



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/07543/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 29 April 2014
Extempore**

Determination Sent

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R M

(ANONYMITY ORDER MADE)

Claimant

Representation:

For the Claimant: Ms C Bayati, Counsel, instructed by S. Satha & Co,
Solicitors

For the Respondent: Ms J Isherwood

DETERMINATION AND REASONS

1. Appeal of R M whom I refer to as the claimant against the decision of the Secretary of State which was taken on 26 July 2013 to refuse her asylum and to give directions for her removal from the United Kingdom pursuant to directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The claimant's claim is set out in detail in the refusal letter, in her witness statement and is referred to in detail in the determination of Judge Clayton. In summary the claimant is a Sri Lankan national of Tamil ethnicity. In 2008 she began a relationship with a man called Umesh and on 15 October 2010 she was arrested, detained for nine days, tortured and questioned on suspicion of being involved with the LTTE. She was specifically questioned about Umesh who she was told was a LTTE member who had also been arrested. It appears that she was sexually assaulted during this detention. She was released on 24 October 2010 upon payment of a bribe and was taken to hospital where she received treatment. The CID searched for her at her home and arrangements were then made for her to travel to the United Kingdom for which a student visa was obtained for her and she left Sri Lanka using her passport with the assistance of an agent.
3. The claimant did not claim asylum until June 2013 when she attended a screening interview and was given a substantive asylum interview on 25 July 2013. The respondent refused the application for the reasons set out in the refusal letter of 26 July 2013. In summary the respondent accepted that the claimant was of Tamil ethnicity but did not accept that she had been arrested, detained or ill-treated as claimed, did not accept the reliability of the documents she had adduced in support of her claim and having had regard to the country guidance set out in **GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319** considered that she would not be of adverse interest to the authorities on return even if what she said were true.
4. The claimant appealed to the First-tier Tribunal but did not give oral evidence before Judge Clayton there being by that point a report from a consultant psychiatrist, Dr Raj Persaud, which indicates that she was unable to attend court and was unfit to give evidence or be cross-examined. In a follow-up letter to that report Dr Persaud states that he doubted whether she was in fact capable of instructing Counsel.
5. Judge Clayton heard submissions from Ms Physsas of Counsel for the claimant and from Mr Panayi, a Home Office Presenting Officer. In the absence of oral testimony from the claimant the judge accepted that the psychiatric report was pivotal and having had regard to it and the other evidence from the claimant's general practitioner records, a letter from a Nugegoda Private Nursing Home in Sri Lanka and having examined the interview record Judge Clayton found that the claimant's account was truthful and that she had been detained and tortured as claimed. She accepted that she had been released through a bribe as has been her smooth passage through the airport and that following the notice of decision in **GJ** that she would be perceived to be of interest in the in post-conflict Sri Lanka as an individual perceived to be a threat to the integrity of Sri Lanka. She then allowed the appeal on asylum grounds and on the basis that the claimant's removal to Sri Lanka would be in breach of Article 3 of the Human Rights Convention.

6. The Secretary of State then sought permission to appeal on three principal grounds which have been characterised by Ms Isherwood as:
 - (1) failing to take into account the delay on the part of the claimant in seeking asylum despite the fact that that was raised explicitly in the refusal letter,
 - (2) failing to resolve a conflict in evidence between the records of the GP and what is said in Dr Persaud's report as to whether or not the claimant had been raped or not and in so doing, attaching too much weight to the report of Dr Persaud in reaching findings with respect to credibility; and
 - (3) failing to apply properly the country guidance in **GJ** given a failure to provide reasons as to why the claimant would fit into the risk categories identified in **GJ** or what risk categories she would fit into.
7. The grounds are further subdivided in the application but I considered it was fair to proceed on the three main heading.
8. Permission to appeal on all grounds was granted by First-tier Tribunal Judge Sommerville on 26 March 2013. Subsequent to that a Rule 24 letter has been produced by the claimant's solicitors and was drafted by Ms Bayati who appeared before me.
9. I turn first to the issue of delay in making a claim for asylum. As Ms Bayati candidly accepted the judge makes no express reference either Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 or to the specific allegation made in paragraphs 11 and 12 of the refusal letter. I accept also that the delay in this claim was somewhat over two years. It is not, however, incumbent on a judge to address Section 8 of the 2004 Act first in reaching a determination nor is section 8 determinative. It is a factor to be taken into account and I note that that is the view of the Court of Appeal in **JT (Cameroon)**.
10. The assessment of credibility is to be taken as an overall basis and given the other findings in respect of credibility to which I will turn later I consider that whilst there was no express reference in the determination to the delay, it is nonetheless evident from the judge's approach to the evidence that she was aware of the issue of delay and she refers to that in dealing with the seeking of medical treatment, and thus, it cannot be argued that she did not take it into account; the weight to be attached to it was a matter for the judge and it was open to her, viewing the evidence as a whole, not to attach significant weight to it.
11. Judge Clayton also said that she had considered all the evidence with greatest care and it is also a case where the judge had noted inconsistencies in the claimant's evidence and had resolved them in the claimant's favour, in particular at paragraph 43 and to an extent also at paragraph 42. On that basis I am satisfied that this did not amount to a

material error which is capable, given the other positive findings, of affecting materially the outcome of the appeal.

