Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07246/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 November 2017	**On 11 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

KT (SRI LANKA)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Bandegani,
Counsel instructed by Duncan Lewis & Co Solicitors
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals from the decision of the First-tier Tribunal dismissing the appellant's protection claim, but allowing her human rights claim under Article 8 ECHR. The appellant opposes the Secretary of State's appeal, and cross-appeals from the decision of the First-tier Tribunal dismissing her protection claim. The First-tier Tribunal made an anonymity direction, and I consider that it is appropriate that the appellant continues to enjoy anonymity for these proceedings in the Upper Tribunal.

Relevant Background

2. The appellant is a national of Sri Lanka, whose date of birth is [ ] 1992. She was granted entry clearance as a student, on a visa which was valid from 8 October 2013 until 10 November 2015. She arrived in the United Kingdom on 13 October 2013, and returned to Sri Lanka on 21 June 2014. She came back to the UK a month later, on 21 July 2014 using her own national passport, which was endorsed with her student visa. On 8 November 20134, she claimed asylum.

3. Her claim was that, on 9 July 2014, she had visited St Mary's Church in Jaffna, where she had taken photographs of the church using her Smartphone. In front of the church there was an Army camp called "512 Camp". While she was taking photographs, soldiers from the camp accosted her. They accused her of taking photographs of the camp and they took her phone off her. They accused her of being LTTE and of spying on them. She was taken inside the camp, where she was detained for 7 days and interrogated. She was beaten and abused. Her fingerprints were taken, and there came a point when she was forced to sign a white sheet of paper. She was blindfolded, and taken out of the room and put into a vehicle. She was pushed out of the vehicle near her home. She walked home and saw her parents, who introduced her to two agents who facilitated her escape. It turned out that her father had paid money to the agents with which they had bribed the Army so as to procure her unofficial release.

4. On 29 June 2016, the Secretary of State gave her reasons for refusing to recognise the appellant as a refugee. She had said that the church was next to the army camp and it was on Station Road. Objective evidence had been obtained which was contradictory to her claims. The objective evidence showed that St Mary's Church was on Katheral Road. The objective evidence had confirmed that there was a camp known as 512 in Jaffna, but no objective evidence could be sourced to substantiate her claim that this camp was located near St Mary's Church.

5. It was noted that, during her screening interview, she was asked if she had ever been detained as a suspected terrorist or any combatant, whether charged or not. She said 'no' to this. This was considered inconsistent with her claim that she was held as a suspected spy for the LTTE.

6. The remainder of her account was internally consistent, but not all the criteria of 339L were met, and hence the benefit of the doubt would not be afforded her. Among other things, she was asked at her asylum interview to provide evidence in relation to her claim, yet this evidence had yet to be submitted and no satisfactory explanation had been received regarding the absence of medical evidence. Also, her claim that St Mary's Church was next to 512 Camp ran counter to the available specific and general information, as previously highlighted.

The Hearing Before, and the Decision of, the First-tier Tribunal

7. The appellant's appeal came before Judge Obhi sitting at Sheldon Court in Birmingham on 7 February 2017. Both parties were legally represented. The Judge

received oral evidence from the appellant and from "J", who the Judge described as the appellant's boyfriend. J was also a Sri Lankan national, and he had been recognised as a refugee.

8. In her substantive asylum interview, the appellant had said that the soldiers had found photographs of her attending Memorial Day in the UK in May 2014 with her boyfriend. In cross-examination, Ms Owen, the Presenting Officer, asked the appellant if she had any photographs taken by her boyfriend or by friends of the Memorial Day event that she had attended with her boyfriend in 2014, "*and the photographs of which were on her phone showing her boyfriend present*". The appellant replied that she did not have any such photographs.

9. J said that he had been granted asylum on the basis that he was part of the Tamil diaspora working against the Sri Lankan Government. He said that he was at the Memorial Day event in May 2014, but he did not take any photographs. They were all on the appellant's phone, as she had her phone with her.

