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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03804/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 15 February 2016	**On 9 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

JB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Paramjorthy, Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka, aged 21. He has appealed with the permission of the Upper Tribunal against a decision of Judge of the First-tier Tribunal J C Hamilton, dismissing his appeal against a decision of the respondent to remove him to Sri Lanka as an illegal entrant, having refused his asylum and human rights claims. The appellant, who is Tamil, claimed to have been detained and tortured in Sri Lanka on account of his brother-in-law's membership of the LTTE.

2. The First-tier Tribunal made an anonymity direction. I continue that direction in order to protect the identity of the appellant. .

3. The appellant claimed to have left Sri Lanka on 18 April 2014 by boat, travelling to India. He made his way to the UK, arriving on 11 May 2014. On 15 May 2014 he contacted the Asylum Screening Unit. He claimed asylum and was detained. His claim was processed in the Detained Fast Track system then in operation at the Harmondsworth IRC. The appellant's claim was refused for reasons given in a letter dated 5 June 2014. The appellant's account was considered to contain inconsistencies and discrepancies. It was not accepted he had been detained and tortured or that he was at risk on return. Even if his account were true, it was noted he had twice been released on payment of a bribe and his brother-in-law had been arrested. Therefore he would be of no further interest to the authorities.

4. The appeal was heard at Hatton Cross on 13 February 2015. At a previous hearing the appeal had been transferred out of the Detained Fast Track procedure. Medical reports were filed describing the appellant's physical and psychiatric injuries. The former, prepared by Professor S Lingam, was broadly supportive of the appellant's account of ill-treatment. The latter, prepared by Professor R Persaud, indicated there was a risk the appellant would commit suicide if removed to Sri Lanka. The appellant did not give evidence because it was considered he was not fit to do so. The only witness was a friend of the appellant, Mr Subramaniam.

5. In a lengthy and detailed decision the judge set out his reasons for dismissing the appeal. He concluded in paragraph 91 that the core of the appellant's account had been consistent and he found the appellant had been detained and tortured on account of his association with his brother-in-law from 26 November 2013 until 14 January 2014 and again from 20 February until 15 April 2014. He then wrote:

> "92. However, even on his own account, the Appellant was only detained initially because the authorities could not find his brother-in-law. On the second occasion he seems to have been arrested because he was with his brother-in-law when the authorities found his brother-in-law and arrested him. I do not find there is any or any sufficient evidence for me to conclude that the Appellant was arrested and detained because the authorities had an interest in him personally. This is consistent with the objective information about the focus of the authorities' anti-terrorist activities and the appellant's own account."

6. The judge found the only evidence of any ongoing interest in the appellant on the part of the authorities came from Mr Subramaniam's account of his telephone conversation with the appellant's father. The judge accepted the witness's account of the conversation but found the information relayed to him by the appellant's father was not reliable. Even if the father's account of a visit by the authorities looking for the appellant in November 2014 was accurate, it did not necessarily demonstrate ongoing interest in the appellant. Even if there were ongoing interest, this was localized and the appellant could relocate

within Sri Lanka. Applying the country guidance given in *GJ and Others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC), the judge concluded the protection claim was not made out.

7. The judge then turned to the other ground of appeal which concerned the risk of the appellant committing suicide if he were removed to Sri Lanka. Again the judge's assessment is detailed. He found the appellant had not shown that adequate medical treatment would not be available to him in Sri Lanka. He went on to apply the guidance provided in *Y (Sri Lanka) & Z (Sri Lanka)* [2009] EWCA Civ 362 and he recognized the appellant might fall into the category identified in that case of persons who had a genuine fear notwithstanding there was not a real risk of those fears becoming reality. The judge identified his task as assessing whether there was a real risk of suicide or self-harm and, if there was, whether it could be managed by the provision of appropriate treatment. He considered the expert opinion contained in the report of Professor Persaud.

