IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05027/2014

THE IMMIGRATION ACTS

Heard at Field House
On 11 September 2015

Decision & Reasons Promulgated
On 21 September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

TV (SRI LANKA)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Allen, Counsel instructed by Camden Community Law Centre

For the Respondent: Mr S Kandola, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Coll) sitting at Taylor House on 23 February 2015, dismissing his appeal against the decision of the Secretary of State to refuse to recognise him as a refugee, or as otherwise requiring international or human rights protection, and against her concomitant decision to remove him as an illegal entrant/person subject to administrative removal under Section 10 of the Immigration and Asylum Act 1999,

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his asylum claim having been refused. Although the First-tier Tribunal did not make an anonymity direction, I consider that the appellant should be accorded anonymity for these proceedings in the Upper Tribunal in view of the nature of his case.

The Grant of Permission to Appeal

2. On 17 April 2015 First-tier Tribunal Judge Nicholson granted the appellant permission to appeal for the following reasons:

> "2. Ground 1 contends that the judge erred in failing to allow the appeal on the basis of the Discretionary Leave policy. According to the application, the policy states that those who have been granted discretionary leave before 9 July 2012 will normally continue to be dealt with under the policy through to settlement if they qualify for it (normally after accruing 6 years continuous DL).
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> 3. The appellant, who was born on 4 March 1996, was granted discretionary leave as an unaccompanied minor from 15 December 2008 until 15 December 2011. He made an in time application for further leave on 8 December 2011. It was not until 3 July 2014 that the respondent refused the application, by which time the appellant was over 18 and not entitled to a further grant of discretionary leave.
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> 4. At paragraph 73 of the decision, the judge stated that the delay was irrelevant because, if the application had been dealt with in a timely fashion, the appellant would only have been granted discretionary leave up to the age of seventeen and a half, at which point he would have accrued just under 5 years discretionary leave so he would not have been able to make an application for settlement at that time.
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> 5. It is the appellant's case, however, as I understand it, that the appellant's discretionary leave granted on 15 December 2008 was extended by statute under section 3C of the 1971 Act when he submitted his application on 8 December 2011 and that that discretionary leave was continuing under section 3C at the date of the hearing, by which time the appellant had accrued the necessary 6 years leave.
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> 6. That is not quite how the skeleton argument put it to the judge and that argument would not help the appellant establish that the respondent's decision was not in accordance with the law because the relevant date for deciding that issue was the date of decision (see **CW (Jamaica) v SSHD 2013 EWCA Civ 915**), at which point the appellant had not accrued the necessary 6 years leave.
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> 7. Nonetheless, despite the apparent sense in the judge's comments, depending on the terms of the actual policy, it is arguable that, where more than 6 years leave (discretionary leave extended by statute) had accrued by the date of the hearing, that was a relevant factor for the purposes of article 8. Permission is accordingly granted on this issue, although the appellant's representatives will need to file and serve a complete copy of the policy relied on. I do not refuse permission on the remaining grounds."

The Rule 24 Response

3. On 6 May 2015 Mr Avery of the Specialist Appeals Team settled a Rule 24 response on behalf of the Secretary of State opposing the appellant's appeal:

> "2. The respondent opposes the appellant's appeal. In summary, the respondent will submit *inter alia* that the judge of the First-tier Tribunal directed himself appropriately.
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> 3. From the comments of Judge Nicholson who granted permission (para 6) it does not seem that the argument now being advanced was put to Judge Coll at the FTT hearing it is therefore somewhat disingenuous to now say it was an error of law for the judge not to consider it. Furthermore it is not at all clear that the appropriate Home Office guidance upon which this argument is said to be based was before him either.
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> 4. The Secretary of State does not accept that time spent on 3c statutory leave counts as 'discretionary leave' for the purposes of calculating the residence requirements, particularly where the application giving rise to 3c leave is refused. Furthermore the unaccompanied minors policy is a specific discretionary leave policy which the Secretary of State does not accept counts for the purposes of the grant of residence under the general discretionary policy, particularly in a case where the appellant, under the unaccompanied minors policy, could never have met that requirement."

