Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03983/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 July 2017	**On 25 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

VV
(ANONYMITY ORDER MADE)

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Representation:

For the Appellant: Ms E. Harris, counsel instructed by the Tamil Welfare Association (Romford Road)
For the Respondent: Mr. P. Duffy, Home Office Presenting Officer

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1. This appeal came before me for a resumed hearing on 5 July 2017, following an adjourned hearing on 20 April 2017. Directions in respect of that hearing are appended.

2. The Appellant is a national of Sri Lanka, born on 6 July 1953. He arrived in the United Kingdom on 28.12.99 and claimed asylum on 11.1.00. His asylum application was refused on 14.1.01 on the grounds of non-compliance due to his failure to attend his asylum interview. It was accepted on all sides that the reason for this was that the letter inviting him to interview was not sent to the Appellant's correct address as a consequence of which he failed to attend. On 13.6.13 the Appellant made submissions in support of a fresh asylum claim and on 21.8.14 the Respondent's agreed to consider these as a fresh claim. The Appellant was then interviewed on 4.11.15 and his asylum application was refused in a decision dated 7 December 2015.

3. The Appellant appealed and his appeal came before First tier Tribunal Judge Blundell for hearing on 20.1.17. Prior to the substantive hearing a litigation friend had been appointed on the basis that the Appellant was unfit to provide instructions or to participate in the hearing. The appeal thus proceeded on the basis of submissions only. In a decision promulgated on 10.2.17 the Judge dismissed the appeal.

4. An application for permission to appeal to the Upper Tribunal was made in time on or about 21.2.17. Two sets of grounds of appeal were submitted: initial grounds (undated) and grounds of appeal settled by the Appellant's counsel dated 21.2.17. Permission to appeal was granted by First tier Tribunal Judge Ford on 2.3.17 limited to the following:

> *"5. The only argument with any merit is that the assessment of Article 8 proportionality was inadequate taking into account the length of the Appellant's residence in the UK, his mental health condition, his fear of return and the impact on him of such a return as described by Dr. Lawrence. This is the only ground."*

5. At the hearing on 20 April 2017 both parties sought an adjournment: Ms Isherwood because she was not in possession of the Home Office file and Ms Harris, because she sought to rely on the additional grounds of appeal, which had not been determined by the Upper Tribunal as no IA68 was served in order to give the Appellant the opportunity to renew the application to the Upper Tribunal. In the interests of fairness to both parties, I acceded to the request for an adjournment and informed the parties that I would make a decision on the additional grounds of appeal at the adjourned hearing.

6. Prior to the resumed hearing I received an amended rule 24 response by Ms Isherwood dated 19.6.17 in response to the full grounds of appeal.

Hearing

7. I heard submissions from Ms Harris, who indicated that she was only relying on the "additional" grounds of appeal of 21.2.17, which are quite extensive and raise the following challenges:

(i) the Judge failed to assess the Appellant's claim in the round, taking account all the evidence including the medical evidence and failed to assess the common thread throughout the accounts in light of the Appellant's circumstances upon which the FtTJ was required to make findings of fact;

(ii) the standard of proof was not appropriately considered in light of the precautionary principle;

(iii) in finding at [45] that the Sri Lankan authorities would not visit the Appellant and would inevitably form the conclusion that he suffered from mental health problems and was of no further interest to them, the Judge misapplied *GJ* at [169] and failed to take account of a material consideration *viz* the medical evidence which makes clear that the Appellant's mental health difficulties are not *prima facie* obvious;

(iv) the Judge erred in placing no weight on the conclusions of Dr Lawrence as to the risk of suicide on return;

(v) the Judge materially erred in his assessment of the public interest considerations as part of the assessment of proportionality.

8. Ms Harris submitted that the Judge erred at [42] in finding that the Appellant does not currently put forward a version of events which are the truth upon which he can make findings of fact. She submitted that this was compounded at [43] because the Judge should have but failed to look at common things between the accounts ie what is consistent and failed to assess his claim in the round, including his medical reports and make any kind of findings of fact as to what happened to the Appellant in Sri Lanka. This is axiomatic given that the Appellant cannot now give evidence about it. She submitted that weight should have been given to earlier account and the Judge makes no allowance for the Appellant's medical condition in giving his later account, which amounts to a material error.

