



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03606/2017

THE IMMIGRATION ACTS

Heard at Liverpool
On 19th December 2017

Decision & Reasons Promulgated
On 1st June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

LT
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Greer, Ison Harrison Ltd
For the Respondent: Ms H Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. The First-tier Tribunal ("FtT") has made an anonymity order and for the avoidance of any doubt, that order continues. LT is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.
2. The appellant is a national of Sri Lanka. He arrived in the UK as a Tier 4 student in September 2011 with leave valid until 12th August 2013. In February 2013 his leave was curtailed to 22nd April 2013. On 3rd May 2013, the appellant made a claim for

asylum. The claim was refused by the respondent on 31st May 2013 and the appellant appealed to the First-tier Tribunal (“FtT”). His appeal was dismissed for the reasons set out in a decision promulgated in January 2014. That decision of the FtT was set aside on appeal to the Upper Tribunal, and the appeal was remitted to the FtT for re-hearing. The appeal was heard by a panel of the FtT comprising of FtT Judge Brunnen and FtT Judge Davies. The appeal was again dismissed by the FtT for the reasons set out in a decision of the panel promulgated on 26th November 2014. Permission to appeal that decision was refused by both the FtT and the Upper Tribunal such that the appellant had exhausted all rights of appeal by 28th April 2015.

3. On 13th February 2017, the appellant made further submissions to the respondent. On 28th March 2017, the respondent concluded that the appellant does not qualify for asylum or humanitarian protection, and that his removal from the United Kingdom would not be in breach of his human rights. That decision attracted a further right of appeal, and the appeal was heard by FtT Judge Pickup on 10th May 2017. FtT Judge Pickup dismissed the appeal for the reasons set out in a decision promulgated on 26th May 2017 and it is that decision, that is the subject of the appeal before me.

4. I pause at this juncture to note the material conclusions reached by the panel of the FtT comprising of FtT Judge Brunnen and FtT Judge Davies in their decision promulgated on 26th November 2014. In their decision, the panel set out, at paragraphs [12] to [20], the account of events relied upon by the applicant in support of his claim for asylum. At paragraphs [21] to [24], the panel refer to the evidence that was before the FtT. The panel’s consideration of the evidence, and the respondent’s decision, is to be found at paragraphs [25] to [42] of their decision. At paragraph [45], the panel stated:

“We are persuaded by Dr Pushkar’s evidence and that there is a reasonable degree of likelihood that the appellant was deliberately ill-treated by the LTTE and from this it follows that we accept he did serve with them before he left Sri Lanka in 2003. However having regard to the inconsistencies in the evidence and the damage to the Appellants credibility that we have detailed above we are not satisfied that he has ever been or is now of any adverse interest to the Sri Lankan authorities.”

5. In light of their findings, the panel went on to address the risk upon return, both by reference to the Country guidance decision of GJ and Others (post civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC), and background material relied upon by the appellant to demonstrate that the Sri Lankan authorities act with impunity, and the human rights situation had deteriorated. Insofar as is material, the panel stated:

“47. We are satisfied that the evidence does not establish any real likelihood that the Sri Lankan authorities would regard the appellant as any threat to the unitary state or the present government. He has said nothing of any political activities outside of Sri Lanka and it is his case that he served in the LTTE only under compulsion and without any personal ideological commitment, ceasing to do so several years before the end of the civil war. There is no reason for the government to have any other perception of him.

49. ... we have carefully considered the evidence on which Mr Ficklin’s submission is based, as listed in paragraphs 29 to 31 of his skeleton argument. It is neither possible more necessary to set out that evidence at length.... However this evidence does not in our judgement show that the risk categories identified in GJ are incomplete or too narrowly defined. The evidence certainly shows that for persons in those categories the risks may be very real and serious. However it does not in our judgement show that someone such as the appellant, who has a historical, unwilling connection with the LTTE would now be at real risk on return. It does not undermine what the Upper Tribunal said in paragraph 8 of the headnote in GJ.

