Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08039/2018

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 4 April 2019	**On 29 April 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

G I R K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms I Sriharan instructed by Lova Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

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Introduction

2. The appellant is a citizen of Sri Lanka who was born on 3 September 1980. He first entered the United Kingdom on 30 September 2003 as a student. He was subsequently granted periods of leave as a student until 1 November 2007. He returned to Sri Lanka in 2005 to marry his wife, returning later that year.

3. On 24 August 2012 the appellant made a human rights application which was refused without a right of appeal. On 3 March 2014, the appellant made a further application for leave to remain based upon his private and family life. That application was refused and certified as clearly unfounded on 3 July 2015. He unsuccessfully sought permission to a judicial review of that decision. On 18 February 2016, the appellant claimed asylum.

4. The basis of his claim was that he would be at risk from the Sri Lankan authorities as a result of being suspected of helping the LTTE, in particular he claimed that he had provided accommodation to two men who were involved in the assassination of the Sri Lankan Foreign Minister. He claimed that in August 2005 he had been arrested and detained for about 7 days and ill-treated. Whilst detained, he claimed that he had signed a confession admitting complicity in the assassination. He claimed he escaped when he was being transferred in a vehicle. His wife came to the UK in September 2006 after, he claimed, she was detained and raped whilst after being arrested in August 2005. He claimed that in June/July 2016, his father-in-law informed him by letter that men had come to his house looking for the appellant and had threatened to kill him if he did not tell them of the appellant's whereabouts.

5. On 12 June 2018, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal. In a decision promulgated on 7 November 2018, Judge L Murray dismissed the appellant's appeal on all grounds. She made an adverse credibility finding and rejected the appellant's account and, therefore, did not accept that he would be at risk on return. The judge also found that the appellant's health problems were not such that his return would breach Art 3 of the ECHR. Finally, the judge found that the appellant's removal would be a proportionate interference with his private and family life in the UK and so would not breach Art 8 of the ECHR.

The Appeal to the Upper Tribunal

7. The appellant sought permission to appeal to the Upper Tribunal on five grounds. Principally, ground 1 averred that the judge had failed properly to take into account a medical report prepared by Dr A M Mason (dated 20 January 2017) at the Medical Foundation. Ground 1 averred that the judge

had failed to take into account that report in assessing the appellant's credibility and also by failing to consider the risk to the appellant of committing suicide if returned to Sri Lanka.

8. On 7 December 2018, the First-tier Tribunal (Judge Keane) granted the appellant permission to appeal.

9. The respondent did not file a rule 24 notice.

10. The appeal came before me on 4 April 2019. At that hearing, the appellant was represented by Ms I Sriharan and the respondent by Mr C Howells.

The Issues

11. Judge Keane granted the appellant permission to appeal without specifically limiting the grant of permission. Although, the reasons given by Judge Keane relate to that part of ground 1 which relies upon the averment that the judge failed to consider Dr Mason's report and the risk, if any, to him of committing suicide on return to Sri Lanka.

12. Ms Sriharan referred me to the Upper Tribunal's decision in Safi and Others (permission to appeal decisions) [2018] UKUT 00388 (IAC) (Lane P and UTJ Dawson). She submitted that, although Judge Keane's reasons related to only one part of ground 1, in the light of Safi his grant of permission should be read as not subject to any express limitation but to be a grant of permission on all grounds. In fact, Ms Sriharan only relied upon ground 1. She placed no reliance on grounds 2 – 5 and made no submissions in respect of them.

13. Mr Howells, having considered the decision in Safi, accepted that there was no express limitation in the grant of permission and he accepted that the appellant could rely upon ground 1 generally.

14. The hearing, thereafter, proceeded on the basis that the live issue was whether the judge had erred in law by failing to consider properly Dr Mason's report both in assessing the appellant's credibility and by failing to consider whether his return to Sri Lanka would breach Art 3 as a result of his being at risk of committing suicide.