10. At paragraph [25] of her subsequent decision, the Judge said that she considered carefully the account that the appellant had given. She claimed that there were about 100 people in attendance at the church festival, and she was taking photographs with her camera of the church. This was a church she visited infrequently. It was not her normal church. The respondent carried out a search on Google Maps and struggled to find it. She had been told by Ms Matthews that Google Maps were unreliable and they only listed businesses and not places of religious worship or other things: "*I am not sure that is correct. The appellant has produced no evidence to show that to be the case. Nor had she produced any other evidence of the existence of the Church or the proximity of the army camp to the church. In fact, it is quite easy to search for army camps on Google Maps and then to search for churches in the vicinity, and this would provide very reliable information about such places. The fact that the appellant has not rebutted the assertion of the respondent with her own reliable evidence undermines her claim.*"

11. The Judge held that it was implausible that she would be arrested and no one would check what she had actually taken photographs of before she was detained and tortured. The soldiers who arrested her would not have found any photographs of the camp on the phone. The appellant further claimed that she attended a celebration of Memorial Day with her boyfriend, and that photographs of that event were also on her phone. She stated that, as a result, there was another reason for the authorities to claim that she was a threat to them and to view her with suspicion: "*However no one else has taken any photos of that event. It seems remarkable that no photos were taken of her by her boyfriend or by anyone else, so there is no evidence of the fact that she even attended that event.*"

12. At paragraphs [26]-[29], the Judge addressed the Medical Foundation report by Dr Mary Beyer addressing both scarring on the appellant's body and also her psychological presentation.

13. At paragraph [27], she noted that Dr Beyer did not have a specific psychiatric qualification. At paragraph [28], she said that there were difficulties with her report.

The first was that she had not carried out an assessment which appeared to be consistent with the Istanbul Protocol and that she did not consider other probable causes of the injuries that she had observed. She attributed the self-harm to the appellant's claimed experiences but she had not considered that, in the light of her ability to self-harm, the other injuries could possibly be self-inflicted, or inflicted by proxy.

14. Further, Dr Berry appeared to accept without any question the account given to her by the appellant. She had not set out the likelihood of the injuries being inflicted in the way claimed, and gave an outright opinion accepting that they were attributable to the explanation provided. Of greater concern was the speculation in relation to L10 - the appellant had not provided an explanation for this injury, but Dr Beyer had provided a likely cause.

15. Secondly, in relation to the psychological trauma and psychiatric presentation, Dr Beyer was not (in her respectful opinion) qualified to provide an opinion in relation to Post Traumatic Stress Disorder.

16. At paragraph [29], the Judge said that the medical report was of less value than the reports she had seen in other cases, and did not assist her particularly. In the absence of a more reliable medical report, looking at the account overall, she had to find that it was not reasonably likely that the appellant had accurately described her experiences. If she had been the victim of an assault, then the circumstances she had described were not the cause of it. She was not satisfied that she was arrested for taking photographs of a church next to an army camp; or that she was seen as a threat to the single state because of the discovery of photographs of her boyfriend on her phone.

17. For the reasons given in paragraphs [30]-[32], the Judge held that the appellant did not face a future risk on return to Sri Lanka, and accordingly she was not satisfied that the appellant qualified for recognition as a refugee.

18. At paragraphs [34] and [35], the Judge turned to address an alternative claim under Article 8 ECHR. She found that the appellant was in a relationship with J, who had been granted refugee status until 2022. She was satisfied that there were insurmountable obstacles to them continuing their relationship in Sri Lanka, due to his refugee status. Although the appellant did not meet the requirements of Appendix FM and Rule 276ADE, she was satisfied that this was a case in which "*it is possible*" that the appellant would succeed if her claim was to considered outside the Rules, in accordance with the **Razgar** test.

