



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03906/2016

THE IMMIGRATION ACTS

Heard at Field House
On 16 May 2018

Decision & Reasons Promulgated
On 14 June 2018

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

TL
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Saini, Counsel instructed by A & P Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sri Lanka. His date of birth is 1 January 1977.
2. The Appellant came to the UK on 30 July 2014. He made an application for asylum that same day. On 29 July 2004 the application was refused and certified as clearly unfounded. This decision was withdrawn following a successful application for judicial review. The Secretary of State reconsidered the application and refused it on 4 November 2004. The Appellant appealed against that decision. His appeal was dismissed by the then Adjudicator Mr S A Pedro ("the first judge") in a decision of 9 February 2005, following a hearing on 31 January 2005. The Appellant's application for permission was refused on 3 May 2005. He became appeal rights exhausted on 11 May 2005.

3. On 22 June 2011 the Appellant was convicted of conspiracy to commit fraud and he was sentenced to a term of imprisonment of 21 months. Following this the Respondent, on 21 May 2015 made a decision to deport him. On 18 June 2015 the Appellant made a further application restating his asylum claim and under Article 3 and 8. This application was refused on 5 April 2016.
4. The Appellant appealed against the decision of 5 April 2016. His appeal was allowed by Judge of the First-tier Tribunal C A Parker (“the second judge”) in a decision of 21 June 2017, following a hearing on 7 June 2017. The appeal was allowed on asylum and human rights grounds.
5. The Secretary of State was granted permission to appeal by Upper Tribunal Judge Kekic on 3 August 2017. The matter came before me on 18 September 2017 to determine whether the second judge erred. I concluded that the second judge materially erred and I set aside her decision. The error of law decision reads as follows:

“29. The second judge properly directed herself in relation to Devaseelan and the guidelines; however, I am satisfied that she did not properly apply them. In relation to the Appellant’s father’s affidavit, the ‘very good reason’ identified by the judge does not stand scrutiny because it misunderstands or misrepresents the decision of the first judge. The Appellant’s evidence before the first judge was that he had been in contact with his father for some time after his departure and that contact had ceased shortly before the hearing (in December 2004). The first judge did not accept his evidence, but the point he made was that the Appellant had had ample time to obtain evidence from his father, particularly in the light of the letter from the LTTE which according to the Appellant had been hidden at his home. When he was asked about this by the first judge, he did not say that he had not been able to obtain the evidence because he was not in contact with his father. He stated that they did not discuss such matters. This does not sit well with the evidence before the second judge that he had lost contact with his father and that was the reason why there was no evidence from him before the first judge and undermines the reason given by the second judge for departing from the conclusions of the first judge.

30. In relation to the Appellant’s sister’s evidence, the second judge did not engage with the failure to adduce evidence from her at the hearing before the first judge; particularly, in the light of the first judge’s concerns about the lack of evidence. The second judge did not identify the reasons why there was no evidence from the sister before the first judge and failed to identify a ‘very good reason’ why the Appellant’s failure to adduce this evidence before the first judge to rely on it and depart from the findings of the first-judge.

31. Whilst I appreciate that there was significant medical evidence and a statement from N (relating to matters post-date the hearing before the first judge) capable of corroborating the Appellant's account, the failure to properly apply the Devaseelan guidelines is a material error. The error goes to the heart of the second judge's credibility assessment and constitutes a material error of law. The judge attached significant weight to the evidence of the father (in particular when concluding that there was a continuing interest in the Appellant by the authorities) and the sister. For this reason the decision of the second judge is set aside.
32. The entire decision of the judge is unsafe because the credibility findings are fundamentally flawed. However, for sake of completeness, I will briefly engage with the remaining grounds. In relation to the grounds of appeal in respect of the medical evidence, at the hearing before me, it became apparent that Mr Martin was provided with the reasons for refusal decision and the decision of the first judge, contrary to the assertions in the grounds. In relation to Dr Dhumad, he had before him the Reasons for Refusal Letter. Whilst his report does not refer to the decision of the first judge, the Reasons for Refusal Letter cites at length the first judge's decision, making it clear to the reader that there has been a previous decision by a judge who rejected the Appellant's claim. I note that Ms Jones was instructed, that the previous determination was before Dr Dhumad, but she had no evidence of this."
6. The matter was adjourned for a resumed hearing to 20 November 2017. On that occasion the appeal was adjourned at the request of the Appellant. Mr Saini explained that had been instructed very late in the day and was not ready to proceed with the hearing. The appeal was adjourned until 28 February 2018. An application was made for an adjournment by the Appellant on 5 February 2018 on the basis of Counsel's unavailability. The application was refused by Upper Tribunal Judge Jordan on 6 February 2018. In any event because of my unavailability the appeal was adjourned until 16 May 2018.

