Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/07682/2015**

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 9 January 2018	**On 5 February 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TR
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Senior Home Office Presenting Officer
For the Respondent: Ms A Imamovic instructed by Migrant Legal Project (Cardiff)

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the respondent (TR). A failure to comply with this direction could lead to Contempt of Court proceedings.

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

Introduction

3. The appellant is a citizen of Sri Lanka who was born on 5 January 1987. He entered the United Kingdom on 12 November 2012 with a visa as a Tier 1 (Post-Study) partner. On 4 November 2014 the appellant claimed asylum on the basis that he was wanted by the Sri Lankan authorities as a perceived supporter of the LTTE.

4. On 20 April 2015, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR.

The Appeal

5. The appellant appealed to the First-tier Tribunal. Judge Coaster dismissed the appellant's appeal on asylum and humanitarian protection grounds. She rejected the appellant's claim that he was wanted by the Sri Lankan authorities and that he would, as a consequence, be at risk on return. However, the judge went on to allow the appellant's appeal under Article 3 on the basis that if removed to Sri Lanka it was likely that he would commit suicide as a result of his mental health problems.

6. The Secretary of State sought permission to appeal against the judge's finding in favour of the appellant under Article 3 of the ECHR.

7. On 22 August 2017, the First-tier Tribunal (Judge Kelly) granted the Secretary of State permission to appeal.

8. The appellant did not seek to appeal the judge's adverse finding in respect of his asylum and humanitarian protection claims. However, in a rule 24 response dated 9 January 2018, the appellant sought to uphold the judge's finding in his favour under Art 3 of the ECHR.

The Judge's Decision

9. The judge's reasoning in respect of Art 3 is set out at paras 67–79 of her determination. The judge began by setting the scene concerning mental health facilities in Sri Lanka and summarising, in part, the expert psychiatric evidence from Dr Shivashankar at paras 67–69 as follows:

> "67. I then assess whether it would be a breach of Article 3 to return the Appellant to Sri Lanka. Recent objective evidence '*Talking Economics' the blog of the Institute of Policy Studies of Sri Lanka'* – a Sri Lankan social economic policy think tank document provided at the hearing, shows that there are mental health services in Sri Lanka but they are plagued by poor funding and a scarcity of trained human resources. The paper urges the Sri Lankan government to consider providing a comprehensive and integrated response to mental health and care services. The paper does not materially contradict **GJ** guidance, contrary

to the Appellant's submission, nor the Upper Tribunal's finding on available mental health care in Sri Lanka.

68. Dr Shivashankar refers in his latest report to the Appellant's recovery being very slow with some improvement and then regression in the community. It is apparent that this is because of the possibility of a negative outcome in his asylum appeal. The Appellant is diagnosed as having psychotic symptoms in the form of long standing paranoid and persecutory beliefs affecting his functioning abilities in the community including interaction with others. Dr Shivashankar state that the Appellant is scared of having to return to Sri Lanka because of his subjective believe that he would be killed by the Sri Lankan government.

69. Dr Shivashankar states that any adverse outcome from the court proceedings could again negatively affect his mental health with the possible increase in risk to his health and safety including suicidal risk. The prognosis is poor with limited improvement despite various interventions from the UK health care authority and medication".

10. Then at paras 70–73, the judge considered the legal approach set out in J v SSHD [2005] EWCA Civ 629 and Y and Z (Sri Lanka) v SSHD [2009] EWCA Civ 362 as follows:

"70. Guided by **GJ** I have had regard to the six tests set out in **J v SSHD [2005] EWCA Civ 629** summarised in paragraph 450:

(1) The ill-treatment relied upon must attain a minimum level of severity 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* paragraphs [38-39];

(2) The appellant must show a causal link between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's article 3 rights. Examination of the article 3 issue 'must focus on the foreseeable consequences of the removal of the applicant to Sri Lanka ...';

(3) 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.

(4) An article 3 claim can in principle succeed in a suicide case;

(5) 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;

(6) The decision maker must have regard to 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.

71. At paragraph 451 **GJ** also had regard to the observation of Lord Justice Sedley in **Y (Sri Lanka) v SSHD [2009] EWCA Civ 362**, at paragraph [16], 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'.

72. The appellant has not suffered mistreatment in Sri Lanka and therefore limb 2 of the **J v SSHD** tests has no application. Under limb 3 the threshold for the Appellant to succeed in a breach of article 3 is particularly high because it is a foreign case and 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, physical or mental. In respect of limb 5 the Appellant's fear of return is not objectively well founded and that weighs against there being a real risk of removal being in breach of article 3.