19. The Judge went on to apply the **Razgar** test in paragraph [35]. She was satisfied that the appellant had family life with her boyfriend in the UK, and private life in respect of her studies. If she was required to leave the UK, there would be a significant interference with her family life. The Judge was satisfied that, on this occasion, the appellant's private rights superseded the general public interest. Although she did not find her asylum claim to be credible, "*I do think that applying for permission to*

return as the dependant or partner of a refugee may pose some difficulty for her." Thus, she suggested that granting the appellant discretionary leave in these circumstances would be the appropriate course, and hence she was allowing the appeal under Article 8 ECHR, while refusing the appeal in respect of the Refugee Convention, humanitarian protection and Article 3 ECHR.

The Reasons for the Grant of Permission to Appeal on the Article 8 Finding

20. On 12 July 2017, First-tier Tribunal Judge Cruthers granted the Secretary of State permission to appeal against the decision of Judge Obhi to allow the appellant's appeal under Article 8 EHCR for the following reasons:

> In my assessment, the grounds on which the respondent seeks permission to appeal are arguable. Specifically, I consider it arguable that the Judge may not have sufficiently considered the relevant requirements of the Immigration Rules or part 5A of the Nationality, Immigration & Asylum Act 2002 (or the principles explained in **Chen (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC)**, circulated on 20 April 2015 and/or the Supreme Court's judgment in **MM (Lebanon)** before proceeding to allow this appeal on an Article 8 basis. It has to be worth noting that, throughout the relationship between the appellant and J, it has been described as a relationship of boyfriend/girlfriend.

The Reasons for the Grant of Permission to Appeal on the Protection Claim Findings

21. On 12 September 2017, Upper Tribunal Judge Kamara granted the appellant permission to appeal against the dismissal of her appeal against the refusal of her protection claim and her claim under Article 3, as it was arguable that the Judge's credibility findings and *"view of the medical evidence"* were unsafe, for the reasons set out in paragraphs 3-6 and 11-12 of the grounds.

The Hearing in the Upper Tribunal

22. At the error of law hearing, Mr Bandegani mounted a robust defence of the Judge's decision on the Article 8 claim. The Judge had misdirected herself at paragraph [3] of the decision, in stating that the appellant had only been living with J for six months. In fact, they had been cohabiting for three years. Nonetheless, her decision on the Article 8 claim was fully sustainable on the facts which she had found. It was irrelevant that the Judge had not made express reference to the public interest considerations arising under section 117B of the 2002 Act.

23. With respect to the cross-appeal on the protection claim, Mr Bandegani mounted an equally robust assault on the Judge's adverse credibility findings in paragraph [25] of her decision. He submitted that they displayed a totally irrational approach to the appellant's narrative, and to the surrounding evidence.

24. With regard to the Judge' approach to the medical evidence, Mr Bandegani withdrew the ground of appeal contained in paragraphs 12-15. This was that the Judge had artificially separated the medical evidence from the rest of the evidence, and had reached conclusions as to credibility without reference to that medical evidence,

contrary to the guidance given by the Court of Appeal in **Mibanga -v- SSHD [2005] EWCA Civ 367**.

25. However, he developed the criticism contained in paragraph 6 of the grounds, which was that the Judge had misdirected herself in criticising the doctor for not considering the possibility of self-harm by proxy. Dr Bandegani supported this criticism by reference to the Court of Appeal decision in **KV (Sri Lanka) -v- SSHD [2017] EWCA Civ 119**.

26. Mr Bandegani further submitted that the Judge's finding that Dr Beyer was not qualified to diagnose PTSD was irrational, in the light of the contents of the Home Office Asylum Policy Instruction on Medico Legal reports from the Helen Bamber Foundation and the Medical Foundation Medico Legal Report Service, version 4.1, published in July 2015.