The Submissions

15. At the core of Ms Sriharan's submissions was the argument that the judge had failed properly to take into account Dr Mason's report relating to the appellant's mental health, including his symptoms of PTSD and suicidal ideation. She submitted that at para 32 the judge had concluded that the report was a: "detailed and well-reasoned report to which I must attach considerable weight as independent evidence." Ms Sriharan submitted that, however, thereafter the judge failed to do that both in assessing the appellant's credibility and in assessing any risk to him on return to Sri Lanka of committing suicide. Ms Sriharan properly drew my attention to

para 54 where, despite Dr Mason's report, the appellant's (then) Counsel had not made an application to treat the appellant as a vulnerable witness within the *Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance*.

16. Ms Sriharan submitted that at para 56, the judge had been wrong to state that there was:

> "Nothing in the medical report that explains why the appellant's account would contain the inconsistencies identified above in relation to the core of his account."

17. Finally, Ms Sriharan submitted that the judge had been wrong in para 62 of her determination when she had stated:

> "I have also not been referred to any evidence to show he is at risk of suicide on return nor was this argued before me."

18. In relation to these submissions, Ms Sriharan relied upon passages in Dr Mason's report at paras 97 – 104 and at paras 109 – 112 in Dr Mason's summary.

19. Paragraphs 97 – 104 are as follows:

> "97. [The appellant] has signs and symptoms of a severe **depression** (see Appendix E). He has recognised indicators of depression such as a loss of self esteem and feelings of uselessness and unworthiness. He has anhedonia (lack of interest or pleasure in doing things), restlessness and sleep disturbance. His mood is low and he has had thoughts of suicide, particularly when he thinks of the possibility of being returned to Sri Lanka.
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> 98. He is receiving medical treatment for depression from his GP whilst awaiting a psychiatric outpatient review, and an appointment with a counsellor in his new home location. A PHQ-9 questionnaire was used and gave a depression score indicative of severe depression despite being on therapy.
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> 99. [The appellant] has signs and symptoms of **post traumatic stress syndrome** (see Appendix D) with flashbacks, re-living of the trauma and he avoids cues to any triggers for these. He continues to leave recurrent nightmares of witnessed and experience trauma (*"people are coming to me .... got to kill me"*) during which he calls out and cries; anhedonia (loss of interest and pleasure) and associated depression.
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> 100. [The appellant] has not previously revealed the full extent of his trauma and ill treatment in detention. The long period of time since these occurred has been one in which he has tried to cope by avoidance; burying the thoughts and not discussing his ill treatment with his GP, counsellors or his wife. This is a common coping response and such conscious, or sub-conscious, avoidance is a commonly seen feature of PTSD.
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> 101. Late disclosure is common in cases of sexual assault owing to feelings of shame, fear, emasculation and the expectation of not being believed. The need for disclosure now has meant that [the

appellant] has had to surmount these fears and he has done this despite very evidently finding it difficult and distressing to discuss.

102. [The appellant] has found discussing his ill-treatment for this report difficult; he has wept, shown physical signs of fear (shaking and postural changes) and has experienced some re-traumatization with having to recount the events of ill treatment in detention in great detail but feels that this is now required of him in order to give a full picture of his reasons for not wishing to return to Sri Lanka. That he has delayed seeking asylum is explicable given that he finds his experiences very difficult to discuss, even with his wife. The effect of this avoidance and the associated time lag between the events and being asked to recount them is likely to result in some inaccuracies in recall.

103. [The appellant] is separated from his extended family and home country; this in itself is a recognised source of emotional distress in a migrant who has no history of ill treatment and detention. The level of distress, and the signs and symptoms of mental ill health that I have observed, ore elicited evidence of, from [the appellant] during six hours of assessment and interview, exceeds that which I would have expected in a migrant who had not experienced any ill-treatment.

104. His physical reactions of fear and distress on recounting the events, or considering the likely outcome for the family if returned to Sri Lanka, are those I consider to be entirely congruent with what he is describing and would be difficult to fabricate and consistently sustain over the course of three sessions of interviews. [The appellant] has not sought to embellish his account or to attribute lesions arising from other causes (L7 and L19) to his ill-treatment. I have considered the possibility of fabrication as required by Istanbul Protocol paragraph 105(f) but do not consider there to be any false allegation in this case."