6. The panel also considered the risk to which the appellant would be exposed if returning to Sri Lanka because he would commit suicide or at least cause himself serious harm. At paragraph [51] of their decision, the panel stated:

“Mr Ficklin’s final submission was that irrespective of such risks there was a real risk that if returned to Sri Lanka the appellant would commit suicide or at least cause himself serious harm. It is well established that in principle the risk of suicide or serious harm can engage Article 3 but the threshold is very high. As the Court of Appeal said in KN [2008] EWCA Civ 1430, that threshold is not reached by reliance on a single line in a medical report. Whilst it can be said that Dr Pushkar has devoted four sentences to the risk of suicide or self harm, saying that there was, at the date of his report, a moderate risk, that falls well-short of establishing that to return the Appellant to Sri Lanka would cause the UK to violate his Article 3 rights. As we have observed above, although there are some medical notes concerning the Appellant’s mental health in April and October of this year, there is no assessment of his current condition by any medical practitioner. The note from October merely records the symptoms of which the Appellant complained and that his medication had been changed. That does not amount to clear evidence that he was considered to be at risk of suicide or self harm, let alone that the risk was so great as to cross the threshold of engagement for Article 3. We also note

that the two previous suicide attempts reported by the Appellant were connected to his grief following the death of his girlfriend and not connected to his own experiences. There is no reason to think that he has not recovered from that grief.”

The decision of FfT Judge Pickup

7. Unsurprisingly given the previous findings, it was accepted by the respondent that the appellant had served with the LTTE under compulsion and that he had been mistreated. The respondent maintained that the appellant had never been, and was not now, of any adverse interest to the Sri Lankan authorities. At paragraph [12] of his decision, FfT Judge Pickup summarised the three strands to the appellant’s claim and at paragraphs [15] to [22], he briefly set out the claim being advanced by the appellant. At paragraph [23] of the decision, the Judge correctly notes that his starting point is the previous decision of the FfT panel and at paragraphs [24] to [28], he summarises the conclusions reached by the panel previously. At paragraphs [29] to [39], FfT Judge Pickup sets out the evidence before him, including medical evidence that post-dates the decision of the FfT panel previously.

8. The Judge adopted the findings made previously by the FfT panel and, having considered the evidence for himself, was not satisfied that the appellant is of any adverse interest to the Sri Lankan authorities as he claims. In reaching his decision, the Judge notes at paragraph [56] that he has had regard to the medical evidence of Dr Pushkar and Dr McCutcheon, that the appellant would likely have had difficulty concentrating, his experiences were distressing to recall, and that he was using alcohol and drugs. At paragraph [59] the Judge states:

“In light of the evidence as a whole, even taking the medical evidence into account, I am not able to accept that the authorities were looking for the appellant in either 2003 or 2010, or since. I reach the conclusion, as did the previous Tribunal that there has been no adverse interest in the appellant since he left in 2003. He was able to re-enter on his own identity through normal channels, exit and re-enter again in 2010 and 2011. I am satisfied that this part of his claim is an exaggeration and embellishment of his account. I find no reason to depart from the conclusions in this regard of the previous First-tier Tribunal panel decision.”

9. The Judge went on at paragraphs [61] to [65] of his decision to address the risk upon return, taking into account the country guidance decision of GJ, the background

material relied upon by the appellant and the expert report of Frederica Jansz. The Judge concluded, at [65], that he was unable to find sufficient specific evidence to suggest that this appellant, on his circumstances as found, would face any risk at all upon return. The Judge was not satisfied that even as a failed asylum seeker, the appellant would be subjected to screening or questioning on return. Having considered the evidence as a whole, the Judge was not satisfied that there is clear and cogent evidence, on the facts, to depart from the risk categories identified in GJ.