73. However, I find the Appellant falls within paragraph 16 of **Y (Sri Lanka) v SSHD** in that he has no objective foundation for his fear but nevertheless, based on Dr Shavishankar's evidence and the lengthy and sustained mental ill health of the Appellant that there is a risk of suicide if there is an enforced return. This is despite some evidence that the Appellant has improved with the significant support of the UK mental health services in the UK such that he is not currently suicidal. The risk arises on the prospect of a forced return".

11. The judge's reference to GJ is, of course, to the country guidance decision in GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC).

12. At paras 74–76, the judge considered the appellant's position on return to Sri Lanka, in particular whether there would be any adequate family support, and the background evidence derived from GJ concerning available mental health care in Sri Lanka:

> "74. Although the Appellant could not be said to be suicidal at the time of the hearing no doubt due to the NHS mental health support services, what would be the case in Sri Lanka? I have found that the Appellant has not been honest about the whereabouts of his mother and there is not necessarily a lack of family support from either his mother or his wife's family. However, I accept that they are not a substitute for professional medical assistance.
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> 75. As to the current situation with mental health services in Sri Lanka I have to rely on the Country Guidance in **GJ** which states at paragraphs 454 and 455 the following:
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> > *'454. 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'.*
> >
> > *455. 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:*

> *'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'.*

76. **GJ** indicates that the Appellant is unlikely to receive appropriate medical treatment in Sri Lanka. He is diagnosed in March 2017 as having a mental disorder in the form of Recurrent Depressive Disorder, current episode of Severe Depression with psychotic symptoms in the background of difficult social circumstances with financial and immigration difficulties".

13. Then at para 77, the judge quoted from the (then) recent decision of the Strasbourg Court in Paposhvili v Belgium (Application no 41738/10) [2017] Imm AR 867 concerning the test to be applied in an Art 3 claim in a "health case".

14. Then at para 78–79 the judge reached her finding that the appellant had established a breach of Art 3 based upon the risk to him of committing suicide on return:

> "78. I note that the Article 3 threshold is very high especially in foreign cases, nevertheless I must accept that Article 3 is engaged in this case because it involves the high risk of suicide on return to Sri Lanka notwithstanding the Appellant's lack of an objective well founded fear. In this case I conclude from Dr Shivashankar's reports that the risk has reached the minimum level of severity and that the Appellant has shown a link between his removal and the likely risk of suicide even though his objective fear is not well founded. It remains a fact that the receiving state does not have effective mechanisms to reduce the risk.
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> 79. I find that the removal of the Appellant would be a breach of Article 3 and therefore unlawful. …."

The Secretary of State's Challenge

15. Mr Richards, who represented the Secretary of State, relied upon the grounds of appeal upon which permission to appeal had been granted which he expanded upon in his oral submissions.

16. First, he submitted that the judge had been wrong to rely upon the case of Paposhvili at para 77 of her determination which, as was established by the recent case of EA and others (Article 3 medical cases – *Paposhvili* not applicable: Afghanistan) [2017] UKUT 445 (IAC) was not to be followed by the First-tier Tribunal or Upper Tribunal because of the binding decision of the Court of Appeal in GS (India) and Others v SSHD [2015] EWCA Civ 40 (as is the House of Lords' decision in N v SSHD [2005] UKHL 31) on the appropriate test to be applied when determining whether Art 3 is breached in health cases.

17. Secondly, Mr Richards submitted that the judge's key finding in para 78 was fundamentally wrong. The judge had found that there was a "high

risk of suicide" on return to Sri Lanka but the most recent report of Dr Shivashankar dated 6 March 2017 did not support that finding where at para 3.3 it was stated that the appellant had "no self-harm or suicidal ideas, no ideas to harm others". Mr Richards submitted that all that Dr Shivashankar's report supported was in para 4 under the heading "Opinion and Recommendations" was that there was a: "possible increase in risk to his health and safety including suicidal risks". There was, Mr Richards submitted, no reference to a "high risk" of suicide on return to Sri Lanka.

18. Thirdly, Mr Richards submitted that the judge had failed to assess Dr Shivashankar's evidence in the light of the judge's adverse credibility findings in relation to the appellant's asylum claim and that he had lied about having lost contact with his mother. It was, Mr Richard submitted, not factored in either by Dr Shivashankar or by the judge that the appellant did not even have a genuine subjective fear.