The Decision of the First Judge

7. The first judge summarised the Appellant's account at [4] of his decision. There is no challenge to this. It reads as follows;
- "4. In summary, the appellant claimed that he feared persecution from the Sri Lankan authorities, the EPDP and the LTTE should he return to Sri Lanka. He is a Tamil born in Jaffna. He and his family then lived in Vavuniya, where the appellant developed his business. He described his occupation as a government building contractor. He also operated an office in Colombo, and travelled backwards and forwards between Vavuniya and Colombo between 1996 and 2004. The incident which caused him to decide to leave Sri Lanka occurred on 9th July 2004 in Colombo. Prior to that, he claimed that he had experienced only minor difficulties. He

referred to a specific incident in 1998, during which he was detained by the police and ill-treated. He was taken to court and accused of being involved with the LTTE, but was acquitted. Prior to the incident in July 2004, the appellant had been engaged/employed as a government building contractor, and also carried out work for the LTTE, EPDP and the army. In July 2004, he was engaged in construction work for the EPDP and delivered materials to the particular site for the purpose commencing such work. However, on 1st July 2004, he received a letter from the LTTE warning him not to work for the EPDP. Therefore, he stopped working for the EPDP. On 9th July 2004, he was visited at his office in Colombo by the EPDP and army intelligence officers. They seriously ill-treated him, but he was able to escape after being allowed to go to the toilet. He went to his friend's house in Colombo and remained there until 16th July 2004. He then left Sri Lanka pursuant to arrangements made by his father with an agent. He travelled to the United Kingdom via Dubai and claimed asylum on arrival in the United Kingdom."

8. The first judge rejected the Appellant's evidence that he received a letter on 1 July 2004 from the LTTE warning him to stop working for the EPDP. He concluded at [18] as follows;

"I find this scenario does not sit comfortably with the circumstances described by the Appellant relating to his occupation, as well as the objective position. I take into account the Appellant's described occupation as a government building contractor. He had an office in Vavuniya for a number of years, and indeed he and his family had lived in Vavuniya since he was a child. His work activities must have been well known in the area for a considerable period of time. Indeed, the Appellant claimed at his interview that the EPDP had required him to carry out work for them because he had been carrying out work for the LTTE. If the EPDP were hostile to that fact, it would be surprising that they would not have taken any action against the Appellant for carrying out work for the LTTE. Perhaps, this could be explained by the fact that matters have calmed down in Sri Lanka since the peace process was initiated. If so, it does not explain why the Appellant would have been warned by the LTTE not to carry out work for the EPDP. Moreover, I find the scenario of the LTTE taking the trouble to deliver a letter by hand to the Appellant warning him not to carry out work for the EPDP on 1 July 2004 lacks credibility, bearing in mind that he has alleged he was already carrying out work for the LTTE and that they could simply have warned him verbally or taken action against him if they felt strongly about the matter, rather than hand delivering (sic) a letter." In respect, I note that the Appellant has failed to produce that letter. At the hearing, the Appellant claimed that he had kept the letter in a safe place in a tin can buried in the earth. He went on to confirm that that tin can is buried at his home in Vavuniya. When asked by Mr Lumb to explain why he had not requested that letter to be sent to him by his family, the Appellant claimed that he could not do so because although he was in contact with his father on the telephone until recently, they did not discuss such matters on the phone. Moreover, the

Appellant claimed that he had a map indicating where the tin can containing the LTTE letter is buried, and only he knows where that is. The Appellant explained that he had hidden the letter because it would be very dangerous to show the letter to anyone. When asked to explain why he did not simply destroy the letter bearing in mind its alleged dangerous nature, the Appellant claimed that he thought it would be useful one day and so decided to keep it."

