



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03456/2017

THE IMMIGRATION ACTS

Heard at Field House
On 6th September 2018

Decision & Reasons Promulgated
On 20th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A P

(ANONYMITY DIRECTION MADE)

Respondent

Anonymity

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer

For the Respondent: Mr N Paramjorthy, Counsel, instructed by Satha and Co

DECISION AND REASONS

Introduction

1. At the error of law stage the Appellant was the Secretary of State. However, for the purposes of my decision at that initial juncture, and now, I shall refer to the parties as they were before the first-tier Tribunal: A P is once more the Appellant, and the Secretary of State is the Respondent.
2. This is the remaking of the decision in the Appellant's appeal against the Respondent's decision, dated 31 March 2017, refusing her protection and human rights claims. This follows my earlier decision, promulgated on 11 April 2018, that the First-tier Tribunal judge had materially erred in law when allowing the Appellant's appeal. My error of law decision is annexed, below.
3. The matter was then set down for a resumed hearing on 18 May 2018. Prior to this, the Appellant's representatives wrote to the Upper Tribunal requesting that this date be converted into a Case Management hearing on the basis that there was some uncertainty as to whether the Appellant had capacity to give proper instructions. That hearing date was in fact utilised in the manner requested. I issued directions relating to the Appellant's capacity and the provision of any further medical evidence. The appeal was then set down for a resumed hearing, and this proceeded without further obstacles. The solicitors remain on record as acting for the Appellant.

The scope of the resumed hearing

4. The First-tier Tribunal judge rejected the Appellant's protection claim and there has never been any challenge to this. With reference to paragraph 11 of my error of law decision, her appeal is now concerned solely with Articles 3 and 8 ECHR in the context of her mental health. In other words, this is a "medical claim".
5. During the course of submissions, Mr Paramjorthy realistically accepted that, in this particular case, the Appellant's Article 8 claim would stand or fall with her Article 3 claim, particularly in light of MM (Zimbabwe) [2012] EWCA Civ 279.
6. In my error of law decision I specifically preserved a material finding of fact made by the First-tier Tribunal judge, namely that the Appellant had been raped by members of the Sri Lankan security forces in 2002, and that she had had a son as result of this assault.

The evidence now before me

7. I have the Appellant's bundle that was before the First-tier Tribunal: this is now marked AB1, and is indexed and paginated 1-141. Amongst other items, this bundle contains medical records and a psychiatric report from Dr S Dhumad, dated 8

November 2017. New evidence, which I have admitted pursuant to rule 15(2A) of the Upper Tribunal Procedure Rules, consists of: a letter from the Appellant's GP, dated 20 August 2018; a note of the Appellant's attendance at the Emergency Care Department of a hospital in Hillingdon, dated 16 May 2018; and an addendum psychiatric report from Dr Dhumad, dated 5 September 2018.

8. The Appellant attended the hearing but, as was the case before the First-tier Tribunal, did not give evidence.

Submissions of the parties

For the Appellant

9. Mr Paramjorthy relied on the two reports from Dr Dhumad. There was evidence of two suicide attempts by the Appellant. Reliance was placed on paragraphs 454-456 of GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). It was said that there was no evidence from the Respondent to indicate that provision of and access to relevant medical treatment in Sri Lanka had improved since GJ. It was submitted that the Appellant would be questioned on arrival, a fact acknowledged in GJ. This would exacerbate the Appellant's mental health problems, as she would come face to face with officials. Although the Appellant's son resided in Sri Lanka under the care of an aunt in the north of the country, Mr Paramjorthy submitted that seeing him again would act as a "tangible trigger" of the memories of the rape in 2002. With reference to the judgement of the CJEU in MP case C-353/16, it was submitted that the Appellant was "terrified" of returning to Sri Lanka: she had a subjective fear, and this was a significant factor in this case, as it was in MP. It was submitted that there was a high risk of suicide or at least a very serious deterioration in the Appellant's mental health after return.