19. Mr Richards submitted that these errors fatally flawed the judge's finding in the appellant's favour under Art 3.

Discussion

20. First, I will deal with the issue of whether the judge applied the correct legal approach. At para 70, as I have set out above, the judge set out the six stages in J where the Court of Appeal articulated the approach to considering whether a breach of Art 3 arose when it is contended that an individual is at risk of suicide on return to his own country.

21. The judge also noted the variation to the fifth principle in J identified by the Court of Appeal in Y and Z at para 71 of her determination.

22. It is plain, in my judgment, that the judge applied the correct legal approach in paras 70–73 and in reaching her conclusion in para 78 that the appellant had established a breach of Art 3. I do not accept Mr Richards' submission that the judge's reference to Paposhvili in para 77 led her to misdirect herself by applying a lower or more generous approach to Art 3 in a health case identified by the Strasbourg Court in Paposhvili by comparison to its earlier decisions in D v UK (1997) 24 EHRR 423 and N v UK (2008) 47 EHRR 39. It is plain that in para 78 she correctly identified that there was a "very high" threshold under Art 3 and, of course, she was concerned with a risk of suicide, namely death which, in itself, does not require any dilution of the approach in D v UK and N v UK acknowledged in Paposhvili.

23. Secondly, the judge was, in my judgment, entitled to take into account, following Y and Z, the subjective fear of the appellant on return to Sri Lanka. Whilst I accept that Y and Z (Sri Lanka) was concerned with a case where the background facts were established but the objective risk based upon on them was not, this case is not wholly different in the sense that it is a case where the appellant was wholly disbelieved. He was, of course, disbelieved as to much of his claim but, in fact, the judge accepted that he had been involved in charitable and other work which was, in part, an

aspect of his fear that it would be perceived as supporting the LTTE abroad.

24. In any event, a *genuine* subjective fear, as the Court of Appeal recognised in Y and Z, can properly be taken into account in assessing whether the appellant has established a real risk of suicide on return. Where the individual's whole claim is disbelieved as a fabrication, it may well be difficult for that individual to establish that he has a genuine belief. If his claim is a fabrication, it is likely that his genuine belief to fear the authorities on return, such that he may commit suicide, is also likely to be a fabrication. In this appeal, however, there is no doubt that Dr Shivashankar in his multiple reports identified the appellant as suffering from genuine mental illness, for which he has been hospitalised and treated including receiving ECT, and that this includes paranoid and persecutory beliefs. I do not accept Mr Richards' submission that Dr Shivashankar's opinion and the Judge's findings are flawed because the appellant had been found not to be credible in respect of his asylum claim (or at least largely so) or whether he has lost contact with his family. The judge was entitled to accept that Dr Shivashankar, as a consultant psychiatrist, had diagnosed the mental illnesses which created the paranoid, delusional and *genuine* persecutory beliefs.

25. I, therefore, reject Mr Richards' submissions that the judge's approach to Art 3 was legally flawed.

26. Thirdly, I turn now to Mr Richards' submission that the judge was wrong to find that Art 3 was engaged on the basis that there was a "high risk of suicide on return" based upon Dr Shivashankar's reports. There were a number of psychiatric reports before the judge which she summarised at paras 18–22 of her determination as follows:

> "18. On 19th December 2015 Dr Shivashankar stated that the working diagnosis was that the Appellant as suffering a mental disorder in the form of severe depressive episode with psychotic symptoms along with co-morbid post-traumatic stress disorder symptoms with ongoing negative cognition and suicidal thoughts. Dr Shivashankar stated that the 'treating team' still believed that the Appellant is a high risk for completing his suicide considering his difficult social circumstances including his legal status to remain in this country.
>
> 19. On 20th January 2016 Dr Shivashankar reported that although the Appellant was slowly making progress with regard to his mental illness he still had significant depressive and PTSD symptoms. A formal cognitive examination 15th January 2016 had shown significant deficiencies in attention, memory and visuo-spacial abilities. Dr Shivashankar reiterated that the treating team still considered the Appellant to have a high suicide risk considering his difficult social circumstances including the question of his legal status to remain in this country. Again, the Appellant was, in the opinion of Dr Shivishankar, not fit to attend legal proceedings.
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> 20. On 6th March 2017 Dr Shivanshankar reported in a supplementary report for the purpose of these proceedings that the Appellant suffers from a mental disorder in the form of Recurrent Depressive Disorder, current episode of Severe Depression with psychotic symptoms in the