9. The first judge found at [19], that the Appellant was 'simply fabricating his account regarding the letter as he went along and providing explanations for his actions regarding the letter which lacked credence'. The first judge found that letter was a document which the Appellant claimed was in existence and that he knew the location and yet he had made no effort to produce the letter in support of his claim, despite the fact that he confirmed that he was in contact with his father in Sri Lanka for a considerable period after his departure and until recently. The first judge concluded that the letter had not been produced because it did not exist and that the Appellant had given a 'fanciful account regarding the letter, and that he has fabricated this particular allegation and incident in order, falsely, to bolster his claim to asylum'.
10. The Appellant's evidence was that he was visited by the EPDP and army intelligence on 9 July 2004 and accused of being involved in a bomb incident in Colombo on 7 July 2004. The first judge noted that the accusation bore no relation to the previous incidents described by the Appellant, including the letter of 1 July 2004 and, in his view, there was no reason why the Appellant would suddenly be suspected of having been involved in a bomb incident. The first judge recorded that the Appellant claimed he was beaten severely and tortured whilst he was detained and that he was burnt with a hot iron and that he suffered scarring (see [21]). He recorded that there was no medical report or corroboration of such injuries even though the alleged injuries occurred only some eleven days or so prior to the Appellant's arrival in the UK.
11. At [23] the first judge recorded that at one stage in the Appellant's evidence he claimed that he and his father did not discuss problems on the telephone through fear of discussing such matters and yet his evidence was that his friend with whom he was staying telephoned his father in Vavuniya from Colombo to tell him that the Appellant had a problem and where he was staying. He concluded that this was inconsistent. In relation to the Appellant and contact with his father in Sri Lanka, the first judge recorded, at [31], that the Appellant confirmed that he was in contact with his father in Sri Lanka until December 2004 but he claimed that he lost contact with them because of the tsunami. The first judge did not believe him as he concluded that there was no 'credible explanation' why his father, a government employee, would suddenly move to Mullaithavu immediately prior to the tsunami having lived in Vavuniya for many years. The judge concluded

'I simply found that the Appellant was trying to deny, falsely, knowledge of the whereabouts of his parents and his two sisters, whom he claimed disappeared some time ago, in an attempt to indicate that he has no family to return to in Sri

Lanka. I do not believe him, and I believe instead that he would be able to return to his immediate family in Sri Lanka and resume his family life there’.

12. The first judge recorded, at [25], that the Appellant claimed in his screening interview that he was an only child with no members of his family in the UK, which was not the case because it transpired at his subsequent interview that he had a sister in the UK who arrived here in 1999 and that she at the date of that hearing had indefinite leave to remain.
13. The first judge was not satisfied that the Appellant was of any adverse interest to the Authorities, the LTTE, EPDP or any other group. He rejected the Appellant’s evidence in relation to his escape, finding that it was not credible.
14. There was no medical evidence before the first judge. He considered Article 8. He concluded that there was no corroborative documentary evidence to establish that the Appellant had a sister in the United Kingdom or if she exists her immigration status here. He recorded that the Appellant told him at the hearing that his sister had driven him to the court but had been unable to stay because she has children. The judge found that the position was ‘totally unsatisfactory’ (see at [31]) and he stated;

‘Even if the sister had been unable to attend the hearing, I am surprised that there is not even a letter from the sister giving her support to the Appellant’s appeal or claim under Article 8. I do not understand why no documentation has been produced to corroborate the sister’s immigration status in the United Kingdom. ...’.