27. On behalf of the Secretary of State, Ms Fijiwala submitted that no evidence had been provided to rebut the contentions put forward in the refusal letter with regard to the absence of objective evidence to show that there was a church next to 512 Camp, and so the Judge's adverse credibility findings were reasonably open to her on the evidence, for the reasons which she gave. With respect to the Judge's treatment of the medical evidence, she submitted that the Judge had not discounted it. She had accepted Dr Beyer's diagnosis of PTSD. The Judge had not said in paragraph [29] that she was placing no weight on the report of Dr Beyer.

Discussion

28. Two crucial elements in the appellant's account of past persecution are firstly that she had been taking photographs of a church in such close proximity to Army Camp 512 that soldiers at the camp suspected that she was taking photographs of the camp, not the church; and, secondly, having inspected her Smartphone, the soldiers found stored on it photographs of J at a Memorial Day event which he had recently attended with the appellant.

29. The Judge was not bound to take Ms Matthews' word for it that Google maps were unreliable, and did not list places of religious worship. Moreover, in broad terms it was open to the Judge to attach significant weight to the fact that the appellant had not brought forward objective or independent evidence from any source to show that there was a church by the name of St Mary's (or indeed by any other name) next to Camp 512, in circumstances where the respondent had been able to find Camp 512, but had not been able to find a church by the name of St Mary's next to it.

30. I also consider that it is open to the Judge to attach adverse weight to a point highlighted by Ms Owen for the Home Office in cross-examination, which was that there was no supporting photographic evidence to show that the appellant had attended the Memorial Day event at which she had claimed to have photographed her boyfriend, so as to have incriminating photographs stored on her phone which could be seen by the soldiers at the camp.

31. On the other hand, the Judge's declaration in the middle of paragraph [25] that "*it is quite easy to search for army camps on Google Maps and then to search for churches in the vicinity*" is vulnerable to the criticism that the declaration is not supported by any reasoning or by any specific evidence on the point which is admissible. If the assertion is based on research on Google Maps conducted by the Judge, then such research would have been improper. Assuming that the Judge did not carry out her own research, then on the face of it the assertion is based on speculation. The respondent did not claim to have located Camp 512 using Google Maps.

32. With regard to the medical evidence, the Judge rightly gave anxious scrutiny to the report of Dr Beyer. In broad terms, the degree of weight which she chose to give to the report was a matter of judicial discretion, and she was not bound to give the report decisive weight on the question of the appellant's overall credibility.

33. However, I am persuaded that the Judge materially erred in her assessment of the expert evidence in two respects. Firstly, her criticism of Dr Beyer for not following the Istanbul protocol was unfair, as it was to a significant extent based on the false premise that Dr Beyer should have considered in respect of each scar the possibility of the scar being inflicted by proxy ("SIBP"). Giving the leading judgment of the Court in **KV**, Sales LJ said at paragraph [92] that if an applicant for asylum has scarring and maintains that it is a result of torture, it should appear from the Secretary of State's decision whether she accepts their account or not. If she does not accept it, she should explain why she rejects it or is unpersuaded by it, including by saying (if this is her reason) that she considers that the injuries could have been self-inflicted or the result of SIBP. The question of self-infliction or SIBP will then appear to be an issue between the appellant and the Secretary of State, and the expert witness will know that there is something about which they should give any relevant evidence which they properly can, within their expertise. Sales LJ continued in paragraph 93:

> Self-infliction of wounds, or wounding by SIBP, is generally so unlikely that the Secretary of State should raise it as an issue, if it is to be part of her reason to reject an account of torture.

34. There was no presenting feature in this case that raised self-infliction by proxy as a more than fanciful possibility by way of an explanation for the scarring on the appellant's body observed by Dr Beyer. Thus, the Judge had no legitimate basis for attaching less weight to her report because she had not specifically addressed the possibility of SIBP.

35. The appellant volunteered to Dr Beyer that some of the scars were self-inflicted by her in her traumatised state, following the rape and sexual abuse to which she had been subjected while she was in detention at Camp 512. The Judge criticised Dr Beyer for failing to consider whether the other injuries could possibly be self-inflicted.

