Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06661/2013

<u>THE IMMIGRATION ACTS</u>

Heard at Field House	**Determination Promulgated**
On 12 March 2014	**On 7 April 2014**
Prepared 13 March 2014	………………………………….

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

SP

<u>Appellant</u>

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

<u>Respondent</u>

<u>Representation</u>:

For the Appellant: Mr P Turner, of Counsel instructed by Greater London Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

<u>DECISION AND DIRECTIONS</u>

1. The appellant, a citizen of Sri Lanka born on 5 July 1993 appeals, with permission granted by Judge of the First-tier Tribunal Simpson on 29 January 2014 against a decision of Judge of the First-tier Tribunal Brenells dated 27 December 2013 in which he dismissed the appellant's appeal

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against a decision of the Secretary of State, dated 2 July 2013, to refuse to grant asylum and to issue removal directions to Sri Lanka.

2. The appellant was brought up by her uncle who was childless in Jaffna. Her parents and siblings lived in Vanni. When her studies were completed in January 2013 she went to see her parents as her father was seriously ill. Shortly after her arrival soldiers came to the house and took her sister away. Her sister later returned in tears. On 4 February soldiers came to the house and took her sister and the appellant away. They were separated. Her sister was taken outside by a soldier and was raped. The soldier who was keeping the appellant tried to get her to undress. She then heard a shot and her sister came in holding a gun which caused the soldier to back off. The appellant ran away running past the dead soldier who had been shot. She injured herself when she ran and met another girl and told her what had happened. That girl called the appellant's uncle and arrangements were then made for her to be taken to hospital and then to leave Sri Lanka. She left Sri Lanka, going to India. Her uncle told the appellant that the army would record that they had arrested two LTTE members who had then shot two soldiers and escaped and that her life would not be safe if she returned to Sri Lanka. After five weeks in India the appellant had travelled with the assistance of agents to Britain.

3. The Secretary of State, in a detailed letter dated 2 July 2013 noted the basis of the appellant's claim and her immigration history and in particular the fact that she appeared unable or unwilling to give full details of her travel to Britain. In paragraphs 23 onwards of the letter of refusal the Secretary of State considered the appellant's story and in effect stated that she had not been able to substantiate her claim and that it was not plausible that the appellant had continued to stay at her parents' house after her sister had returned after being taken away by the soldiers on the first occasion. It was not accepted that the appellant and her family were involved with the LTTE.

4. It was noted that the appellant had said that her sister had been forced to undress and had been raped but that that was inconsistent with her claim that they had been separated and that the appellant's sister had been taken outside the house where she was attacked. As the appellant had said that she had not seen her sister since the incident there was no way that she could state that she knew what had happened. Moreover the appellant had claimed that her sister had shot both soldiers who had abducted the appellant but was unable to explain how or where she had obtained the gun and was unable to say if the soldiers were armed. It was therefore not accepted that the appellant and her sister had been attacked by two soldiers.

5. With regard to the appellant's travel from Sri Lanka, it was noted that the details she gave of whether or not she had been accompanied by agents was inconsistent and moreover that she had said that she had had no contact with anyone in Sri Lanka and therefore did not know if the

authorities were looking for her or for any other member of her family. It was stated it was not considered credible that the appellant's uncle whom she claimed had treated her like a daughter and taken her to hospital after the attack and arranged for her travel to Britain would not maintain contact with her nor was it credible that, as she asserted, the person with whom she was living would speak to her uncle on the telephone but would prevent her from doing so on the grounds of safety. It was thought that if she were genuinely in fear of her life she would have spoken on another telephone or used an alternative means of communication to contact her uncle.

6. Judge Brenells heard the appeal on 13 December 2013. He had before him a witness statement from the appellant, one from her guardian, S A and a psychological report by a Dr Rozmin Halari.

7. In paragraphs 13 onwards he set out his findings of "credibility and fact". He did not accept the reasons why the appellant had gone to visit her parents and considered that if the appellant had done so and was aware that her sister had been raped it lacked credibility that she would have remained. Moreover he did not consider the appellant's evidence regarding the route and method she took to travel from Sri Lanka to the United Kingdom was credible, placing weight on the fact that the appellant had said that she had travelled by boat from Colombo to India which had taken about three quarters of an hour. He stated that that was not possible. He also did not consider it credible that she would not have been in contact with her family since arriving in Britain. He criticised the fact that the appellant gave no details of anything that had occurred in Sri Lanka to her family after she had left. He noted that there were some inconsistencies as to when the two soldiers had been shot and he referred briefly to what the appellant was recorded as having told Dr Halari. He found that her story was "highly unlikely". He stated in paragraph 19:-