For the Respondent

10. Mr Kotas relied on MM (Zimbabwe) and KH (Afghanistan) [2009] EWCA Civ 1354. In respect of Article 8, the Appellant had no family life in this country and her private life here was "not strong". In respect of the suicide issue, Mr Kotas emphasised the high threshold to be reached. He cited J [2005] EWCA Civ 629 and Y (Sri Lanka) [2009] EWCA Civ 362. The Appellant would have family support in Sri Lanka and would have the benefit of the devotion towards her son there. She had no well-founded fear of persecution. I was referred to paragraphs 436(b) and 447 of GJ. On the facts of appellant MP's case, there was not adverse history and a clear subjective fear, distinguishing it from the present case. Mr Kotas posed the rhetorical question, "is the Appellant's case truly exceptional?", implicitly asking me to conclude that the answer is "no".

Relevant findings of fact

11. I have considered the evidence before me as a whole and on the lower standard of proof.
12. I find that the Appellant was raped at her home by members of the Sri Lankan security forces in 2002 at the age of just thirteen. This finding was preserved from the decision of the First-tier Tribunal judge.
13. With reference to the unchallenged rejection of the Appellant's protection claim by the First-tier Tribunal judge, I too find that the Appellant was not detained by the Sri Lankan authorities at any time after the attack in 2002.
14. With reference to the unchallenged evidence contained in the Appellant's asylum interview, the letter at page 115 AB1, and the histories set out in the medical reports, I make the following findings. As a result of this assault, the Appellant gave birth to her son in January 2003. I find that he has lived with the Appellant's paternal aunt throughout his life, and continues to do so. As a consequence of the circumstances of his birth, he has never been told that the Appellant is in fact his mother.
15. In respect of the Appellant's current familial connections in Sri Lanka, the picture is not entirely clear. There is no witness statement from the Appellant before me, and no other source of evidence appears to deal with the issue (see, for example, pages 111 and 115 of AB1). Having re-read the Appellant's asylum interview, dated 1 February 2017, I note that she stated that at that time she had her mother, two sisters, and two brothers living in Sri Lanka (question 139). I cannot see any specific reference in subsequent evidence to indicate that the state of affairs confirmed in the interview has changed. All things considered, I find that the Appellant does have at least some of these family members still living in Sri Lanka. By virtue of a lack of evidence, I simply cannot say what the family's circumstances currently are.
16. In respect of the United Kingdom, I find that the Appellant continues to reside with a friend, Mrs P, and that she is providing the best support she can (111-112 AB1).
17. I turn now to the core issue of the Appellant's mental health. I start by noting that none of the medical evidence before me has in fact been directly challenged by the Respondent at any time. I note too that the medical evidence emanates from a variety of sources: Dr Dhumad, Consultant Psychiatrist; the Appellant's GP; West London Mental Health NHS Trust; the Central and North West London NHS Foundation Trust; and the Hillingdon Hospitals NHS Foundation Trust. On a cumulative view, and seen in the context of the evidence before me as a whole, I find all of the medical evidence to be from expert sources, to be reliable, and to be deserving of significant weight.
18. It is at the very least reasonably likely that the Appellant has been suffering from mental health problems for a considerable period of time. Although the earliest documentary evidence relating to this only dates from September 2016 (see for example, 30 AB1), I find that the problems themselves pre-date this. Even at the early

stage of professional intervention in 2016 (only about a month after her arrival in the United Kingdom), the evidence clearly indicates that there were significant problems: there is reference in the GP records to panic attacks, nightmares, depression, anxiety, and PTSD. The psychological therapy service at West London Mental Health NHS Trust was of the view at that point that the Appellant suffered from "complex trauma" and required long-term psychotherapy (C10 of the Respondent's bundle). Very significant symptoms were truthfully described to a community psychiatric nurse in October 2016, with a reference to suicidal thoughts (C8 of the Respondent's bundle). In a letter from her GP from January 2017, there is a description of, "severe depression, poor sleep, nightmares, and anxiety and panic attacks." (C4 of the Respondent's bundle). This pattern of symptoms, if it can be described as such, continues throughout subsequent medical evidence. I find this evidential thread to be entirely credible.