10. At paragraphs [66] to [78], the Judge addressed the claim advanced by the appellant on account of his mental health. He noted that previously, the FtT panel had considered there to be insufficient evidence regarding the deterioration in the appellant's mental health and the risk of suicide. The Judge concludes as follows:

“79. Putting all of this evidence together, in the round, as I must, I am not satisfied to the lower standard of proof, and for the reasons stated, that the appellant's threat that he will commit suicide is justified as a real risk that his return would breach articles 3 or 8, when considering the factual findings and the medical evidence. There is, in my view, no well-founded objective fear or risk of being detained and mistreated on return by the Sri Lankan authorities. And, for the reasons stated, I am not satisfied that the appellant's threat is subjectively a real risk, even though apparently believed by the consultant psychiatrist. I am not satisfied that the risk has been made out to the necessary, even lower, threshold and I am not satisfied that it is made out that there is a real risk that he would do so, on the medical evidence.

80. I am also satisfied that there are facilities for treatment of mental health patients in Sri Lanka and note that the appellant has been treated entirely as an outpatient with reviews on a quarterly or less basis. He may continue to say that he will commit suicide on return, I don't doubt that that he has claimed that he would commit suicide, but I do not find that the risk of this is borne out by the medical evidence when taken into account in the context of the evidence as a whole. There may be a risk of deterioration on return to Sri Lanka, but the evidence does not suggest that this would be to the point when the appellant would be at real risk of reduction in life expectancy by attempts at suicide.

81. In the circumstances, and for the reasons stated, I am not satisfied to the lower standard of proof that the article 3 (or 8) risk has been demonstrated. He does have mental health issues, but the evidence is that adequate treatment will be available, more accessible in Colombo than elsewhere. There is no evidence that he would be unable to access, or denied that treatment. I am also satisfied that he would also have me some family support, from his sister.

The appeal before me

11. The appellant's written grounds of appeal are lengthy and identify five errors in the Judge's decision. Permission to appeal was granted by FfT Judge Hodgkinson on grounds, 2, 3, 4 and 5. Permission was refused on ground 1. That is, the FfT Judge failed to accord due weight to the background material relied upon by the appellant to support his claim that an individual with his profile, would be at risk upon return to Sri Lanka. FfT Hodgkinson noted that the Judge's conclusion disclose no arguable error of law and the Judge was entitled to conclude that the relevant country guidance decision in GJ remains authoritative. The appellant renewed the application for permission to rely upon ground 1 to the Upper Tribunal. Upper Tribunal Judge Kekic again refused permission to rely upon ground 1, for the reasons set out in her decision dated 6 November 2017.
12. The matter comes before me to consider whether the decision of the FfT involved the making of a material error of law on the remaining grounds, and if so, to remake the decision. Each of the four grounds upon which permission to appeal has been granted relate to the Judge's consideration of the medical evidence and the appellant's mental health.
13. I can take the second and third ground of appeal together since they both concern the Judge's consideration of the report of Dr McCutcheon and her opinion as to the risk of suicide. It is claimed that the Judge erred in going behind a concession made by the respondent in respect of the medical evidence. It is said that the respondent did not challenge the report of Dr McCutcheon and her opinion in respect of the suicide risk. It had been conceded at the outset of the hearing that the appellant suffers from PTSD and depression. It is also said that the Judge approached the medical evidence in an improper manner and misunderstood the evidence before him. Mr Greer submits that Dr McCutcheon, at paragraph 3.14 of her report, confirmed that the appellant has consistently said that he will himself rather than face deportation to Sri Lanka. She confirmed that he had made some plans for how he might kill himself if he felt people were approaching him to arrest him, in order to be deported. Dr McCutcheon expresses the opinion that she believes he would attempt suicide, if

detained and even on the plane, if he were to be transported back to Sri Lanka. She reiterates that opinion at paragraph 5.1 of her report. Mr Greer submits that at paragraphs [72] and [76] of his decision, the Judge went behind the opinion of Dr McCutcheon and the concession made by the respondent in a way that is not permitted. He submits that the Judge erroneously focuses upon causes other than the appellant's fear of the Sri Lankan authorities as contributing to the appellant's ill health. He submits that the fact that the appellant may have embellished one aspect of his account is not to diminish the severity of his mental health.