The Factual Background

3. The appellant is a national of Sri Lanka, whose date of birth is 14 March 1996. He claimed asylum on 31 October 2008. He said he had been brought by a family to the UK four days earlier, and had entered on a false passport. At his screening interview, he said his journey had been arranged and paid for by his uncle. He was of Tamil ethnicity, and before he left Sri Lanka he had been living with his mother, step-father and step-brother in Jaffna district, where he had intermittently attended the local school. His family had long suffered as a result of internecine ethnic violence in Sri Lanka, and he was unable to lead a normal life. All this caused him great anxiety, and when his nightmares became worse, his mother had decided to send him to a safe country. After being taken to Colombo by a family friend, he was handed over to a family of four who told him that they were going to take him to an uncle in Switzerland and told them to pretend that he was part of their family. Although it was his understanding that he was going to be taken to Switzerland, upon his arrival in the United Kingdom, he was told that there had been a problem obtaining a visa for that country. He said the family that accompanied him took him to a house to rest before phoning his uncle in Switzerland and receiving instructions to take him to Mrs J, whom he now referred to as his aunt.

4. The appellant's application for asylum was refused on 15 December 2008, but he was granted limited leave to remain in the United Kingdom in accordance with the published Home Office asylum policy on discretionary leave, as it had been concluded that he had not established any reason why he would be eligible for such a grant of limited leave to remain beyond him being an unaccompanied child for whom the Home Office was not satisfied that adequate reception arrangements in the country of return existed.

5. On 30 July 2009 Samantha Morgan and Sarah Rance, both psychotherapists at East London NHS Foundation Trust, submitted a report about the appellant to his GP.

He had been referred on 3 February 2009. The GP described a history of trauma back in Sri Lanka, including the murder of his father, and said that T was currently presenting as withdrawn and had difficulties in concentrating. He had now completed an extended assessment over eight sessions.

6. T had been brought by his "aunt" and carer, Mrs J, a family relative, with whom T now lived, along with her two children. She reported that T had nightmares, and that he also could present as quite anxious. Both of them also reported that T had been bullied at school. It seemed that T was having enormous difficulties in trying to learn English as well as adjusting to a new educational system. When they first met, T presented as an enthusiastic boy, who was hopeful about his future and his ability to do well in school. But during the course of the assessment, they were concerned to see that T's mood had significantly lowered. By the end of the period of assessment, they were pleased to find that there had been significant improvements in T's mood since the earlier concerns in May and June 2009.

7. They had met T's head of year on 1 July 2009, and she expressed concern about the bullying that T had experienced at school, as well as a request for more formal and active support for T to learn English.

8. The appellant's discretionary leave ran until 15 December 2011. The appellant made an in-time application for further leave to remain. The application was made with the assistance of S. Satha & Co, who sent chasing letters and also provided the Home Office with updated information about the appellant's educational progress. On 23 August 2012 they wrote to the Home Office about the appellant's current studies in the UK, and on 23 January 2013 they enclosed copies of the appellant's GCSE results for 2011 and 2012, along with certificates and ICT from OCR. They informed the Home Office he was now doing A levels. He had turned out to be a very enterprising person and had used his stay to great advantage.

9. On 22 August 2012 Sarah Rance wrote to Elaine Campbell, the social worker on the Safeguarding and Assessment Team responsible for the appellant, detailing her current concerns about the appellant, his aunt and her children. The current safeguarding concerns were about the deterioration in T's relationship with his aunt by marriage, with whom he lived. There was an incident during which she pushed him out of the front door of the house, approximately ten days ago. Her ill-health meant that she relied quite considerably on T to help out at home with domestic tasks and care of the younger children. This has not always been easy for T and there had inevitably been some tensions. Mrs J may well be suffering also from symptoms of PTSD because of her abusive relationship with her children's father, which included physical violence.

10. T had settled into school, but had found it difficult to make close friendships and had suffered from some bullying, both racially motivated and because he suffered from bad acne. Despite these difficulties his English had come on extremely well since his arrival and he was a very hardworking student.