9. In respect of the precautionary principle and the question of how one deals with a person who cannot give evidence or be cross-examined for medical reasons, Ms Harris relied on the UNHCR Handbook at [210] and the guidance that it is necessary to lighten the burden of proof. She submitted that at [42] the Judge refers to this but fails to apply the shared burden principle: see [207]-[212]. Ms Harris submitted that the fact that the Appellant cannot answer questions does not mean he is not at risk or vulnerable to persecution.

She submitted that allowance is made for this in respect of child refugees but no similar approach taken in respect of an appellant who would be in a similar situation. Whilst the standard of proof is the same for all applicants where you have someone with a mental impairment you have take a precautionary approach to someone who might be at risk as it is less easy for that person to meet that standard *cf.* paragraph 339L of the Immigration Rules.

10. Whilst the Judge engaged with the issue of a litigation friend at the hearing at [15] and the procedure at the hearing, he failed to factor the impact of this on to the Appellant in terms of his assessment of the asylum claim. Dr Lawrence makes clear that the Appellant does not know anymore which is why he did not give evidence. There is no guidance as to what is then done with an asylum claim. The vulnerable witness' guidance [Joint Presidential Guidance Note No 2 of 2010] is premised on the basis that a person is giving evidence and does not cover this situation. This is why we say this aspect of the decision is in breach of the precautionary principle. It would be nonsensical if the Convention would provide protection for everyone other than those who are unable to answer questions about their claim.

11. In respect of the "home visit" grounds, Ms Harris acknowledged that the difficulty with the claim is the fact that the Appellant does not fall neatly into the *GJ* categories. The Judge's failure at [45] to accept that the Appellant would be visited entirely misunderstands and misinterprets what is said in *GJ* which is that he must expect to be visited. The question is whether there is then a real risk and what would happen when he was visited. She submitted that, regardless of whether or not the authorities have sophisticated intelligence, they are not going to know about his mental health. This goes to the evidence of Dr Lawrence and the fact that one cannot tell from looking at the Appellant that he has mental health problems or the way that he comes across: good self care, engaged, did not have a problem finding words. The Judge did not meet the Appellant as he was outside court and the litigation friend was inside court because Dr Lawrence recommended that he not come to court. The Appellant will not understand that he has given a different answer and is not able to give an account of where he has been. He is not able to give credible and consistent answers and this would put him at risk with the authorities.

12. In respect of the suicide risk, what this comes down to is that the Judge simply disregards what Dr Lawrence has to say about it. The Judge finds at [51] that there is no proper evidential foundation upon which he could conclude that the Appellant would take his own life, however page 28 of Bundle 2 clearly refers to a suicide risk and Dr Lawrence explains the evidential foundation of the suicide risk. It is impossible to know the level of risk with any certainty but Dr Lawrence looks at it as objectively as possible

and concludes whilst currently at low risk he would be at very high risk of suicide if any attempt was made to remove him to Sri Lanka.

13. In respect of Article 8, this is considered by the Judge at [56] and [57] which is a very short summary, which is inadequate. The Appellant had been in the UK for 17 years. The Appellant claimed asylum two weeks after arrival in 1999 and was then waiting for a decision for years. The Judge does accept that the reasons for this are the responsibility of the Respondent rather than the Appellant. In respect of the section 117B considerations it makes no difference whatsoever as the Appellant will not integrate in the same way as others and is being cared for by his litigation friend. The Appellant will not be able to learn English. At [56] the Judge accepted the Appellant has developed a private life since he came to the UK, however, no consideration was given at all to his private life. Ms Harris submitted that 17 years residence is going to give rise to more than the minimum in that he has developed a debilitating illness and has become more dependent on those around him. Delay is a material factor *viz* chapter 53 of the CIG which provides that delay may be considered exceptionally when a person has lived in the UK for more than 6 years and cf. *EB Kosovo* at [15] and [16]. When the Appellant first made his claim in 2000 he would have been able to have been interviewed and he has been prejudiced by the Respondent's delay, as his illness means he cannot now be interviewed. The Judge materially erred in that there was no *Razgar* assessment outside the Rules. Nothing in the Judge's article 8 assessment demonstrates why the public interest is overwhelming despite all these factors.