12. Turning to the apparent conflict of evidence which is said to exist between what is said in the GP records and what is recorded by Dr Persaud in his report. I start first with the GP records which consist of brief notes extracted from the claimant's GP's database. The relevant passage appears in an entry of 20 July 2013 when the claimant saw a practice nurse who records when she was undertaking a smear test that the claimant was, and I quote, "not sexually active, never has been, still a virgin, explained risk is low and parental choice was that the patient was happy to leave." She also goes on to record that: "says things happened in the past? Sexually not sure but she says told by GP back home still a virgin." What Dr Persaud records after setting out the claimant's account of the claimant being assaulted and waking up to find her clothes ripped is:

"She repeats several instances like this but it is possible that because of the cultural taboo over sex and rape she has not been clear that she was raped but she gives every sense that this is indeed what happened, without explicitly saying so. She keeps complaining during the consultation that she does not talk about the past, and this almost aggressive response to any inquiries about what happened to her, while understandable will also explain why she has not improved at all. She needs specialist counselling from rape trauma specialists and PTSD specialists to help her - I note she has not benefited from such a referral as yet."

13. I do not consider that the notes made by the practice nurse could be treated as a verbatim note of what was said. It is evident from the notes that the practice nurse had some concerns about what she had been told or rather believed that the claimant had said raised certain concerns as to whether she had suffered sexually in the past. It is remarkable that the nurse writes "says told by the GP back home still a virgin". This is not the same thing that she had told the GP that she was still a virgin. I consider that this particular phrasing and the apparent concern by the GP to explain that the claimant was still a virgin is in itself indicative of some concern that the claimant had been sexually assaulted. There would have been little need, if there had been no concern about that on the part of the GP, for him to use such a phrase.
14. Whilst I accept there is no mention of possible sexual assault in the letter of referral from the North East London Foundation Trust in respect of the claimant this letter concerned most with how the claimant herself presents and what she had suffered and the current threats and concerns which in this case appears to be a significant amount of suicidal ideation. The letter from the Nugegoda Private Nursing Home does refer to sexual abuse and that the claimant was subjected to sexual abuse and that is of course a letter which Judge Clayton found to be document on which she could rely and it is also evidence from the grounds of appeal that that finding is not

directly challenged. Accordingly I am not satisfied that there is when properly viewed an evidential conflict between what is recorded in the GP's notes and what is said in Dr Persaud's report.

15. Ms Isherwood developed the challenge to Dr Persaud's report identifying a number of issues which are raised in submissions made by the Presenting Officer to Judge Clayton that were not factored into account when assessing Dr Persaud's report. Whilst it is correct that at [15] the submission was made that a credibility issue arose from the timing of mental health coming to be raised with the GP and that it was not credible that the claimant had not sought treatment upon arrival in the United Kingdom that issue is dealt with by Judge Clayton albeit briefly at [42] and that she accepts it was somewhat tardy. Although I consider that in reality the judge was here using understatement, it is not arguable that the judge did not have regard to the issue.
16. A further submission was made to Judge Clayton [18] that Dr Persaud's report was flawed in that it was said [75] that the claimant continued to have suicidal thoughts and, on top of that, command hallucinations of a serious nature and intent, inconsistent with paragraph 4 which said if she is experiencing auditory hallucinations then she becomes unreliable in terms of giving an account of herself. I find that there is in reality no inconsistency here. When reading the report as a whole and in particular paragraph 4 it is clear that Dr Persaud did accept that the claimant is suffering or is experiencing auditory hallucinations and it is important to note the whole paragraph which says:

"I am very concerned that if she is experiencing auditory hallucinations then she becomes unreliable in terms of giving an account of herself. She did appear to be hearing 'command hallucinations' where voices command the patient not to respond to questions or to give certain answers. In the grip of 'command hallucinations' then a patient may not be giving truthful answers or responding as they would like to really. Instead they are responding through fear of the voices."

It could not possibly be said that this is an indication that she was not having hallucinations.

17. Ms Isherwood submitted also that Judge Clayton had attached too much weight to the report of Dr Persaud bearing in mind that in this case there had been no oral evidence from the claimant nor indeed a witness statement. While it is correct that the claimant did not give evidence, as I have noted earlier, it is evident from paragraphs 42 and 43 of her determination that Judge Clayton based her credibility findings on matters other than those raised by Dr Persaud and for the reasons I have given above there appears to be no evidential conflict between what was told him and what was said to the GP. It could not properly be said that the judge in this case had relied solely on what was said by Dr Persaud in reaching her conclusions.

18. Finally I turn to the judge's findings with respect to **GJ**. It is important to bear in mind that this is a case in which if the claimant's account is correct she had been ill-treated and indeed tortured by the Sri Lankan authorities on suspicion of involvement with the LTTE post-conflict. The purpose of the guidance **GJ** is to identify those who have not come to adverse attention in Sri Lanka post-conflict but who may nonetheless be at risk on return. That is not the case here.
19. On the basis of the findings which were reached by Judge Clayton and which I consider are sustainable the claimant had been ill-treated and tortured because it appeared she was believed to be involved with the LTTE. Whether that is a rational belief on the part of the Sri Lankan authorities is not the point; the point is that that is what the Sri Lankan authorities believed. It is not clear why they think that she is a threat but she appears to have been treated as though she is a threat given the manner in which she was investigated and abused. As Judge Clayton noted at 44 the claimant was arrested, detained, questioned and fingerprinted. It is unlikely that those records will have been expunged given that she was ill-treated in such a manner post-conflict. As Ms Bayati submitted, given the provisions of the Qualification Directive and paragraph 339K of Immigration Rules it was open to the judge to conclude that, as there had been no indication that there had been any change in circumstances since the claimant left Sri Lanka or indeed that the situation has changed since **GJ** was handed down, that the claimant is at risk on return of the same treatment to which she has already been subjected.
20. Accordingly, for these reasons I consider that the determination of First-tier Tribunal Clayton did not involve the making of an error of law capable of affecting the outcome and I uphold it.

Signed

Date approved 2 June 2014



Upper Tribunal Judge Rintoul