15. The first judge dismissed the Appellant’s appeal, finding that the Appellant was not credible. He found that the evidence relating to his employment and involvement with the EPDP and the Sri Lankan Army was fabricated. In respect of the Appellant’s evidence relating to the incident in 1998 the first judge concluded at [15];

“The fact is that even on the account given by the Appellant he was acquitted by the court. Therefore, he was found innocent of any accusation that he was involved with the LTTE. This in itself would indicate that he would have been of no further interest to the Sri Lankan authorities at that time. Whilst any ill-treatment received by the Appellant during that incident is not to be condoned, and indeed is to be condemned, the fact is that on the account given by the Appellant he was acquitted by the court. As I say, I do not find that this particular incident, even had it occurred as described by the Appellant, had any connection with his subsequent departure from Sri Lanka in July 2004, some six years later.”

The Appellant’s evidence

16. The Appellant submitted a bundle containing 60 pages (AB 1). There was an additional bundle (AB 2).

The report of Dr Saleh Dhumad of 5 February 2017 (AB 1 p1-24)

17. Dr Dhumad is a consultant psychiatrist at Brent Mental Health Services. He is approved by the Secretary of State as having special experience in the diagnosis and treatment of mental disorder in accordance with Section 12 of the 1983 Act. He is entered on the specialist register of the General Medical Council of the UK for general psychiatry and substance abuse. His special interest is post-traumatic stress disorder (PTSD). He interviewed the Appellant on 31 January 2017. He set out the documents that he had before him and they include the Appellant's medical records and the scarring report prepared by Dr Andres Martin of 28 January 2017.
18. Dr Dhumad recorded in his report what the Appellant told him (see [6.2] of his report). He told Dr Dhumad that he was tortured by Sri Lankan authorities in 2004 and that officers from the army and Tamil party groups came to his office. He was accused of working for the LTTE and beaten unconscious. His father arranged for an agent to help him escape Sri Lanka. Two of the Appellants sisters are settled in the UK. He worked for both the LTTE and the government. His company was contracted to do roadworks and building work for the LTTE and that he did similar work for the government. Government officers accused him of bringing LTTE members to Colombo and he was accused of being involved in a bomb blast. He told Dr Dhumad that he was interrogated and tortured in his office. He was beaten with rifle butts, stamped on, burned with hot iron on his back and left lying on the floor. He denied mental health problems prior to the incident in 2004. His mental health has deteriorated since then. He was not able to sleep. He was worried and frightened and he heard voices. He told Dr Dhumad that he had been admitted to the Mental Health Unit at Northwick Park Hospital for over three months in 2005 where he was treated for depression and given antidepressant medication. The Appellant felt safe in the UK. He has been under the care of mental health services on and off since his arrival in 2004.
19. The Appellant's mental health condition deteriorated after his arrest in the UK and sentence in 2011. He was released after ten months. He felt hopeless and scared of deportation. He heard noises and could not sleep. He took an overdose and was taken to A&E. He was treated with antidepressant medication and received counselling from Harrow Psychological Services in 2012. He was diagnosed with PTSD and schizophrenia unspecified. He was treated with antidepressants and antipsychotic medication. He was admitted to Northwick Park Hospital numerous times as an informal patient and he stayed between three to four months on each occasion.
20. At section 12 of the report Dr Dhumad assessed PTSD according to the ICD10 criteria. He assessed the Appellant's medical records which revealed that the Appellant has history of related symptoms of poor sleep and flashbacks. There was an inpatient episode in 2005 but no records pertaining to that were available. He saw a psychologist on three occasions in 2012. In 2015 he was referred by his GP to and assessed by an "Assessment and Brief Treatment Team in Harrow." He complained

to them of hearing voices that reminded him of his experiences in Sri Lanka whilst imprisoned. He had some suicidal ideation but no intention to end his life. His mood was noted as stable. He presented at that time with symptoms of PTSD, nightmares and feeling hopeless in regard to his present situation which was impacting on his sleep. He was advised to continue with antidepressant medication, referred to the psychological services and discharged to his GP. It was noted in his medical records that he presented to A&E frequently due to fear and worries at night. He was seen by Harrow Home Treatment Team from 25 to 30 June 2016. It is recorded that he was suffering from PTSD. He received antipsychotic medication at night and antidepressant medication. He was followed up in the community by a Community Mental Health Team under the care of Dr Husni, a consultant psychiatrist.