19. I find that the Appellant has been prescribed relevant medication for PTSD and depression. This has included sertraline (at a maximum dosage) and zopiclone.
20. There is reference in the evidence from the GP that whilst the Appellant has had suicidal ideation, she had stated that she would not act on these because of the presence of her son in Sri Lanka. However, notwithstanding what the Appellant may have said to her GP, the evidence before me shows that on 13 April 2017, approximately two weeks after her protection and human rights claims were refused by the Respondent, she took an overdose of medication. She took herself to the Accident and Emergency unit at Hillingdon hospital and remained there for tests and observation for some eleven hours (36, 103 AB1). Further, there is evidence to prove that the Appellant again took an overdose of medication on 15 May 2018. She took herself to the Emergency Care Department at Hillingdon hospital and remained there for approximately 7 ½ hours before being discharged (separate discharge letter admitted as new evidence). It has not been suggested by Mr Kotas that these two incidents were contrived in any way, or that they were anything other than genuine attempts by the Appellant to take her own life or at least to cause herself significant harm. In any event, I would for my part exercise very real caution before finding that an individual with significant mental health problems who then took an overdose of medication was, absent other material indicators, not acting out of a genuine sense of hopelessness and despair. In the present case, there are no such external indicators and there is the expert evidence from Dr Dhumad (see below), combined with the other sources medical evidence going back over the last two years. I find that both overdoses were in fact a result of the Appellant acting on pre-existing suicidal ideation. My finding it is consistent with what the Appellant in fact said to Dr Dhumad during her interview with him in preparation of his first report (paragraph 11.9), namely that she would take her own life if sent to Sri Lanka.
21. I turn to the two reports from Dr Dhumad. In respect of the first, he provides the opinion that the Appellant was suffering from a "severe depressive episode", and also met the criteria for PTSD (paragraphs 17.1-17.2). As to the risk of suicide, the author was of the view but this could be classed as "moderate", having regard to all the circumstances. It was also his view that this risk would be likely to increase at the point of, or after, removal from United Kingdom (paragraph 17.4). Finally, Dr Dhumad's

opinion is that a removal to Sri Lanka would result in a "serious deterioration" of the Appellant's mental health (paragraphs 17.5).

22. In his addendum report from September 2018, Dr Dhumad reconfirms his diagnosis of a severe depressive episode and PTSD (paragraphs 9.1-9.2). In respect of the suicide issue, he takes the view that this has now increased to a "significant" level. He states that the Appellant has become more depressed, anxious and hopeless, and had, by the time of the addendum report, attempted suicide on two occasions (paragraph 9.3). He remains of the view that a removal to Sri Lanka would result in a "serious deterioration" in the Appellant's mental health (paragraph 9.5).
23. It is also of some significance that both of his reports state the conclusion that the Appellant was unfit to give evidence at a hearing.
24. As stated previously, I attach significant weight to all of the medical evidence before me, including the two reports of Dr Dhumad. In consequence of this, I find that matters I have referred to in the preceding three paragraphs represent an accurate expert view of the Appellant's current state of mental health.
25. I find that the Appellant has been, and remains, in receipt of therapy from Freedom from Torture.

Conclusions

26. I begin with three observations. The first is that Mr Paramjorthy is entirely right to have conceded that the Article 8 claim must stand or fall with the Article 3 claim. In a case such as this, where there are no other material aspects of family and/or private life in play, the relevant threshold for the Article 8 claim will effectively be the same as that required under Article 3 (see, for example, paragraphs 20-23 of MM (Zimbabwe) and paragraphs 25-28 of SL (St Lucia) [2018] EWCA Civ 1894).
27. The second point is that the relevant threshold referred to in the preceding paragraph is, on any view, a very high one, with reference to all of the very well-known case law. This is so whether mental health issue is being assessed in the context of a suicide risk or in the context of a more general argument on deterioration in health/absence of proper treatment in the receiving country.
28. The final point is in my view particularly important. In reaching my conclusions in the Appellant's case, I have at the forefront of my mind the core underlying facts that she is the victim of rape, that the attack on her took place when she was just thirteen years old, that the perpetrators were members of the security apparatus of her home country, and that there remains in Sri Lanka a living "trigger" of her past trauma in the form of her son.

Risk of suicide

29. I direct myself to the leading case of I [2005] EWCA Civ 629 and the various material issues that need to be addressed:

“25. It should be stated at the outset that the phrase "real risk" imposes a more stringent test than merely that the risk must be more than "not fanciful". The cases show that it is possible to amplify the test at least to the following extent.