> "110. Overall I found his assessment of the risk of suicide to be couched in unhelpfully vague terms and qualified by the caveat that the risk was dependent on the Appellant not receiving adequate psychiatric care. As I have already noted there was no evidence before me that adequate psychiatric treatment would not be available in Sri Lanka.
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> 111. In all the circumstances even applying the lower standard of proof, I do not find that the appellant has shown that there is a real risk that he will harm himself. The Appellant has severe depression but there is no evidence that he has made any attempt to self-harm or has acted on his reported suicidal ideations. Professor Persaud's concerns appeared to be rooted in his unsubstantiated belief that the Appellant would not obtain appropriate treatment. Furthermore, he has not given any adequate detail about the proposed treatment or why he believes it would not be available in Sri Lanka."

8. The appeal was dismissed on Article 3 and Article 8 grounds.

9. Permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal. Upper Tribunal Judge Blum considered it was arguable that the First-tier Tribunal had erred in finding the circumstances of the appellant's second detention were such that there would no longer be any adverse interest in him. It was also arguable that the First-tier Tribunal had not engaged with the issue of whether the appellant would be capable of accessing treatment so as to negate the suicide risk.

10. The respondent has filed a rule 24 response opposing the appeal.

11. I heard submissions on whether the judge made a material error of law.

12. Mr Paramjorthy's submissions followed the grounds seeking permission to appeal. He began with the issue of the judge's treatment of the article 3 claim based on the risk of suicide. In essence, he argued the judge's reasons for not placing greater weight on Professor Persaud's report, that he did not appear to be qualified to give an opinion on whether there was treatment available in Sri

Lanka, overlooked the evidence which was before him that mental health services in Sri Lanka are sparse.

13. Next Mr Paramjorthy argued the judge's finding on risk on return was erroneous because he had failed to engage with paragraph 339K of the Immigration Rules[1]. In reasoning that the purpose of the appellant's detention had been to obtain intelligence regarding his brother-in-law and therefore the authorities would have no further interest in the appellant following his brother-in-law's capture, the judge appeared not to have recognised that the appellant was detained for two months on the second occasion and was severely ill-treated. Mr Paramjorthy suggested the judge's decision was infected by his error in relation to internal flight as the whole point of the 'watch list' was that individuals would be allowed through airport security and arrested in their home area. The judge also overlooked the importance of familial connections to persons in the LTTE.

14. Ms Isherwood argued there were no errors in the decision. On the question of risk on return, she emphasised the judge had not heard oral evidence from the appellant and therefore he could only rely on the available evidence from such sources as the background evidence, the medical reports and Mr Subramaniam's evidence. She likened the grounds seeking permission to appeal to mere disagreement with the judge's decision. She argued the judge's consideration of the mental health issue was also adequate.

15. I reserved my decision on the question of whether the judge made a material error of law.

Error of law

16. I shall give my decision firstly on the point about risk on return and secondly in relation to the risk of suicide.

Risk on return

17. I start by noting the judge made positive findings of fact in relation to all the matters put forward by the appellant with the exception of his father's account of recent interest on the part of the authorities, although even on that point the judge made alternative findings in case he was wrong. Overall, the judge gave careful and thorough consideration to the evidence and the issues for determination.

18. However, having found the appellant was detained and ill-treated in the past, the judge did not expressly remind himself of paragraph 339K of the rules. This would not always lead to error if it were clear the judge had kept the

[1] "339K. The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."

point in mind and applied it in substance. However, despite the otherwise thorough analysis of the evidence made by the judge, I find there is a danger here that the judge did not have the past persecution point fully in mind. My reasons are as follows.

19. As the Upper Tribunal made clear in *GJ & Ors*,

> "428. … The effect of [paragraph 339K] is that where the circumstances are the same, then past persecution or serious harm is to be regarded as predictive of future persecution or serious harm, absent a change of circumstances."