14. The appellant relies upon the concession that was made by the respondent when asked at the outset of the hearing, that the appellant does suffer from PTSD and depression, as referred to in the medical evidence. At paragraph [7] of the decision, the Judge records that it is not in dispute that the appellant suffers from depression and PTSD. At paragraph [66], the Judge expressly states that he takes into account that it has been conceded that the appellant does suffer from PTSD and depression.
15. I reject the claim that the Judge approached the medical evidence and the opinion of Dr McCutcheon set out in her report dated 6th June 2016 and the addendum report of 2nd May 2017 erroneously, or that the Judge misunderstood that evidence.
16. Cases in which it is alleged that there is a risk of suicide on return to third countries pose considerable difficulties for judicial fact-finders. All relevant authorities highlight the point that cases of this type are highly fact-sensitive.
17. The Judge was clearly aware that the appellant suffers from PTSD and depression and that the medical evidence included an assessment by Dr McCutcheon that in her opinion, if he returned to Sri Lanka, the appellant would commit suicide. In my judgment, the Judge carefully considered the matters referred to in the report of Dr McCutcheon and the opinions expressed, but concluded that in the end, on the facts as he found them, he did not accept the conclusion reached by Dr McCutcheon. Plainly, the more an expert's opinion is based upon the account given by the appellant, the less likely it is that significant weight will be attached to the opinion,

in the event that the account given and relied upon by the appellant, is rejected by the Tribunal.

18. In my judgement, a careful reading of paragraphs [72] to [78] of the decision demonstrates that the Judge properly understood that the issue of risk was essentially for him to assess, based on all the evidence and the findings made. The Judge carefully considered the medical evidence concerning the records of the appellant's expression of ideas of self-harm or suicide and his treatment, across those paragraphs. The Judge did not disregard the opinion of Dr McCutcheon, and took the medical evidence that was before him, carefully into account. The Judge found that the mistreatment suffered by the appellant at the hands of the LTTE were relevant to the appellant's mental health, but the Judge did not accept that the appellant has a well-founded, or subjective fear of the Sri Lankan authorities. Having rejected the appellant's claim to fear the Sri Lankan authorities, it was in my judgment, open to the Judge to conclude that his findings undermine the reasons given by the appellant for threatening to commit suicide, and to take into account that the appellant may have been exaggerating his fear to medical professionals. In my judgment, the Judge gave sound reasons for arriving at a different conclusion to the opinion expressed by Dr McCutcheon, and in doing so, had proper regard to the diagnosis of PTSD and depression and the concession made by the respondent.

19. The fourth ground of appeal alleges that the Judge erroneously departed from the country guidance in GJ insofar as his assessment of the provision of mental health care in Sri Lanka is concerned. Mr Greer submits that at paragraph [456] of its decision in GJ, the Upper Tribunal found that the mental health resources in Sri Lanka are sparse and are limited to the cities. The respondent's operational guidance note itself confirms that there are facilities only in the cities, and that they do not provide appropriate care for mentally ill people. The Upper Tribunal noted, at paragraph [454] of GJ, that there are only 25 working psychiatrists in the whole of Sri Lanka, and that although there are some mental health facilities, 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. Mr Greer confirmed that the appellant no longer relies upon the decision of the ECHR in Paposhvili.