26. First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of severity. The court has said on a number of occasions that the assessment of its severity depends on all the circumstances of the case. But the ill-treatment must "necessarily be serious" 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* paras [38-39].

27. Secondly, a causal link must be shown to exist between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's article 3 rights. Thus in *Soering* at para [91], the court said:

"In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which *has as a direct consequence the exposure of an individual to proscribed ill-treatment.*" (emphasis added).

See also para [108] of *Vilvarajah* where the court said that the examination of the article 3 issue "must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka..."

28. Thirdly, 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. This is made clear in para [49] of *D* and para [40] of *Bensaid*.

29. Fourthly, an article 3 claim can in principle succeed in a suicide case (para [37] of *Bensaid*).

30. Fifthly, in deciding whether there is a real risk of a breach of article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will

tend to weigh against there being a real risk that the removal will be in breach of article 3.

31. Sixthly, a further question of considerable relevance is 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."

30. I also bear in mind what was said at paragraph in Y (Sri Lanka) [2009] EWCA Civ 362:

"16. One can accordingly add to the fifth principle in *J* 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.

17. DIJ Woodcraft's scepticism about the existence of such a fear in either of the two appellants begins with his noting that, at the time of the initial appeal decision, that of Mr Elvidge, in January 2004, there was no suggestion in the evidence that Y, despite serious physical scarring, had been emotionally traumatised by his ill-treatment. It was in the report of Dr Patterson, prepared shortly after that hearing, that this first emerged: as the DIJ records it (§82), "Dr Patterson noted that [Y] was now becoming increasingly preoccupied with suicidal thoughts 'since he received the adjudicator's determination several weeks ago'." This, taken by itself, is perfectly intelligible: a victim of torture and abuse who believes he has found safety here and expects or hopes to be given asylum may be trying to put his experiences behind him; but if told that, in spite of what he has undergone, it is now considered that he can safely be returned, his fears, whether or not still well-founded, may well resurface and possibly become overwhelming."

31. On my findings of fact, the Appellant is, and has been for some time now, suffering from two serious mental health conditions, namely depression and PTSD. I have accepted expert medical opinion that there is currently a significant risk of suicide as a result of the Appellant's past experiences and her mental health.

32. Mr Kotas has submitted that the Appellant would be unlikely to act on any suicidal ideation for two reasons: first, that she would be able to receive support by her family members in Sri Lanka; second, because of a devotion to her son in that country. The second point has been based on what the Appellant apparently told her GP on at least one occasion. On the assumption that she did indeed say this, the fact is, as I have found it to be, that the Appellant has taken overdoses on two occasions with the intention of either ending her life or at the very least causing herself very serious harm. Thus, her actions undermine both the significance of what she said to her GP and the force of Mr Kotas' submission. In addition, the Appellant has specifically told another medical professional (Dr Dhumad) she would take her own life if removed to Sri Lanka. Finally, as I have mentioned previously, the presence of the Appellant's son in

Sri Lanka does not necessarily have the positive effect that Mr Kotas suggests. In one sense he represents a "trigger" of the memories of the rape. Further, it is the case that the Appellant would not on return be reunited with him in any meaningful way because of course the fact is that her parentage has never been revealed and they have never lived together. There has been no suggestion that this state of affairs would be overturned were she to return to Sri Lanka. If such a suggestion had been made, it would clearly involve a new and inherently very difficult scenario: the Appellant would be expected to go to somewhere that she had never lived before, live with her son there either as a stranger, thereby creating and perpetuating a lie, or disclosing his true parentage, thereby causing the Appellant and her son very, very considerable distress. Taking all matters into account, I conclude that the Appellant's son in Sri Lanka does not, and would not, represent a "safety valve" such as to counteract suicidal ideations and her willingness to act upon them.