> background of difficult social circumstances with financial and immigration difficulties. Dr Shivashankar stated that he was aware of his duties in providing the report to the Tribunal.
>
> 21. Dr Shivashankar reports that the Appellant has psychotic symptoms in the form of long standing paranoid and persecutory beliefs affecting his functioning abilities in the community including interaction with others. He is scared of having to return to Sri Lanka with the belief that he would be killed by the Sri Lankan government. An adverse outcome from the court proceedings could again negatively affect his mental health with possible increase in risk to his health and safety including suicidal risks. The Appellant's prognosis is poor considering the way he has been struggling with his mental health difficulties since November 2015 with limited sustained benefit from various interventions including in-patient care, biological treatments, medication and extensive course of ECT and input from CRHT and CMHT. Given the Appellant's poor response to treatment options so far, it is possible for him to take a longer time before he becomes well and fit to attend legal proceedings.
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> 22. Dr Shivashankar opined that the Appellant did not have capacity to give instructions and to withstand legal proceedings".

27. It is important to note that the appellant has, throughout the proceedings, been unable to take any part by giving instruction or giving evidence. Dr Shivashankar's reports consistently indicate that the appellant's mental health is such that he is not able to take part in legal proceedings. The appellant clearly suffers, on the basis of Dr Shivashankar's expert opinion, from serious and severe mental health problems. He suffers from recurrent depressive disorder, severe depression with psychotic symptoms. He has been hospitalised, taking medication and subject to ECT (electroconvulsive therapy) on a number of occasions. The nature of the therapeutic interventions reflects the seriousness and severity of the appellant's mental health problems.

28. The evidence of Dr Shivashankar was, until the appellant underwent treatment over a sustained period of time, that there was high risk of suicide. By the time of his final report on 6 March 2017, to which Mr Richards referred me, the appellant had been undergoing treatment for some time and his condition had stabilised. He continued to receive antipsychotic medication and psychological and behavioural interventions. It is clear from Dr Shivashankar's report that it is the past treatment and continuing interventions which have produced this result. It is in that context that Dr Shivashankar stated at para 3.3 that the appellant had "no self-harm or suicidal ideas" at the present. Although, he noted that the appellant "continued to have persecutory delusional beliefs". In that context also, Dr Shivashankar concluded that if the appellant's appeal proceedings were adverse that could: "negatively affect his mental health with possible increase in risk to his health and safety including suicidal risks". The background risk, of course, prior to his treatment was that he was at a "high risk" of suicide.

29. In considering the risk to the appellant on return, the judge took into account at para 75 of her determination what was said by the Tribunal in the country guidance case of GJ and Others at [454] and [455] which identified the limited availability of treatment for mental disorder in Sri

Lanka. It is, perhaps, worth noting the conclusion reached by the UT in GJ in relation to the third appellant in that case at [456] of its determination:

> "456. We note that the third appellant is considered by his experienced Consultant Psychiatrist to have clear plans to commit suicide if returned and that he is mentally very ill, too ill to give reliable evidence. We approach assessment of his circumstances on the basis that it would be possible for the respondent to return the third 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, we are not satisfied on the particular facts of this appeal, that returning him to Sri Lanka today complies with the United Kingdom's international obligations under Article 3 ECHR".

30. Here, in my judgment, the judge was entitled to take into account the background evidence and the likelihood that the appellant would not be able to continue to receive treatment for his clearly diagnosed mental disorders. In the light of that, it was open to the judge, taking into account Dr Shivashankar's past assessment of the risk of suicide by the appellant prior to treatment together with his present view if the appellant were returned after treatment, to find that the 'high threshold' under Art 3 of the ECHR was established, namely that there was a real risk of the appellant committing suicide on return to Sri Lanka. That risk was, in my judgment, one which the judge was entitled to find and arose because of the potential deterioration in the appellant's mental health if he were removed to Sri Lanka.

31. For these reasons, the judge did not err in law in allowing the appellant's appeal under Art 3 of the ECHR.

32. Because of her decision in respect of Art 3, Judge Coaster did not go on to consider whether the appellant's return would breach Art 8 of the ECHR. Neither representative invited me to deal with Art 8 of the ECHR if Judge Coaster's decision in respect of Art 3 was sustainable.

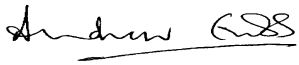
Decision

33. The decision of the First-tier Tribunal to allow the appellant's appeal under Art 3 of the ECHR did not involve the making of an error of law. That decision stands.

34. The First-tier Tribunal's decision to dismiss the appeal based upon asylum and humanitarian protection grounds also stands.

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

Signed



A Grubb
Judge of the Upper Tribunal

Dated 01 February 2018