11. In a letter dated 23 October 2012 Sarah Rance explained why it was not suitable for T to continue living with his aunt. He was living thousands of miles from his mother and younger brother, who he had not seen since arrival in the UK in 2008, though he maintained contact by telephone. He was a socially isolated and vulnerable young person living in a very unhappy intense situation with his aunt and cousins. Because of the impact of his aunt's ill-health and his own mental health development, she was of the firm opinion that T needed to be moved from living with his aunt, and to be cared for in a foster placement, ideally with two parental figures. Appropriate parental care was needed to help address the gaps left by the death of his father and separation from his mother. To push him into premature independence at this stage in his development would be detrimental to his present and future mental health.

12. On 14 September 2013 Stephen Timms MP wrote a letter on the appellant's behalf to the Home Office (Immigration) MP's Liaison Unit reporting that the appellant had come to his advice surgery that morning. He was currently being supported by Newham Social Services and had recently moved to an address in East Ham (which was not the address of his aunt). Despite requests to expedite his case, he was still waiting for a decision to be made on his application for an extension of leave. He was currently studying A level maths and a BTEC Level 3 in Construction. He had told the MP that he wished to move into higher education to study architecture.

13. On 3 July 2014 the Secretary of State gave her reasons for refusing to grant the appellant further leave to remain. He had submitted a medical report from Newham Child and Family Consultation Service. The report stated he had received treatment for PTSD and low mood and anxiety. He did not claim to be taking any medication for this condition. There was no provision within the Immigration Rules for a person to be granted leave to remain in the UK to receive medical treatment on the NHS. It was accepted that he had been diagnosed with PTSD, but it was not accepted his removal from the UK would amount to a breach of Article 3 (medical). The Secretary of State went on to refer to background evidence which she said showed that medical treatment for a variety of mental health conditions was available in Sri Lanka. There was insufficient evidence of any severe difficulties that prevented him from obtaining the medical treatment he required in Sri Lanka.

14. At the time of his asylum claim, he had confirmed he was able to speak to his mother. It was also noted that in his statement of 7 December 2011 he said that he spoke to his mother whenever it was OK for her to call him.

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

15. For the purposes of the appeal hearing, the appellant's solicitors compiled an appellant's bundle which contained all Sarah Rance's reports on the appellant running from 2009 until 7 August 2014. In her most recent report, she said in her professional opinion that T would be at serious risk of relapse in his PTSD symptoms were he returned to Sri Lanka. Although the symptoms of PTSD displayed by T on arrival in this country had initially subsided, his adverse experiences here had brought about a relapse. It would most likely be detrimental to T's mental health

and welfare for him to be returned to Sri Lanka where he would not have access to the necessary professional support and treatment. Here he continued to be supported by a centre in Newham, who were monitoring his mental health. They were able to offer low level interventions in counselling and cognitive behavioural therapy, but might well need to refer him onto the Community Mental Health Team for in-depth treatment if necessary.

16. In his subsequent decision, Judge Coll's findings of credibility and fact were set out at paragraphs [63] onwards. Having found that the appellant would not be at risk upon return to Sri Lanka of being exposed to treatment which might give rise to a need for international refugee protection, the judge turned to address two other strands of the appellant's claim. The first of these was that he ought to be treated as having qualified for settlement; and the second was that, in the alternative, his return to Sri Lanka would breach his rights under Article 3 ECHR on medical grounds:

> "72. I turn now to the appellant's representative's submissions that the Immigration Rules do not apply given the date of the application in 2011 and that, but for the respondent's delay of two and a half years, the appellant would have accrued six years' discretionary leave and accordingly qualified under the pre July 2012 policy for settlement.
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> 73. I accept that the respondent delayed by two and a half years but the question before me is whether the appellant has been prejudiced by such delay. I find that the appellant has not for the following reasons. First, I find that, if the application had been dealt with in a timely fashion, the appellant would have still been an unaccompanied child asylum seeker and thus been granted a further period of discretionary leave – either up to three years' or up to the age of 17½, whichever was the sooner. In the appellant's case, this would have been until 17½ years of age i.e. 14 September 2013. Secondly, I find that he would have needed to make his third application and applied for further leave before the expiry of the further period of discretionary leave i.e. before 14 September 2013.
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> 74. Thirdly, at the point of making his third application, he would not have had six years' discretionary leave (but rather a few months short of five years'). He would therefore not have been eligible to apply for settlement. For this reason, given that his third application would have been in September 2013, Appendix FM and Paragraph 276ADE of the Immigration Rules are appropriate to apply in deciding this appeal. In sum, I find that the appellant cannot say that he has been disadvantaged by the respondent's delay. In addition, I find that the appellant cannot reasonably say that without the respondent's delay, he would have been granted further leave to remain after the age of 17½ years of age.
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> 78. The appellant in evidence said that he had lost his mother's telephone number and without that, had been unable to contact her. I accept the appellant's evidence that he was not still in contact with his mother. Nevertheless, that the appellant may still have family members in the form of his mother and younger brother in Sri Lanka and the Red Cross, having met with him twice, may agree to assist him and succeed in tracing them. In that case, I find that he could turn to his mother and brother if he were to be returned because he was on good terms with his mother before he lost contact. If his family are not found, bearing in

mind that he still speaks Tamil and has obtained an education in the meantime, I find that he could resettle if the need arose, given that he spent more than half his life in Sri Lanka. I find that he spent 12 years in Sri Lanka and that at the date of his application for further leave, he was 15 years old and at the date of the appeal before me, 18, thus having spent respectively three to six years of his life in the United Kingdom. In consequence, I find that he cannot satisfy Paragraph 276 ADE.

79. Turning to the appellant's claims based upon his mental health and taking account of the evidence of Ms Rance and Ms Raulefs, I find on the facts before me that the appellant's PTSD has improved considerably from the point when he started treatment in 2009 to today and that although he has some symptoms, he has made a good recovery for the following reasons. First, he is not on any medication. Secondly, I find that the intensity of his therapy with Ms Rance reduced over the years from weekly to monthly as a reflection of the fact that his condition was no longer severe. Thirdly, since leaving Ms Rance's service in or about March 2014, he has not been referred for appropriate NHS Adult Services for continued psychotherapy. Fourthly, his therapy with Ms Raulefs is focussed on improving life skills such as self-confidence, and relationships, I find that if he had not continued to make and maintain a good recovery, he would have been referred back to the NHS for Adult Psychotherapeutic Services.

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81. I am aware also of the case of **GS (India)** referred to in the respondent's submissions above. **GS (India)** held that foreign nationals who were suffering from a terminal illness and liable for removal, might avail themselves of Article 3 protection in *exceptional circumstances*. "Exceptional circumstances" were confined however to deathbed cases. On the basis that the appellant's Article 3 claims failed there was no basis to allow the additional claims under Article 8. The court agreed with the decision in **MM (Zimbabwe) [2012] EWCA Civ 279** that in order for the appellants to engage Article 8 successfully, there had to be factors in addition to the lack of adequate medical care in the country of origin. As per **MM (Zimbabwe)**, the court accepted that if any of the appellants had established firm family ties in the UK then that (hypothetical) fact coupled with the availability of continued medical treatment in the UK would engage Article 8. A claim under Article 8 based on the disparity of medical treatment abroad was not however sufficient.

82. In effect, the appellant's representative submits that the appellant's Article 3 rights and Article 8 rights to the preservation of his mental stability (i.e. his moral integrity) would be breached in that he will relapse if he were removed to a country where he will not receive appropriate or sufficient treatment and support for his PTSD.

80. I find that the appellant's PTSD does not bring him within the exceptional circumstances set out in **GS (India)**. For that reason, his appeal under Article 3 cannot succeed.

81. Under **GS (India)** I find that the appellant does not succeed under Article 8 on health grounds alone because he has failed to succeed under Article 3."

The Hearing in the Upper Tribunal

17. At the hearing before me to determine whether an error of law was made out, Ms Allen, who did not appear below, developed the arguments raised in the grounds of appeal. On behalf of the Secretary of State, Mr Kandola stood by the Rule 24 response.