14. In response, Mr Duffy submitted that, in relation to the asylum claim what the Judge does at [44] is enough and deals adequately with the claim. The Appellant is not within the *GJ* categories. On the facts of this case the Appellant could not succeed in light of *GJ*. Even if he was visited [45] he would not be of interest as they would realize he is not a well man. It was entirely open to the Judge to dismiss the claim on the grounds he gave.

15. In respect of the risk of suicide, if one looks at what Dr Lawrence stated it was that if you attempt to remove him to Sri Lanka there would be a very high risk but this could be managed by the UK and so there would be no breach of article 3. If the Appellant returned to his wife in Sri Lanka we do not know what the risk would be.

16. In respect of the Article 8 point. Mr Duffy submitted that Judge Blundell addresses *Kamara* [2016] EWCA Civ 813. The Appellant has spent a large part of his life in Sri Lanka and his return would be managed by his family on return and there would be no obstacles to integration. Mr Duffy acknowledged that there had been a long delay in interviewing and deciding his asylum claim and that it should have been looked at under the legacy. In respect of the effect of delay he submitted that *EB (Kosovo)* is concerned with

cases where it is indicative of a system that has broken down and where you get inconsistent results, whereas this is an unusual case. The question is whether a person is in need of protection. The Judge does acknowledge this at [56] and has taken it into account.

17. In respect of the precautionary principle, Mr Duffy submitted that the only way one can deal with it is the way the Judge did deal with it at [45] and he looks at the initial claim at its highest, given the situation is that the Appellant is never going to be able to give consistent evidence about his claim.

18. In reply, Ms Harris submitted that at [43] the Judge does not look at the initial claim at the highest and finds the Appellant has not discharged the burden of proof. In respect of the risk of suicide, it is clear from the report of Dr Lawrence in bundle 4 at page 26 in his addendum report that it is clear the increased risk of suicide occurs in the context of sudden loss of dissociative defences triggered eg by a period of detention when he would become acutely aware of his emotions and may well become actively suicidal. Ms Harris submitted that there was a serious question over integration on return and whether he could properly integrate given his medical condition and whether he could participate in society and be accepted there, even with his wife and son there.

19. I reserved my decision, which I now give with my reasons.

Decision on error of law

20. I have concluded that whilst the decision of the First tier Tribunal Judge is careful and reasoned and in many ways an exemplary example, the Judge made material errors of law in the following respects.

21. At [45] of the decision the Judge considered whether the Appellant would be visited at home by the Sri Lankan authorities in accordance with the reasoning set out at [169] of *GJ* and concluded:

> *"I do not consider that this appellant would be visited at his home address. He is a comparatively elderly individual who is demonstrably mentally unwell. The Sri Lankan authorities will know that he is of no interest to them before he arrives. What is important, of course, is their perception of him but I do not consider there to be any reason that he would be perceived to be anything other than a failed asylum seeker who is returning to his wife after many years of enduring mental health problems in the UK. Even if he is visited by a police officer or a CID officer that is inevitably the conclusion at which they would arrive, particularly in light of the fact that their enquiries would be informed by sophisticated intelligence and not merely by whatever information (if any) the appellant and his family volunteer."*

22. The suggestion of a "home visit" comes from the submissions on behalf of the Respondent in *GJ* at [169] that:

> "*169. Mr Hall further accepted that forced returnees, whether travelling on a charter flight or scheduled flight, are asked for confirmation of the address to which they intend to proceed on leaving the airport, and must expect to be visited at that address by the police or the CID in the days following return, and if of interest, may be detained or revisited thereafter …*"