20. The appellant's last experience of detention and torture was in April 2014. Plainly the judge was aware of this. However, it is not possible to find in his decision any indication that he has considered whether this might be a predictor of future persecution. There can be no suggestion that there has been a material change of circumstances as regards the prevailing circumstances in Sri Lanka. The election of President Sirisena with a promise of reforms has not resulted in a change in the background evidence of human rights violations in Sri Lanka.

21. Nor do I regard the capture of the appellant's brother-in-law as sufficient reason to find a change of circumstances given the fact the appellant was not released for two months and was ill-treated notwithstanding there was no longer a need on the part of the authorities to hold him in order to ask where his brother-in-law was hiding. It seems reasonable to conclude that mere association with his brother-in-law was enough to raise suspicions regarding the appellant's own political opinions.

22. The circumstances do not lead ineluctably to a finding that the appellant would be at a real risk of further persecution, applying the *GJ & Ors* country guidance. However, for present purposes, I am satisfied there is a fault in the judge's chain of reasoning and his error may have been material to the outcome of the appeal. He did not give adequate consideration to the paragraph 339K point, especially given the length and severity of his ill-treatment during his second detention.

23. I set aside the judge's decision on the protection aspect of the claim.

Suicide risk

24. Having carefully considered the submissions made to me, I also find the judge's assessment of the medical evidence was flawed. I understand the judge's reasons for finding Professor Persaud's report did not carry weight with regard to the risk of the appellant committing suicide because of his reliance on what appeared to be an assumption that there would be no medical treatment which the appellant could access. However, if the judge had had regard to the Upper Tribunal's findings in *GJ & Ors* about the lack of mental health services in Sri Lanka, he might have found an echo in Professor Persaud's opinion.

25. In allowing the appeal of the third appellant in that case, the Upper Tribunal said as follows:

> "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".
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> 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:
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> > "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."
> >
> > **Post Traumatic Stress Disorder (PTSD)**
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> > 23.29 The BHC letter of 31 January 2012468 observed that:
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> > > "Post Traumatic Stress Disorder (PTSD) was first recognised in Sri Lanka in patients affected by the 2004 tsunami. Many of the psychiatrists and support staff in Sri Lanka have received training in Australia and the UK for the treatment of the disorder. A Consultant Psychiatrist from NIMH said that many patients often sought ayurvedic or traditional treatment for the illness long before approaching public hospitals, adding that this often resulted in patients then suffering from psychosis.""

26. On the basis of this guidance, there is real doubt about whether this appellant would have had been able to access the treatment he would need to reduce the risk of a completed suicide attempt. Again, the issue is open to a finding either way but the judge's error was to disregard the psychiatric report for the reason he gave without taking a rounded view of the evidence before him. A rounded assessment would include evaluation of the ability of the appellant to access treatment both in terms of its general availability or otherwise and his own mental state given his subjective fears. The evaluation would have to assess the likelihood of his family providing support and supervision.

27. I set aside the judge's decision because it is vitiated by material errors of law. The appeal must be heard in the First–tier Tribunal by another judge who must assess the risk on return and the article 3 medical claim. To assist with that task I make the following directions:

DIRECTIONS

(1) The appeal will be heard by any Judge of the First-tier Tribunal except Judge J C Hamilton on a date and at a place to be notified;
(2) The findings made by Judge Hamilton regarding the appellant's experiences in Sri Lanka and family links are preserved;
(3) The Tribunal and the respondent should be informed ahead of the hearing whether it is proposed to call the appellant to give oral evidence;
(4) The appellant's solicitors should notify the Tribunal whether a Tamil interpreter is required for any witness;
(5) If either party wishes to file additional evidence not previously filed, a consolidated bundle should be prepared containing the fresh evidence and all the evidence previously filed, which bundle must be filed at the Tribunal and served on the other party no later than 14 days before the hearing.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside. The appeal will be heard again in the First-tier Tribunal.

Signed **Date 16 February 2016**

Judge Froom,
sitting as a Deputy Judge of the Upper Tribunal