36. Mr Bandegani took me through the section of the report where Dr Beyer deals with the causation of the scars, and I do not consider that the Judge's criticism is

sustainable. For instance, with respect to L6 and L7, the Judge said that the character of the lesions makes self-harm very unlikely. With respect to L8 and L9, Dr Beyer said that the high-pigmented marks were highly consistent with the appellant's attribution; that accidental injuries at that site would be very unusual and self-harm most unlikely. With respect to L10, the long oblique linear scar across the back of the upper left thigh, the appellant asserted that it was inflicted during the episodes of abuse. Although she could not give details of the implement used, Dr Beyer opined that the injuries were typical of violent sexual assault, resulting from restraining positions. Injuries on the back of the upper thighs were very unusual as the result of accidents "*and would not be related to self-harm.*" In short, Dr Beyer considered whether the other scars were self-inflicted.

37. Secondly, the API produced by Mr Bandegani states at paragraph 3.2 that both Foundations (the Helen Bamber Foundation and the Medical Foundation) are accepted by the Home Office as having recognised expertise in the assessment of physical, psychological, psychiatric and social effects of torture. Clinicians and other healthcare professionals from the Foundations are objective and unbiased. Reports prepared by the Foundations should be accepted as having been compelled by qualified, experienced and suitably-trained clinicians and healthcare professionals: "*No report of its contents should be given little weight on the grounds that the writer, whether a GP, consultant, other clinician or healthcare professional, is not sufficiently qualified to write it. In particular, in relation to mental health conditions, the report will be accepted by the Home Office whether completed by a GP, clinical psychologist, consultant psychiatrist, other healthcare professional or other expert with extensive experience in this field.*"

38. The Judge acted reasonably in not taking the API into account, as it was not drawn to her attention. But since it is Home Office policy to accept that Dr Beyer has the requisite expertise to make a diagnosis of PTSD, the line taken by the Judge gave rise to procedural unfairness. I am unable to accept Ms Fijiwala's submission that the appellant was not prejudiced because the Judge nonetheless accepted Dr Beyer's diagnosis of PTSD. On the contrary, the Judge held that Dr Beyer was not competent to make a diagnosis of PTSD in order to justify her non-acceptance of this diagnosis.

39. For the above reasons, I find that the appellant has shown that the decision of the First-tier Tribunal dismissing her appeal against the refusal of her protection claim is unsafe, and that it should be set aside in its entirety.

40. I am also not persuaded that the decision of the Judge on the Article 8 claim is sustainable, having regard to her primary findings of fact and her failure to have any regard to the public interest considerations arising under section 117B of the 2002 Act.

41. On the facts found by the Judge, the relationship between the appellant and J did not have the necessary status to enable the appellant to apply for leave to remain on family life grounds under Appendix FM or, indeed, to enable the appellant to return to Sri Lanka in order to apply for entry clearance as a family member of J. On the

facts found by the Judge, J was neither a spouse, nor a fiancée, nor a partner. For the finding that they had cohabited for six months meant that they had not cohabited in a relationship akin to a marriage for a period of two years. Thus, the decision to allow the appeal on Article 8 grounds was inadequately reasoned, and the decision must be set aside and remade.

Notice of Decision

The decision of the First-tier Tribunal dismissing the appellant's appeal against the refusal of her protection claim, but allowing her appeal on Article 8 grounds, contained errors of law such that the decision must be set aside in its entirety and remade. The respective appeals of the appellant and the Secretary of State to the Upper Tribunal are allowed.

Directions for Disposal

The appellant's appeal is remitted to the First-tier Tribunal in Birmingham for a *de novo* hearing on all issues, with none of the findings of fact of the previous Tribunal being preserved, save for the uncontroversial finding that there are insurmountable obstacles to family life between the appellant and J being carried on in Sri Lanka, as J is a recognised refugee from Sri Lanka.

Direction Regarding Anonymity

Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 9 December 2017

Judge Monson

Deputy Upper Tribunal Judge