23. Thus it is clear, in my view, that in using the phrase *"must expect"* the Respondent's counsel in *GJ* was conceding that there is a serious possibility of a visit to the home address by the authorities with the purpose of ascertaining whether or not the forced returnee is a person of interest and this applies to all forced returnees. I consider that the First tier Tribunal Judge erred in finding that the Appellant would not be visited by the authorities. I further consider that this is a material error in that it is clear from [169] of *GJ* that a risk of detention arises at the home visit and if, for whatever reason, the person is considered to be of interest he may be detained (or revisited). The consequences of detention are acknowledged in the previous paragraph of *GJ viz "168. Mr Hall accepted that individuals in custody in Sri Lanka continue to be at risk of physical abuse, including sexual violence, and that such risk is persecutory."*

24. I consider that the First tier Tribunal Judge further erred in law in his assessment of Article 8 outside the Immigration Rules. At [56] of his decision the Judge agreed it was appropriate to consider Article 8 outside the Rules on the facts of this particular case and made extensive reference to relevant jurisprudence in reaching his decision on the proportionality of removal of the Appellant. However, I agree with Ms Harris that it is unclear from the Judge's article 8 assessment why the public interest is overwhelming despite the factors telling in the Appellant's favour and I find there to be inadequate reasoning in this respect. I also find that there is no analysis of the Appellant's physical and moral integrity as part of the assessment of the material private life factors that required consideration.

25. For the avoidance of doubt, I do not find that the Judge materially erred in his analysis of the Appellant's core asylum claim, given the inherent difficulties caused by the inconsistencies between his original account given in 2000 and his subsequent account, made after his mental health began to deteriorate and which could not be relied upon, as was accepted by all sides in light of the expert medical evidence of Dr Lawrence. Consequently, even if the Judge had applied a more generous standard of proof that would not have made any difference in the circumstances, given that the Appellant was not able to discharge the burden of proving that he would be at risk of persecution if returned to Sri Lanka, regardless of whether or not a reduced standard of proof were to be applied.

26. Nor do I find that the Judge erred in his assessment and conclusions regarding the risk of suicide if the Appellant were to be returned, given that Dr Lawrence's conclusion in this respect was speculative ["*the increased risk concerning suicide occurs in the context of sudden loss of the dissociative defences. If that were to happen, triggered, for example, by a period of detention, then this man would acutely and powerfully be aware of his emotions. During such a point he may well become acutely suicidal, he is almost certainly going to become agitated… it is impossible with any certainty to quantify that risk*"] and the Judge cited Dr Lawrence's opinion in full at [39]. Moreover, throughout the remaining medical evidence there has been no indication that the Appellant entertains suicidal thoughts and Dr Lawrence's assessment at the time he examined the Appellant was that the risk of suicide was low. Given the high threshold necessary to engage Article 3 I find that threshold has not been reached on the evidence put forward.

27. In the event I found an error of law in the decision of the First tier Tribunal Judge the parties agreed it would be appropriate to re-make the decision, given that there was no oral evidence to consider and the Appellant was not seeking to rely on any new evidence.

Findings on the substantive appeal

28. It was acknowledged by Ms Harris that the Appellant does not have a profile that would fall within the risk categories set out in *GJ and Others* (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). As a consequence of my findings at [23]-[25] above there are two issues outstanding that require determination.

29. The first issue is whether there is a real risk or serious possibility that in the course of a home visit following his forced return to Sri Lanka, the Appellant would be detained with a consequent risk of persecutory ill-treatment: [168]-[169] of *GJ* refer. I have concluded that, whilst the risk cannot be excluded, it is essentially speculative and does not reach the threshold necessary to establish a well founded fear of persecution or ill treatment contrary to Article 3 of ECHR. This is due to the fact that the purpose of the home visit is essentially to ascertain whether or not the Appellant is a person of interest. Despite his very long residence in the UK, the Appellant has not been involved with political activities in the diaspora and has no profile that would bring him within the *GJ* risk categories. Moreover, whilst the Appellant is mentally unwell, his illness which is possibly Ganser's Syndrome, does not manifest itself in such a way that it is obvious that he is unwell. This was a point made by Ms Harris in her submissions [11. above] based on the medical evidence and I find, given the purpose of the home visit is to exclude him as a person of interest and there will be no intelligence to indicate otherwise, that any questioning of the Appellant is likely to be brief

and would not arouse the adverse interest of the authorities with the consequence that the Appellant would then be detained.