33. I have of course then considered the possibility of the Appellant's family members providing some form of emotional and/or practical assistance on return. Such a possibility must exist. The question is, what would be its efficacy? The Appellant has already made two suicide attempts in the United Kingdom, notwithstanding support of the friend with whom she lives and that of mental health professionals. The expert medical opinion before me, to which I have attached very significant weight, indicates that a return to Sri Lanka would exacerbate her existing problems and result in a serious deterioration in her mental health. Further, whatever aid family members could provide would certainly not be in the form of trained medical assistance (more on which, below). Finally, if the Appellant were to go and live with, for example, her mother, she would be returning to the family home, the very place where the rape took place in 2002. Taking all of these relevant factors into account, I conclude that even if some support from family members was in theory available, it would not in fact represent a realistic means of materially reducing the risk of suicide.
34. For the avoidance of any doubt, it is very clear to me that notwithstanding the additional difficulties faced by the Appellant in returning to the familial home, that is the only place that she could reasonably go back to. At no stage has the Respondent sought to argue that the Appellant could go and live alone somewhere else in Sri Lanka. Any such suggestion would have been misplaced: taking all relevant circumstances into account, expecting this particular Appellant to go and live as a lone female would only have the effect, in my view, of further increasing the already significant risk of suicide.
35. An important factor in the [] assessment is whether an individual's fear of return is objectively well-founded. In the present case, it is not, on the basis of the First-tier Tribunal's decision on the protection claim. This included a rejection of additional claimed detentions. The absence of an objective risk clearly weighs against the Appellant's case.
36. Having said that, we know from Y (Sri Lanka) that an individual's subjective perception of what might await them in their country of origin or how they will cope once there, is relevant. Mr Paramjorthy submitted that the Appellant is "terrified" of

going back to Sri Lanka. In my view, this point has force to it: it is consistent with all of the medical evidence before me and indeed the Appellant's own actions in this country.

37. Mr Kotas has relied on the factual matrix in appellant MP's appeal in GJ, with reliance on paragraphs 436(b) and 447. It is indeed the case that MP's history with the Sri Lankan authorities was adverse. That does not in my view provide a particularly strong basis for suggesting that the Appellant should somehow be less afraid (at least on a subjective level) of returning to Sri Lanka than somebody such as MP. By its very nature, the issue of a personal fear depends on the individual concerned. One person will react very differently from another, their thresholds will differ, their coping mechanisms maybe more or less robust depending on a whole range of circumstances. Whilst MP had obviously experienced serious problems at the hands of the Sri Lankan authorities on a number of occasions, the Appellant was raped at the age of thirteen by those same authorities. I am not at all sure whether it is appropriate to even attempt to compare one set of circumstances with the other. Ultimately, what I do conclude is that the Appellant holds a very serious fear of being returned to Sri Lanka.
38. I turn now to the issue of medical treatment. Case-law suggests that I should assume that the United Kingdom authorities will be able to put in place appropriate mechanisms to manage the risk of suicide during the course of removal itself. I have to say, in the absence of any particular evidence before me, I have some misgivings about that assumption. Nonetheless, I am willing to accept for present purposes that the Respondent would take steps to manage the risk during the time that the Appellant was under his care.
39. The focus then switches to the situation in Sri Lanka. Mr Paramjorthy relies on the assessment of provision of mental health care made by the Upper Tribunal in GJ, with particular reliance on paragraphs 454-456.

"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.”

Post Traumatic Stress Disorder (PTSD)

23.29 The BHC letter of 31 January 2012⁴⁶⁸ observed that:

“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.””

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.”

40. I fully appreciate that the burden of proof rests with the Appellant to make out her claim and I also acknowledge that GJ does not provide country guidance on medical treatment in Sri Lanka. What the passages quoted above do show, however, is that the provision of specialist mental health treatment in Sri Lanka is extremely limited indeed. There is no more recent evidence before me to indicate that situation highlighted in GJ has improved in any material respect. I conclude that it has not. In turn, I conclude that The Appellant would be unable to access appropriately specialist medical treatment in respect of the risk of suicide which, on my findings, will be significantly increased by the fact of removal back into the general environment in which her past traumatic experiences arose (in saying this, I have course recognised that the civil war itself no longer subsists. It remains the case however that the Appellant would be returning to the family home, and would be likely having to deal one way or another with the authorities from time to time, not least at the point of arrival).
41. Bringing all of the salient points together, I have ultimately reached the conclusion that this is one of the very rare cases in which it can properly be said that the removal of the Appellant from the United Kingdom to Sri Lanka would constitute a breach of Article 3, and would therefore be unlawful under section 6 of the Human Rights Act

