Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/14267/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 December 2019	**On 10 January 2020**
Extempore decision	

Before

THE HONOURABLE MR JUSTICE GOSS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GR
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Ms S Akinbola, Counsel, instructed by Duncan Lewis Solicitors

DECISION AND REASONS

This is an appeal of the Secretary of State. In a Decision and Reasons promulgated on 2 September 2019, First-tier Tribunal Judge Flynn allowed on human rights (Article 3) grounds an appeal brought by the claimant before the First-tier Tribunal, the respondent before these proceedings, against a decision of the respondent to refuse his asylum and human rights claim made in

response to a decision that the respondent took to deport him to Sri Lanka. We will refer to the appellant before the First-tier Tribunal as "the claimant", and will continue to refer to the Secretary of State as the respondent.

The claimant was born on 8 December 1974. He arrived in this country in 2002 and claimed asylum. His claim was refused by the Secretary of State and his subsequent appeal against that refusal was dismissed by the Adjudicator on 4 December 2002. The basis of this claim was that he had been detained as a Tamil in the years leading up to and during the initial stages of the civil war in Sri Lanka. He fled the persecution that he claimed would have awaited him in that country, seeking asylum here. The claimant submitted another appeal, this time on human rights grounds, which was dismissed in 2004. The 2004 adjudicator found that the claimant's return to Sri Lanka would not entail a breach of Articles 3 or 8 of the European Convention on Human Rights.

The claimant committed a number of criminal offences following the refusal of his appeal before the Adjudicator in 2004. Initially, the offences committed by the claimant were at the lower end of the spectrum of severity. In March and May 2006, he was convicted of assault and sentenced to three months' imprisonment and 120 days' imprisonment respectively. In December 2006, the claimant was again convicted of assault and given a hospital order under Section 37 of the Mental Health Act 1983.

The claimant went on to commit a far more serious criminal offence in 2010. He stabbed a man who was living with him at the sheltered accommodation they shared 21 times. The victim died. The claimant pleaded guilty to the offence of manslaughter by reason of diminished responsibility. He was subject to a hospital order.

The decision of the Secretary of State to refuse the claimant's most recent human rights and protection claim was premised primarily on section 72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Under section 72, a person is presumed to have been convicted of a particularly serious crime and to be a danger to the community of the United Kingdom, for the purposes of the construction of Article 33 of the Refugee Convention, when the individual has been sentenced to a period of imprisonment in excess of two years. It is a rebuttable presumption. Judge Flynn found that the claimant had not rebutted the presumption. The effect of having reached that finding was that section 72 required the judge to dismiss the claimant's appeal to the extent it related to the refusal of his asylum claim: see section 72(10).

Section 72 does not affect the separate obligation upon the First-tier Tribunal to consider every matter raised as a ground of appeal, pursuant to section 86(2)(a) of the 2002 Act. See Essa (Revocation of protection status appeals) [2018] UKUT 00244 (IAC) at [21]. As such, it was necessary for the judge to make substantive findings of fact on the claimant's asylum claim. The judge rightly proceeded to analyse the claimant's claim under relating to the likely risk he would face upon his return to Sri Lanka, in light of GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). The judge found that the risk profile the claimant was likely to experience combined with his

mental health conditions was such that it was likely that he would face a real risk of cruel, inhumane or degrading treatment at the border.

The Secretary of State appeals against that finding. She contends that the judge failed to have proper regard to the two previous decisions of the adjudicators which formed the starting point for the judge's analysis.

Secondly, the Secretary of State submits that the judge's application of GJ and others was flawed. Mr Avery contends that the judge reached findings which were not open to her on the evidence. At [66] of the decision the judge said:

> "It is well-established that anyone returned after a long absence from Sri Lanka, especially someone returning from a lengthy residence in the UK, will be interrogated by the authorities about their activities overseas; and also that such a person cannot be expected to lie. It is the perception of the authorities that is the deciding factor, not the level of activities."

Mr Avery submits that that was a finding which was made without evidence and there was no basis for the judge to find that there was routine questioning from those subject to enforced return from this country.

Mr Avery also relies on the account that the claimant gave to the judge considering the appeal in 2002, stating that it was materially different from that he advanced before Judge Flynn. There are details provided in the account provided by the claimant in 2002 relating to initially having lived on a small island off the coast of Sri Lanka before moving to Tamil-controlled areas on the mainland. Mr Avery submits that that is an account which was inconsistent with the account that the claimant provided to Judge Flynn. As such, he submits that the judge should have reached adverse credibility findings against the claimant. It was not open to the judge, he submits, to find that the claimant was now an essentially credible individual.