30. I turn to consider Article 8 outside the Immigration Rules, it having been accepted that the circumstances of the case merit such consideration. The First tier Tribunal Judge found that the Appellant had established a private life in the United Kingdom over his substantial residence since December 1999, which now amounts to 17 and a half years. Whilst the Judge noted the Appellant's length of residence and the lengthy delay in deciding the Appellant's asylum claim and that responsibility for this lies more with the Respondent than the Appellant, he considered the Appellant's health claim only to the extent that it qualifies as a "specific case" *cf. GS & EO* [2015] EWCA Civ 40 at [87]. This is defined at [86] as follows:

> "*86. If the Article 3 claim fails (as I would hold it does here), Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm. That approach was, as it seems to me, applied by Moses LJ (with whom McFarlane LJ and the Master of the Rolls agreed) in MM (Zimbabwe) [2012] EWCA Civ 279 at paragraph 23.*"

The Judge resolved this issue in the Appellant's favour, due to his private life ties formed over the length of his residence, particularly with his litigation friend, Mr P with whom he also lives. However, the Judge failed to analysis the impact of the Appellant's illness on the proportionality assessment.

31. I summarise the Appellant's health claim as follows, based on his GP and psychiatric reports from 2016-2017:

(i) in spite of taking seven hypertensive medications his blood pressure is not very well controlled;
(ii) he was diagnosed with chronic kidney disease stage 3 in June 2009;
(iii) he suffers asthma and heart disease. His asthma is not well controlled;
(iv) he has memory problems and a history of depression;
(v) he suffers from PTSD with secondary depression;
(vi) Dr Lawrence originally considered [report of 20.9.16] that the Appellant was suffering from vascular dementia, due to cognitive impairment, but following an MRI scan which concluded that he was suffering from mild small vessel disease and a discussion with the Neurologist the conclusion was that the vascular changes within the brain are insufficient to account for his functional impairment. He concluded that the Appellant is suffering from Ganser's Syndrome, which is a functional dementia brought about by extreme stress.

32. I have taken account of the fact that the Appellant has a wife and adult son in Sri Lanka. I also bear in mind that, in light of the background evidence including that emanating from the Respondent, the medical treatment available to the Appellant in Sri Lanka will fall below that he is able to access in the United Kingdom, but this needs to be balanced against the public interest *cf. Akhalu (Article 8: health claim)* [2013] UKUT 00400 at [46].

33. Consequently, I conduct the balancing exercise based on the fact that the Appellant is a 64 year old man, of Tamil origin, who has resided in the UK since 28.12.99 ie for 17 and a half years and he suffers from a range of physical illnesses, including kidney disease and a form of functional dementia, which prevented him from being considered fit to provide instructions and give evidence at his appeal hearing. Moreover, whilst the risk of detention arising from a home visit on return and the risk of suicide do not, on the evidence, reach the threshold so as to amount to an Article 3 human rights breach, there is no doubt from the reports of Dr Lawrence that removal of the Appellant to Sri Lanka would have a detrimental effect on his physical and moral integrity and I duly take that factor into account in my consideration of proportionality.

34. The public interest considerations I am obliged to consider are set out at section 117B of the NIAA 2002. I note in particular:

"(1)The maintenance of effective immigration controls is in the public interest.
(2)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
(a)are less of a burden on taxpayers, and
(b)are better able to integrate into society.
(3)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
(a)are not a burden on taxpayers, and
(b)are better able to integrate into society.
(5)Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious."