> "Having obtained a weapon and killed the first soldier the sister is then said to have not fled, but returned and threatened the second soldier. Since the appellant says she heard the gunshot that must have killed the first soldier it is most unlikely that the second soldier would not have also heard the shot and gone to his colleague's aid or at the very least taken steps to guard himself. Rape by Sri Lankan soldiers is not unknown. Nevertheless, I find it highly unlikely that in an attempted rape that the appellant's sister shot and killed two Sri Lankan soldiers. The claim that two soldiers were killed within minutes of each other and the manner their deaths are said to have occurred, leads me not to accept that this event occurred."

8. In paragraph 20 he dealt with the report of Dr Halari. He wrote:-

> "I have read in detail Dr Halari's report, much of which is based on information given to him by the Appellant who I find not to be credible. I accept that the Appellant has been traumatised, but there could be many reasons for this. Since I do not accept the Appellant's story, I do not accept that the cause of her trauma was the attempted rape by two soldiers who were killed during the incident. At paragraph 31 of the report Dr Halari

states that the doctor who treated the Appellant after her overdose told the Appellant not see a psychiatrist because the Home Office would reject her application if she did so. Dr Halari is there only relaying what the Appellant has told him – but she says she took the overdose after her application had been rejected and so it could have no bearing on the Home Office's consideration. The doctor who is alleged to have given this advice to the Appellant must be ascertainable from the Appellant's medical records. No evidence has been obtained from him to support the Appellant's allegation that such advice was given to her. I also have noted that the Appellant, in response to a question I put to her at the hearing, stated that she has registered with a GP and is not on any medication. Whilst Dr Halari found that the Appellant is suffering from moderate levels of depression, he does not indicate whether this level of depression is to be expected in anyone fearing removal after a failed asylum application. At paragraph 56 Dr Halari indicates that the Appellant told him she could not speak at her interview 'about the rape or the soldiers because she was scared this would tarnish her reputation and she feared that this would affect her future'. I accept that the Appellant said that to Dr Halari, but she gave clear information about the rape of her sister and the attempted rape of herself in the course of her interview. She clearly was prepared to mislead Dr Halari."

9. In paragraph 21 he said:-

> "If the Appellant's account is correct, her sister shot two soldiers, killed one and probably killed the other. Her sister was therefore in as much and probably more danger than the Appellant was. The Appellant did not leave Sri Lanka immediately after the incident yet she offers no explanation as to what happened to her sister."

10. In the following paragraph he referred to the risk factors identified in **GJ & Others (post civil war returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) UKAIT 00049** (?). He said there was no evidence which established the appellant fell into any of the categories of those at risk. He therefore dismissed the appeal.

11. Lengthy grounds were then submitted. They asserted that the judge had been wrong to find the appellant was not credible and said that the starting point was that the judge had failed to properly apply the lower standard of proof. At the hearing before me Mr Turner stated that where the judge had, in paragraph 9 stated that "the burden is on the appellant to show as at the date hereof there are substantial grounds for believing that she meets the requirements of the Qualification Regulations...". He was setting out an incorrect standard of proof. The grounds went on to suggest that the judge had placed undue weight on minor inconsistencies and it was asserted that the report of Dr Halari "goes some considerable way to corroborating her account". It was stated that the judge had not properly assessed the report in the round when assessing her account and that he had considered the report having already made adverse credibility findings. It was stated that the conclusion of the judge that the appellant had been attempting to "mislead" Dr Halari was unsupported by reasons.

12. The grounds went on to argue that the various findings of the judge that the appellant would have been unlikely to have gone to visit her parents and regarding her departure from Sri Lanka were untrue was not based on any inconsistency or implausibility. It was claimed that if the judge had been concerned about these issues that should have been put to the appellant. There was nothing, it was inserted implausible in her account.

13. It was asserted finally that the appellant was plainly at risk or there was a real risk that she was wanted as someone who had participated in the killing of two Sri Lankan army soldiers.

14. At the hearing of the appeal Mr Turner referred to the grounds of appeal and asserted that the determination did not indicate that the judge had considered the appellant's case with anxious scrutiny. He stated that the standard of proof was wrong and then referred to the report of Dr Halari which he stated was detailed and had not been properly evaluated by the judge. He asserted that there was no detailed analysis of what the doctor had said and that much of the conclusions the judge had based on speculation. He emphasised that the judge had made his credibility findings before considering the report.