The judge had found at [63] of the decision that the mental health symptoms exhibited by the claimant provided a full explanation for the discrepancies in the evidence that he provided to the judge in 2002, which therefore permitted Judge Flynn to depart from those findings, which otherwise formed the starting point. Mr Avery's submission is that a proper examination of the decision of the Adjudicator in 2002 reveals that it was not inconsistencies in the account provided by the claimant on that occasion which led to the rejection of his account, it was simply broader credibility concerns that the judge had. Similarly, Mr Avery submits that the account provided by the claimant to Dr Agarwal, who had provided a report which was produced before Judge Flynn, was at odds with the account that he had provided both in 2002 to the first judge, and on this occasion during the appeal we are concerned with in these proceedings.

In our view, Judge Flynn reached findings of fact which were open to her on the evidence she heard. The suggestion before us that the account advanced by the claimant was materially different cannot be sustained, following a comparison of the accounts provided by the claimant on each occasion. It is true to say that there was additional detail and additional emphases in the

account provided by the claimant to the judge in the decision in 2002. However, we note that at [32] of Judge Flynn's decision the following is recorded: "In Ms Lambert's submission [on behalf of the Secretary of State], the asylum claim was not materially different from 2002." It seems to us, therefore, that the position that the Secretary of State adopted before Judge Flynn in the First-tier Tribunal was that the claimant had advanced a narrative which was broadly similar to that which the 2002 adjudicator previously considered and dismissed. It is surprising, therefore, that the submissions of the Secretary of State before us have now departed from the position that she took before the First-tier Tribunal, when she submitted to the judge that the two claims were in essence materially the same and, therefore, by implication the factors which applied in the judge's analysis in 2002 which led to the dismissal of the original appeal should apply with equal force on this occasion. There is no material inconsistency.

Turning to the complaints relating to the report of Dr Agarwal, we do not consider that the explanations the claimant provided of the experiences he claimed to have endured in Sri Lanka were so significantly at odds with what was before Judge Flynn so as to render the judge's reliance on the report by Dr Agarwal irrational. We remind ourselves that the task of the Upper Tribunal is not simply to substitute our own view in relation to the findings of the judge below, but rather to consider whether the judge reached findings of fact which were irrational or otherwise not open to her on the evidence. In relation to the claimed disparities between the 2002 narrative provided by the claimant and that which he provided before the judge below in these proceedings, we do not find that this is a submission which is made out. There was additional detail in 2002. There were no inconsistencies.

In relation to the judge's general treatment of the 2002 and 2004 decisions, we do not accept Mr Avery's submissions that the judge materially erred. The judge rightly recorded that those decisions represented the starting point for her analysis, pursuant to Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702. She then considered the developments in the evidence, and in particular the report from Dr Agarwal and a country expert report from Dr Smith, which she outlined in detail at [69] of the decision. Those were all factors which post-dated the earlier decisions of the adjudicators and of which the first two adjudicators did not have the benefit when considering the claimant's initial appeal in 2002 and his human rights appeal in 2004. It follows therefore that, having correctly directed herself as to the import of Devaseelan in [50] of her decision, the judge then rightly considered that any facts happening since the earlier determination may properly be taken into account for the purposes of departing from the starting point which had previously been adopted by different judges.

Mr Avery submits that the judge failed to apply the country guidance case of GJ in relation to the likely risk of the claimant at the border. It is true that the conclusions of GJ focussed primarily on those who are perceived to be a significant threat to the post-conflict unitary state in Sri Lanka. However, country guidance cases such as this cannot cater for every eventuality. In particular, the headnote guidance in GJ was addressing the case of returned

asylum seekers generally, and not those with the significant and extensive mental health difficulties experienced by this claimant. We have already documented how the claimant pleaded not guilty to murder, and guilty to manslaughter, by reason of diminished responsibility on account of his paranoid schizophrenia. The medical evidence demonstrates that that is a condition which has not improved, and which continues to trouble the claimant to a very significant extent to this day.

Dr Smith's report, which was before Judge Flynn, concluded that it was reasonably likely that the claimant's name was a on a "stop list". Other than referring to the headnote of GJ in order to support his submission that the claimant would not be sought by the authorities in Sri Lanka, Mr Avery did not engage with the detail of Dr Smith's findings. He did not seek to demonstrate, for example, that Dr Smith had erred in his conclusions, or that the judge had misread Dr Smith's conclusions in order to support a finding which could not be sustained on the contents of the report. Accordingly, it was well within the range of findings open to the judge to find that the significant mental health conditions experienced by the claimant, combined with the likely questioning which the claimant would be likely to face at the border (see [66] of the judge's decision), that there was a risk that the claimant would be subject to cruel, inhumane or degrading treatment. The judge then proceeded to allow the appeal on Article 3 grounds. In our view, that was a conclusion she was entitled to reach on the evidence before her.

For those reasons, the decision of Judge Flynn does not involve the making of an error of law and stands.

We make a direction for anonymity in light of the risk findings of the judge below.

Notice of Decision

The appeal is dismissed. The decision of Judge Flynn did not involve the making of an error of law.

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

Unless and until a Tribunal or court directs otherwise, the claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the claimant and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Stephen H Smith* Date 19 December 2019

Upper Tribunal Judge Stephen Smith