Then at paras 109 – 112:

"109. [The appellant] has signs and symptoms of depression (See appendix E) for which he has been receiving, and still requires, ongoing medical treatment and counselling. He has recognised indicators of depression such as a loss of self-esteem and feeling of uselessness and unworthiness. He has anhedonia, restlessness and sleep disturbance.

110. He has had suicidal ideation previously and has recurrent thoughts of self-harm when he thinks of the possibility of being returned to Sri Lanka. If he and his family are denied asylum in the UK, then an urgent reassessment of his suicide risk would be advisable.

111. Late disclosure is common in cases of sexual assault in detention, owing to feelings of shame, fear, and the expectation of not being believed. Late disclosure of sexual assault is not suggestive of fabrication. During six hours of interview with [the appellant] there has been no evidence to suggest false allegation.

> 112. [The appellant] has signs and symptoms of post-traumatic stress syndrome (see Appendix D) which include flashbacks, re-living of the trauma and recurrent nightmares."

20. Mr Howells submitted that the judge had considered Dr Mason's report which was dated 21 months before the hearing on 15 October 2018. He submitted that the appellant had not mentioned in his witness statements that he suffered from suicidal ideation and in a letter from his GP dated 18 July 2018 (at page 93 of the bundle) there was no reference to suicidal ideation. Mr Howells submitted there was, in fact, no recent evidence of a risk of self-harm or suicide. He submitted that the judge could not be criticised for not dealing with an issue which had not been pursued before her by the appellant and in the light of the fact that the expert report dated back to January 2017 and there was no more recent reference in the evidence to the appellant's risk of suicide or self-harm.

Discusssion

21. I deal first with the issue of the risk, if any, to the appellant of committing suicide on return to Sri Lanka.

22. As Ms Sriharan pointed out, in the country guidance case of GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC), the Upper Tribunal, identified the limited availability of psychiatric help in Sri Lanka for those who were at risk of suicide (see especially [454] – [457]). Consequently, where a real risk of suicide is identified, the circumstances in Sri Lanka create a very real argument as to whether or not the return of that individual would breach Article 3 of the ECHR. Indeed, one of the appellants in GJ and Others was successful under Article 3 on that very basis (see [456]).

23. It is not immediately apparent why the judge was not directed to those parts of Dr Mason's report which raised the issue of risk to the appellant of committing suicide on return to Sri Lanka. In para 97, Dr Mason states his "mood is low and he has had thoughts of suicide, particularly when he thinks of the possibility of being returned to Sri Lanka." Then, in her summary at para 110 she states:

    > "He has had suicidal ideation previously and has recurrent thoughts of self-harm when he thinks of the possibility of being returned to Sri Lanka. If he and his family are denied asylum in the UK, then an urgent re-assessment of his suicide risk would be advisable."

24. Whilst the judge may well have "not been referred to any evidence to show [the appellant] is at risk of suicide on return" (at [62] of her determination), there was at least some evidence relevant to that issue. Whilst Mr Howells submits that the judge cannot be criticised if she was not referred to it and a claim based upon risk of suicide was not argued before her, there was evidence which on a Robinson basis should have been considered by her. Of course, what weight should be given to that evidence will, no doubt, be affected by the fact that the report predated

the hearing by some 21 months and there was no subsequent reference to suicidal ideation in the appellant's evidence or GP evidence. However, the judge herself remarked at para 32 that Dr Mason's report was "detailed and well-reasoned" and was one to which she "must attach considerable weight as independent evidence". In the light of that, I am unable to conclude that she would have given this evidence *no* weight or no weight of such significance as to be the basis for an arguable claim under Art 3, particularly in the light of the background evidence relating to Sri Lanka set out in GJ and Others to which I have already referred.

25. In those circumstances, I accept Ms Sriharan's submission that the judge erred in law by failing properly to consider the risk, if any, to the appellant of committing suicide on return to Sri Lanka such as to engage Art 3 of the ECHR.