Discussion

18. Despite Ms Allen's best efforts, she is unable to persuade me that the judge erred in law as argued in ground 1. It is indisputable that the effect of the respondent's delay in responding to the appellant's in time application for further leave has been to considerably extend the period of the appellant's lawful residence in the United Kingdom. But he never had a legitimate expectation that his discretionary leave to remain would be extended, as the basis on which he was granted discretionary leave was that he was an unaccompanied asylum seeking minor, and the discretionary leave on that account only ran until the appellant was aged 17½. The appellant had no legitimate expectation that discretionary leave would be extended beyond his 18th birthday, since after his 18th birthday he would cease to be a minor and thus he would cease to meet the essential precondition which had triggered the initial grant of discretionary leave.

19. The policy statement relied on before the First-tier Tribunal was as follows:

> 'Those who, before 9 July 2012, have been granted leave under the DL policy in force at the time will normally continue to be dealt with *under that policy* (my emphasis) through to settlement if they qualify for it (normally after accruing six years' continuous DL). Further leave applications and those granted up to three years' DL before 9 July 2012 are subject to an active review.'

20. The further leave application from the appellant was subject to an active review, and hence the appellant's solicitors corresponded with the Active Review Unit of the Home Office. If the appellant's application for further leave had been dealt with expeditiously by the Home Office, it would not have been dealt with on the basis that prima facie the appellant ought to be granted a further three years' continuous DL running from the age of 17½ until the age of 20½; but on the basis that he was no longer eligible for an extension of leave under the particular policy which had applied to him as an unaccompanied asylum seeking minor. There needed to be some other powerful justification for the appellant being granted an extension of leave - beyond mere length of residence or delay on the part of the Secretary of State in making a decision on his application.

21. Ground 2 is that no consideration was given by the judge to both the impact of the removal and the obstacles to reintegration, and that the findings of the judge in respect of the appellant's mental health were solely based upon the progress being made by him in the UK. They pre-supposed that there would not be a relapse, when the clinical evidence clearly showed that a relapse was more likely than not. In failing to consider the evidence of qualified clinicians who had long-term ongoing contact with the appellant, it was argued that the judge materially erred in law.

22. I consider that the judge adequately addressed the medical evidence relied on, and has given adequate reasons for finding, by reference to relevant case law, that the evidence did not disclose a real risk of Article 3 harm on medical grounds and/or a real risk of a violation of the appellant's physical and moral integrity such as to engage Article 8 ECHR. It was open to the judge to find that there had been some improvement in the appellant's condition since Ms Rance's last assessment on 7 August 2015. It thereby followed that the apprehended risk of a relapse on return to Sri Lanka had receded.

23. The argument advanced in ground 2 also ignores the fact that the judge made an unchallenged finding that, on his return to Sri Lanka, the appellant could turn to his mother and brother for emotional and practical support, because he was on good terms with his mother before he lost contact. One of the central reasons for the appellant's psychological disturbance, as opined by Ms Rance, was separation from his mother.

24. Ground 3 is that the judge had failed to correctly apply the case of **GS India**. The ratio of **GS India**, according to the pleader of ground 3, is that the court agreed with the decision in **MM (Zimbabwe) [2012] EWCA Civ 279** that in order for an appellant successfully to engage Article 8 there had to be factors in addition to the lack of adequate medical care in the country of origin. It is pleaded that there were additional factors in the appellant's life, which were accepted by Judge Coll at paragraph [88] of his determination. But, it is argued, the judge did not bring these additional factors into play when dismissing the Article 8 appeal by reference to **GS India**.

25. There is no merit in this line of argument. There were no relevant additional factors. In paragraphs [75] to [77] of his decision, the judge addressed the proposition that the appellant had established family life in the UK which would be interfered with by his removal. He found that he was living independently from his aunt and cousins, and managing to continue with his studies. At its height his relationship with his aunt might have given rise to normal emotional ties between a parent and a child, but this was no longer the case. The judge accepted that the appellant continued to have a close relationship with his two cousins, but he did not see them regularly any more, restricting his visits to the holidays. He found that neither he nor they had or have a true dependency, emotionally, physically and financially upon each other.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of

their 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

Deputy Upper Tribunal Judge Monson