20. I accept that in the country guidance case of GJ, the appellant being referred to by the Upper Tribunal at paragraph [456] of the decision, had mental health issues having been described by a psychiatrist as having clear plans to commit suicide if returned to Sri Lanka. That person was described as very ill, too ill to give reliable evidence. The Tribunal found, on the evidence, that returning that particular appellant in GJ to Sri Lanka, breached Article 3.
21. In considering the risk to the appellant on return, the Judge took into account at paragraph [70] of his determination, the limited healthcare provision in Sri Lanka for mental health services. The Judge accepted, as Mr Greer had submitted, that the number of psychiatrists in Sri Lanka are limited. The Judge took into account the appellant's repeated claims that he does not wish to return to Sri Lanka and the evidence before him that the appellant's moods, deterioration and flashback experiences increase or diminish with the progress of his asylum appeal.
22. The Judge carefully considered the opinions expressed by Dr McCutcheon. The Judge noted, at [80], that the appellant has been treated entirely as an outpatient with reviews on a quarterly or less basis. The Judge noted that there may be a risk of deterioration on return to Sri Lanka, but concluded that the evidence does not suggest this would be to the point where the appellant would be at a real risk of reduction in life expectancy by attempts at suicide.
23. In my judgement, the Judge considered the appellant's Article 3 claim on the basis that he has been diagnosed of suffering from PTSD and depression. At paragraphs [66] to [81], the Judge set out the basis upon which he considered the risk, noting at paragraph [81] that the appellant does have mental health issues, but the evidence is that adequate treatment will be available to him, more accessible in Colombo than elsewhere. The Judge found there to be no evidence that the appellant would be unable to access, or would be denied that treatment. Furthermore the Judge noted

that the appellant would also have at least some family support available to him, from his sister.

24. The Judge considered the mental health services available to the appellant in Sri Lanka and acknowledged the facilities in Sri Lanka did not match the facilities here. In GJ, the Upper Tribunal considered the Article 3 claim being advanced by the third appellant upon the medical evidence that was specific to that appellant. Paragraphs [454] to [456] of GJ must be read in that context, and do not amount to country guidance to the effect that returning an individual who is found to suffer from mental illness to Sri Lanka would be in breach of the UK's obligations under Article 3 ECHR. At paragraph [456] of its decision in GJ, the Upper Tribunal refers to "*..the severity of this appellant's mental illness*" and "*on the particular facts of this appeal*". Although the observations made by the Upper Tribunal in GJ may be persuasive in an individual case, the Upper Tribunal was not laying down Country Guidance in respect of the mental health services available in Sri Lanka in the way contended by the appellant. The Judge here was not obliged to reach the same conclusion as that reached in respect of the third appellant in GJ.
25. The argument advanced on behalf of the appellant amounts to a disagreement with the conclusions reached by the Judge as to the Article 3 (and 8) risk upon return for this appellant, based upon the evidence before the Judge and the findings made by him. The Judge did not reject the medical evidence but concluded, as was open to him, that there were options in Sri Lanka, which meant there was no breach of either Article 3 or 8 ECHR.
26. Finally, the appellant claims that the Judge, having dismissed the appellant's claim under Article 3, erroneously concluded that the appellant's claim under Article 8 must also fail. This ground has no merit. The appellant's Article 8 claim was intrinsically linked to his Article 3 claim. They were both advanced on the grounds of the appellant's mental health. I accept that the failure of an Article 3 claim is not fatal to an Article 8 claim, but Article 8 concerns different paradigms. It is not enough to rely on the same facts as those, as the appellant did here, which fail to bring the case within the Article 3 paradigm.

27. In my judgement, the appellant did not rely on any additional factual element, sufficient to bring him within the Article 8 paradigm, when his Article 8 claim was, in reality, based solely on the medical treatment that he receives here and the availability of treatment in Sri Lanka. The Judge found that the appellant would have access to treatment in Sri Lanka and it follows that in the circumstances, it was open to the Judge to dismiss the Article 8 claim. There were quite simply no factors which might give rise to a claim under Article 8, when there was none under Article 3.
28. Having carefully considered the decision of the FfT Judge as a whole, I am entirely satisfied that it was open to the Judge to dismiss the appellant's appeal for the reasons set out in the decision.
29. It follows that in my judgment, there is no material error of law in the FfT Judge's decision and the determination shall stand.

Notice of Decision

30. The appeal is dismissed.

Signed

Date

15th March 2018

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

31. The FfT Judge made no fee award. I have dismissed the appeal and there can be no fee award.

Signed

Date

15th March 2018

Deputy Upper Tribunal Judge Mandalia