26. As regards the judge's adverse credibility finding, the judge gave detailed reasons at paras 33 onwards why she did not believe his account and, in the course of those reasons, identified a number of inconsistencies in his evidence. Having prefaced that assessment by reference to Dr Mason's report and at para 32 concluding she should attach "considerable weight" to it, the judge returned at paras 54 – 56 to the issue of whether that report, and what is said about the appellant's mental health, could explain any of the inconsistencies. The judge said this:

> "54. [Counsel for the appellant], when asked by me, said that he did not want to make an application to treat the Appellant as a vulnerable witness. However, the Appellant is receiving treatment for depression and the medical report states that she has signs and symptoms of a severe depression (paragraph 97) and signs of PTSD. There is also a letter dated 18 July 2018 at page 93 of his bundle which states that he is being supported by Mental Health Support Service for PTSD and severe depression. I have considered whether the Appellant's mental condition could have affected his evidence such to explain the discrepancies. In the Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive Appellant guidance paragraph 14 – 15 provides:
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> > "14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and Appellant compared to those are not vulnerable, in the context of evidence from others associated with the Appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
> >
> > 15. The decision should record whether the Tribunal has concluded the Appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the Appellant had established his

> or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind".
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> 55. In **AM (Afghanistan) v SSHD [2017] EWCA Civ 1123** the Court of Appeal declined to provide a checklist of issues for judges and practitioners but reiterated the principles to consider (see [30] – [35] in particular) and warned against overelaborate interpretation of the Guidance note.
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> 56. At paragraph 101 of the medical report Dr Mason states that it is common in cases of sexual assault owing to feelings of shame, fear, emasculation and the expectation not of being believed that late disclosure takes place. However, there is nothing in the medical report that explains why the Appellant's account would contain the inconsistencies identified above in relation to the core of his account."

27. Then at para 61 the judge said this:

> "I have assessed his claim holistically. I have found his evidence inconsistent and implausible in relation to the core of his account for the reasons given above. I do not find that these inconsistencies can be explained by the fact that he was a victim of trauma or the effluxion of time."

28. The difficulty, as I see it, with this reasoning is that Dr Mason does provide supporting evidence as to why the Appellant may not have given a consistent account or may not have disclosed certain matters earlier.

29. At para 99, Dr Mason identifies that the appellant has signs and symptoms of PTSD.

30. At para 100, Dr Mason, in relation to the appellant's failure to disclose earlier the full extent of his trauma and ill-treatment in detention, notes that this is symptomatic of coping "by avoidance" and states that:

> "This is a common coping response and such conscious, or sub-conscious, avoidance is a commonly seen feature of PTSD."

31. At para 101 Dr Mason refers to it being common for there to be late disclosure in cases of sexual assault owing to feelings of shame, fear, emasculation and the expectation of not being believed.

32. At para 102, Dr Mason described the appellant's symptoms when recounting the events of ill-treatment and again refers to the association "of avoidance" and that the effect of:

> "This avoidance and the associated time lag between the events and being asked to recount them is likely to result in some inaccuracies in recall."

33. At para 103, Dr Mason refers to the level of distress and symptoms of mental ill-health exceeding that which would have been expected by an individual "who had not experienced any ill-treatment".

34. At para 104, consistent with the Istanbul Protocol, Dr Mason notes that she considers the possibility of fabrication and does not consider "there to be any false allegation in this case".

35. In her summary section, in particular at paras 109 – 112, Dr Mason again identifies the appellant's mental health and other symptoms consistent with PTSD and again identifies the impact of his circumstances on the integrity of his evidence.

36. In my judgment, the judge failed to grapple with this evidence and her reasons, in para 56 of the determination for finding unpersuasive the expert report to which she considered "considerable weight" should be given, were not adequate to justify her conclusion that the integrity of the appellant's evidence was not materially affected by his mental health.

37. For these reasons, therefore, I also accept Ms Sriharan's submission that the judge erred in law in reaching her adverse credibility finding.

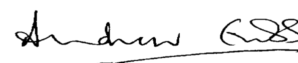
38. For these reasons, ground 1 is made out. Mr Howells accepted that, in those circumstances, the judge's decision should be set aside and remade *de novo*.

<u>Decision</u>

39. The decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. That decision is set aside.

40. Given the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statements, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge L Murray.

Signed



A Grubb
Judge of the Upper Tribunal

23, April 2019