35. Ms Harris submitted (in her grounds of appeal) that:

(i) the weight to be attached to effective immigration control is reduced by virtue of the fact that the Appellant claimed asylum two weeks after his arrival and the delay in deciding his claim was on the part of the Respondent and it was accepted by the FtTJ that responsibility for the delay lies more with the Respondent [56]. She submitted that the issue of delay should also be considered in light of chapter 53 of the CIG where a delay of more than 6 years by the Home Office in deciding an asylum application may be considered exceptionally. This is a reference to the legacy programme. There

is no explanation as to why the Appellant did not qualify for a form of leave to remain under the legacy programme on this basis. Ms Harris also drew attention to *EB (Kosovo)* [2008] UKHL 41 at [14]-[16] in particular:

> *"16. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes."*

(ii) the ability to speak English was not a factor within the Appellant's control due to his mental illness and will for the same reason have limited integration into society, but these are not factors that should be held against him in light of his medical condition and the fact that he resides with his litigation friend Mr P and is supported by him and the Tamil community;

(iii) the case of *Kaur* [2017] UKUT 00014 makes clear that the phrase "little weight" in the context of a precarious private life, does not denote an absolute measurement or concept and will vary according to the particular context. In *Rhuppiah* [2016] EWCA Civ 803 Sales LJ held at [53]:

"53. Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in such circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question, where it is not appropriate in Article 8 terms to attach only little weight to private life. That is to say, for a case falling within section 117B(5) little weight should be given to private life established in the circumstances specified, but that approach may be overridden where the private life in question has a special and compelling character. Such an interpretation is also necessary to prevent section 117B(5) being applied in a manner which would produce results in some cases which would be incompatible with Article 8, i.e. is necessary to give proper effect to Parliament's intention in Part 5A."

36. I have also taken into account the submissions of Mr Duffy, who acknowledged *inter alia* that the Appellant's asylum claim should have been considered under the legacy programme and the points taken by the First tier Tribunal Judge at [57] *viz* there is no evidence to show that he is financially independent *cf. Rhuppiah* [2016] EWCA Civ 803 at [63] ie "*someone who is financially independent of others";* he is dependent on the NHS for treatment for his physical and mental health conditions, which speaks in favour of his removal *cf. Akhalu (Article 8: health claim)* [2013] UKUT 00400 at [46]. I have given careful consideration to whether a fair balance has been struck between the rights of the individual and the interests of the community.

37. I have concluded that, by a very narrow margin, it would not be proportionate to remove the Appellant to Sri Lanka. My primary reasons for so finding are due to the particular circumstances of this case and the fact

that, having claimed asylum at the beginning of 2000, having arrived two weeks previously, the Appellant did not receive the letter from the Home Office inviting him to his asylum interview, due to the fact that this was sent to the wrong address and there then followed substantial delay in processing his claim. The vast majority of cases affected by delay due to the backlog at the Home Office were resolved by way of the legacy casework programme. Mr Duffy, on behalf of the Respondent, accepted that this Appellant's case should have fallen for consideration under the legacy and it unclear why it was not.

38. Moreover, by the time that the Appellant was interviewed, on 4.11.15. his mental state had deteriorated to the extent that he was unable to give a consistent account of the basis of his claim, due to his memory and cognitive problems, which were subsequently diagnosed as a form of functional dementia. Thus the First tier Tribunal found and I accept that the Appellant was unable to put forward a version of events which is said to be the truth upon which he was able to make findings of fact [42]. Essentially it is now too late to properly determine his asylum claim and whether or not he would be at risk of persecution if returned to Sri Lanka.

39. Whilst I have had due regard to the public interest considerations and the other factors which tell against the Appellant set out at [35] above, I have also borne in mind the judgment of Lord Justice Sales in *Rhuppiah* [2016] EWCA Civ 803 Sales LJ at [53] and taking account of all the relevant factors I find that a fair balance on the facts of this case favours the Appellant.

Decision

40. The appeal is allowed on human rights grounds (article 8).

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

24 July 2017