1998. The risk of suicide is, in all the circumstances, sufficiently high to meet the exacting standard required.

42. My conclusion is relatively finely balanced, as will be the case in almost any appeal which succeeds on medical grounds. I also make it clear my conclusion has been reached in light of the binding case-law as it stands, and not on any basis that the very high threshold has in some way been materially lowered by recent decisions of the Court of Appeal, European Court of Human Rights, or indeed the CJEU.

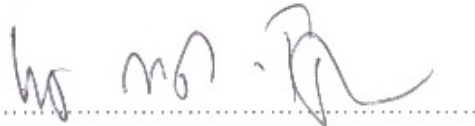
Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by determining that the Respondent's refusal of the Appellant's human rights claim is unlawful under section 6 of the Human Rights Act 1998, with particular reference to Article 3 ECHR.

It follows that the Appellant's appeal is allowed.



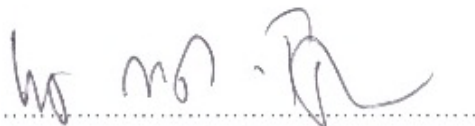
Signed

Date: 18 September 2018

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT FEE AWARD

No fee is paid or payable and therefore there can be no fee award.



Signed

Date: 18 September 2018

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal

ANNEX: ERROR OF LAW DECISION



IAC-FH-LW-V1

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

Appeal Number: PA/03456/2017

THE IMMIGRATION ACTS

Heard at Field House
On 15 March 2018

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A P

(ANONYMITY DIRECTION CONTINUED)

Respondent

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 her or any member of her 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.

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer

For the Respondent: Mr N Paramjorthy, Counsel, instructed by S Satha & Co Solicitors

DECISION AND REASONS

1. Although this is a challenge by the Secretary of State I shall refer to the parties as they were before the First-tier Tribunal. Therefore the Secretary of State is once more the Respondent and AP is the Appellant.
2. The Respondent seeks to challenge the decision of First-tier Tribunal Judge Hussain (the judge), promulgated 19 December 2017, whereby he dismissed the Appellant's appeal on protection grounds but allowed it on human rights grounds, specifically relating to her mental health.

The judge's decision

3. Between paragraphs 18 and 30, the judge sets out a number of objections taken by the Respondent against the Appellant's protection claim. In paragraph 31, and noting that the Appellant had not given oral evidence as a result of her current mental health, the judge concludes that he had "reluctantly" decided that core elements of the Appellant's account were untrue and that she would not be at risk from the Sri Lankan authorities. However, he did accept that the Appellant had been raped by members of the security forces in 2002. The judge then goes on to consider the Appellant's mental health. He makes reference to the medical evidence that was before him, including an unchallenged report from a consultant psychiatrist together with medical records and a letter emanating from the Appellant's GP. I set out paragraph 39 of the judge's decision in full:-

"Although [the] Home Office has drawn on many sources in the background as to the availability of treatment for mental health conditions in Sri Lanka, this issue was closely examined by the Upper Tribunal in its decision in GJ. Relevant passages from that judgement were quoted at pages 8 and 9 of the appellant's skeleton argument. In the light of the tribunal's observations and the appellant's medical condition, the conclusion to which I have come is that there is a real risk that whilst there may not be a breach of article 3, there is a real risk of a likely breach of article 8 (the appellant's physical and mental integrity being compromised by her return to Sri Lanka (sic)). Accordingly, I conclude that the appellant's exclusion from this country is likely to breach article 8 (private life of the Human Rights Convention). In coming to this conclusion, I have of course had regard (sic) to the public interest considerations in in (sic) sections (sic) 117B of the Nationality, Immigration and Asylum Act 2002."

Under the sub-heading "Decision" the judge confirmed that he was dismissing the Appellant's appeal on asylum and humanitarian protection grounds, but allowing it on human rights grounds.

