thoughts*". The concluding 'Impression' is stated to be "*He has predominantly symptoms of PTSD with some low mood; mild paranoia and anxiety*". The Appellant is discharged back to the care of his GP, although it is noted that he has

been referred to Freedom from Torture "*for therapy and help with his asylum application*".

41. Beyond the one reference to suicidal ideation there is nothing in any of this material that offers an evaluation of suicide risk generally, and more particularly nothing that offers an evaluation of suicide risk in the context of removal to Sri Lanka. In such circumstances the contents of these materials do not particularly assist the Appellant's case – and hence no doubt the exclusive reliance upon Dr Heller's report in the Skeleton Argument.

42. It may be observed that the respective diagnoses referenced by Dr Ranjit-Singh, and made by Dr Heller are not *ad idem*. Whilst Dr Ranjit-Singh refers to a diagnosis of PTSD and predominant symptoms of PTSD with some low mood and mild paranoia and anxiety, Dr Heller concludes that the Appellant does not meet the diagnostic criteria for PTSD, notwithstanding that she considers his depression to be moderate to severe. Whilst it may be that in some cases different diagnoses may be explained by a change of circumstance – and here the two consultation dates are approximately two months apart – this does not present an obvious explanation on the facts of this case in circumstances where on the one hand Dr Heller appears to identify a greater level of depression than Dr Ranjit-Singh, yet declines to diagnose PTSD which was considered to be the predominant symptom by the Appellant's consultant. It may of course also be that the particular presentation of a patient on a particular day offers an explanation for different diagnoses. In this context it may be relevant to observe that the consultant would have had the benefit of a greater familiarity with the Appellant and his case notes than Dr Heller who saw the Appellant on a one-off basis - which, as the First-tier Tribunal Judge observed, appeared to have been "*for a period of about an hour*" (paragraph 44). Whatever the explanation might be, given that there is a difference of emphasis, it is not readily apparent that consideration of the other medical evidence would have bolstered the opinion of Dr Heller rather than have undermined it. Be that as it may, and in any event, the simple reality is that the other medical evidence did not express any sort of opinion in respect of suicide risk in the event of removal and was therefore at best of marginal significance and relevance on this issue.

43. Finally, for completeness, I have noted that Dr Heller's description of the incidence of self-harm is limited to it having only taken place in the week before the appointment with Dr Heller, who observed "*evidence of substantial/superficial cutting*" (page 3 of the report). There is no suggestion in any of the other materials of there having been any prior incidences of self-harm. Ultimately, such an event is of little weight in establishing a risk of Article 3 type harm. Similarly, whilst Ms Seehra is in principle correct in her observation that an absence of suicide attempts

does not negate a suicide risk, the Judge was, in my judgement, unobjectionably entitled to take into account the absence of suicide attempts as one factor in a wider evaluation of future risk of suicide; there is nothing in the wording of the Decision to suggest that the Judge thought such a circumstance was determinative.

44. I have also noted and had regard to the analogy sought to be drawn between the Appellant's case and that of one of the successful appellants in **GJ and others**: see in respect of the third appellant therein, at paragraph 435 *et seq.* The instant case is readily distinguishable: the Appellant does not have severe PTSD – his consultant referred to PTSD symptoms with low mood and mild paranoia and anxiety, and Dr Heller concluded that he did not meet the diagnostic criteria for PTSD; he does not have severe depression – his consultant referring to low mood and mild anxiety, and Dr Heller opining that his symptoms were in the range of 'moderate to severe'; the Appellant's presentation at consultation with Dr Heller was markedly different from that of the 'third appellant' – see at paragraph 443. Moreover it is clear that in **GJ and others** "*the gravity of the appellant's past experience of ill-treatment*" was considered a significant factor in evaluating a potential breach of Article 3 (paragraph 453), whereas the Appellant's account of past ill-treatment was rejected herein. The Tribunal's identification at paragraph 450(5) of one of the six elements set out in **J v Secretary of State for the Home Department** – "*Where the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is not objectively well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of article 3*" – is particularly pertinent. Accordingly I find that the Judge's conclusion at paragraph 54 that the Appellant's circumstances did not match those of the third appellant in **GJ** was entirely sustainable.

45. In all the circumstances I do not identify any error of law in the approach of the First-tier Tribunal Judge.

NOTICE OF DECISION

46. The decision of the First-tier Tribunal contained no error of law and stands. The Appellant's appeal remains dismissed.

Signed: **Dated: 15 August 2017**

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Deputy Judge of the Upper Tribunal I. A. Lewis