15. In reply Ms Isherwood stated that there was no error of law and that because of the sheer lack of credibility in the appellant's claim it was not a decision which should be set aside. The grounds were in effect, a mere disagreement with the findings that the judge was entitled to make. She emphasised the lack of information which the appellant was willing to put forward and that the judge was correct to find there was no reason why the appellant should not have contacted her family. She referred to the delay between the alleged incident and the appellant leaving Sri Lanka.

16. Mr Turner in reply raised issues which he had not raised in the grounds of appeal or in his opening submissions to me. These were the fact that there had been two witnesses in the appeal but the judge had not commented on the evidence of the second witness and made no findings as to whether or not he was telling the truth regarding his inability to contact the appellant's uncle.

17. In reply Ms Isherwood stated that the judge clearly had not believed that witness – he had had before him and had indeed commented on the witness's statement and that there was therefore not a material error when dealing with the evidence. Moreover, she emphasised that the medical report had properly been considered under the guidelines in the determination of the Tribunal in **JL (medical reports – credibility) China [2013] UKUT 145 (IAC)**.

Discussion

18. This is certainly a brief determination although the reality is that the appellant's story is also brief and lacking in detail.

19. The first issue raised by Mr Turner was that of the standard of proof used by the judge. It is correct that when considering an asylum appeal as opposed to an appeal under Article 3 of the ECHR the terminology of "reasonable likelihood" or "real risk" would be more appropriate. Nevertheless the judge has indicated that he was applying a lower standard of proof than that of balance of probabilities.

20. Turning to the findings of fact made by the judge I consider that there was little of a moment in his conclusion that it was unlikely that the appellant would have visited her parents and indeed the weight he placed on the lack of information about the appellant's travel to Britain although I consider that it would have been appropriate for the appellant to have been questioned about that at the hearing.

21. The point raised by Mr Turner at the end of the hearing – one which was not raised in the grounds of appeal – that the judge made no comment on the credibility of the second witness is a matter of further concern. However, the issue which concerns me most is the approach of the judge to the medical report. I have considered the judgment of the Court of Appeal in **Mibanga [2005] EWCA Civ 367** which relates to an appeal in which an Adjudicator had found the appellant to be incredible with regard to his story of ill-treatment in the DRC before referring to the medical report. In paragraph 24 of that judgment Wilson LJ states:-

> "It seems to me to axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto."

22. He referred to the judgment in **HE (DRC – credibility and psychiatric reports) [2004] UKAIT 00321** where the Tribunal had said:-

> "Where the report is specifically relied on as a factor relevant to credibility the Adjudicator should deal with it as an integral part of the findings on credibility rather than just as an add-on, which does not undermine the conclusion to which he would otherwise come."

23. Lord Justice Wilson went on to say that the adjudicator in the case of **Mibanga** had erred by addressing the medical evidence only after articulating conclusions that the central allegations made by the appellant were "in her extremely forceful if rather unusual phraseology, 'wholly not credible'."

24. In paragraph 32 of the judgment of Sir Mark Potter, the President of the Family Division in **SA (Somalia) [2006] EWCA Civ 1302**:-

> "...where there is medical evidence corroborative on the appellant's account of torture or mistreatment, it should be considered as part of the whole package of evidence going to the question of credibility and not simply treated as an 'add-on' or separate exercise or subsequent assessment only after a decision on credibility has been reached on the basis of the content of the appellant's evidence or his performance as a witness."

25. While Sir Mark Potter went on to state that in that case what should be looked at is the substance of the decision. In effect, what is required is that the judge has to look at all the evidence including medical and psychiatric reports in the round.

26. While I have some sympathy for the judge as, on the face of it there is much of the appellant's story that lacks credibility the reality is that, as the judge accepted, she has been traumatised in some way and I consider that the judge erred in law by not engaging with that issue before concluding that the appellant was not credible. It was his duty to consider the appellant's claim holistically rather than to find that the appellant was not credible and then to consider the medical report. There is also, I consider, the error that he did not make any findings on the evidence of the supporting witness.

27. I therefore consider that it is appropriate that, having found errors of law in the determination of the First-tier Judge that I should set aside the decision and further that this appeal should be remitted to the First-tier for its decision afresh on all issue. I consider that the paragraph 7.2 of the Senior President Tribunal's Directions are met and that therefore that is the appropriate course of action.

Decision

28. This appeal is allowed to the extent that it is remitted to the First-tier Tribunal for a hearing afresh.

Signed Date

Upper Tribunal Judge McGeachy