The grounds of appeal and grant of permission

4. In essence the two grounds of appeal assert that the judge failed to give adequate reasons for his conclusions on the Article 8 claim and failed to have regard to relevant case law, in particular MM (Zimbabwe) [2017] EWCA Civ 797. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 15 January 2018.

The hearing before me

5. Following what was clearly a productive discussion between the two representatives prior to the start of the hearing, Mr Paramjorthy in his customary fair manner accepted that the judge had materially erred in law by allowing the Appellant's appeal on Article 8 grounds in the manner that he did. It was also accepted that the error was material. In fairness to Mr Paramjorthy, he pointed out that his skeleton argument had never in fact raised Article 8 in respect of the mental health aspect of the Appellant's case. Rather, Article 3 had been relied on (reference was made to pages 8 and 9 of the skeleton). Mr Paramjorthy was unclear as to why the judge had taken the route that he had at paragraph 39 of the decision.
6. Mr Paramjorthy very tentatively suggested that there was a possibility of lodging an extremely late cross-appeal in this case, given what he described as the very thin reasons provided by the judge in respect of the protection claim. To the extent that a formal request was being made, I refused it. In my view it was way too late in the day for a cross-appeal to be put in. Mr Paramjorthy did not seek to press the point.

Decision on error of law

7. Both parties were agreed that the judge materially erred in law. This was clearly the correct position to have adopted. The judge failed to have any regard to relevant binding authority on the issue of medical claims in the context of Articles 3 and/or 8. There is also an inadequacy of reasons.
8. In light of this I set the judge's decision aside.

Disposal

9. There followed a discussion with the representatives as to the proper scope of what I consider to be the appropriate method of disposal in this appeal, namely a remaking decision to be made at a resumed hearing before me.

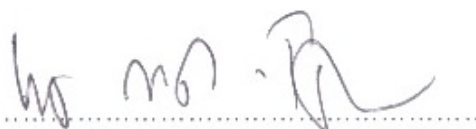
10. Mr Duffy noted that the judge had concluded that Article 3 would not be breached in relation to the Appellant's mental health. Given that there had been no cross-appeal, he suggested that the remaking decision could only be concerned with Article 8. Mr Paramjorthy responded by noting that the judge's consideration of Article 8 had not in fact been based upon the way in which the Appellant's case was put in the first place. He also noted that the Article 8 and Article 3 issues were all based on the same factual matrix, namely mental health condition and supporting evidence. This was a case, he submitted, where a further consideration of Article 3 would not relate to the protection claim in any way, but would be solely focused on the mental health issue.
11. In my view the proper scope for the remaking decision will be as follows: Articles 3 and 8 can and should be considered, but only in the context of the Appellant's mental health. This is indeed a case in which Article 3 can be appropriately ring-fenced and directed only to the medical issue without leading to the danger that protection issues will be re-litigated. I note that the ground of appeal under section 84(2) of the 2002 Act relates to whether the Respondent's decision is unlawful under section 6 of the Human Rights Act 1998. Articles 3 and 8 of the ECHR are both of course contained in Schedule 1 to the 1998 Act. In addition the judge had allowed the Appellant's appeal on human rights grounds and this too indicates that, once I have set his decision aside, it would be open to me to look at both Articles 3 and 8, provided that the former provision was directed solely to the issue of the mental health.
12. Having informed the representatives of my view as to the scope of the next hearing I have decided to adjourn in order that up-to-date medical evidence could be adduced by the Appellant.
13. I will issue specific directions to the parties, below.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and I set it aside.

I adjourn this appeal in order for a resumed hearing to take place before me on a date to be confirmed.

The anonymity direction made previously remains in place.



Signed

Date: 4 April 2018

Deputy Upper Tribunal Judge Norton-Taylor

Directions to the Parties

1. **Any further evidence relied upon by the Appellant shall be served on the Respondent and filed with the Upper Tribunal no later than ten working days before the resumed hearing.**
2. **The scope of the resumed hearing is limited to the issue of the Appellant's mental health in the context of Articles 3 and 8 ECHR.**
3. **Any further evidence relied upon by the Respondent shall be served on the Appellant and filed with the Upper Tribunal no later than ten working days before the resumed hearing.**
4. **No oral evidence is required at the resumed hearing and no interpreter shall be booked.**