21. Dr Dhumad noted on examination that the Appellant appeared severely depressed, very anxious and distracted due to hearing noises. He felt helpless about his safety in Sri Lanka and believed that he would be killed. He felt helpless and suicidal. His sleep was poor and he had nightmares. He was worried that he will be deported to Sri Lanka. Though he did not report delusions he has been hearing voices in the second person (auditory hallucinations). According to Dr Dhumad he was suffering from PTSD.
22. It is Dr Dhumad's opinion that the Appellant's presentation was consistent with a diagnosis of severe depressive episode with psychotic symptoms as defined in the International Classification of Disease 10th Edition, Mental and Behavioural Disorder. It is likely that he was suffering from schizophrenia. He had been suffering from auditory hallucinations for a long time and his symptoms remained unsettled despite a high dose of antipsychotic medication. He suffered from severe PTSD symptoms such as avoidance, flashbacks and nightmares. His symptoms met the criteria for PTSD. This is consistent with the diagnosis of Harrow Mental Health Services and the Appellant's GP. It is Dr Dhumad's opinion that the most likely cause of the Appellant's PTSD is exposure to torture and the nature of the symptoms he described is consistent with his account of torture.
23. At [19.6], Dr Dhumad assessed risk of suicide. In his opinion it is significant in the context of fear of removal to Sri Lanka. The main risk factor is the Appellant's severe depression, PTSD and hopelessness and two previous overdoses. Hopelessness has a serious and significant association with suicide risk and the risk will be greater when the Appellant feels that deportation is close. Any threat of removal will in Dr Dhumad's opinion trigger a significant deterioration in the Appellant's mental suffering and increase the risk of suicide. In Dr Dhumad's opinion the Appellant is very likely to suffer a serious deterioration in his mental health if he is returned to Sri Lanka.
24. At [19.8] Dr Dhumad considered the possibility that the Appellant may be feigning or exaggerating his mental illness. He stated that he has not taken the Appellant's story at face value but carefully examined his symptomatology and his emotional reactions during the interview. He considered the views of other professionals

involved in his care. It is Dr Dhumad's opinion that the Appellant's clinical presentation was consistent with a diagnosis of severe depression and severe PTSD. In Dr Dhumad's opinion it is extremely difficult to feign a full-blown mental illness as opposed to individual symptoms.

25. In Dr Dhumad's opinion the Appellant was not fit to lie given the state of his mental health and the risk of ending his life. It is Dr Dhumad's opinion that he is unfit to attend a court hearing or give oral evidence. He is severely depressed, anxious, and hopeless and his concentration is poor. It very unlikely that he would be able to follow the court proceedings in a meaningful way or tolerate cross-examination. The Appellant is unfit to instruct his solicitor and provide a statement.

The evidence of Dr Andres Izquierdo-Martin of 28 January 2017 (this is not in either bundle. It was served separately)

26. Dr Martin examined the Appellant on 20 January 2017.
27. The Appellant told Dr Martin that on 9 July 2004 he was held by the army and EPDP members and during his detention he was interrogated and subjected to different kinds of tortures including being slapped, kicked and punched and burnt with a hot iron box. Dr Martin examined the Appellant and recorded that he had several round scars in a v-shaped pattern on the middle of the upper-third of the back and several small scars (0.8 cm – 1.5 cm wide) on the anterior aspect of both knees. It is Dr Martin's opinion that the scarring is consistent (with reference to the Istanbul Protocol) with their attributed cause.
28. In respect of the scars on the Appellant's back the Appellant told Dr Martin that the scars were caused by being burnt with a hot iron box during his detention in 2004. The doctor opined that the appearance, distribution and pattern of scars were highly consistent with intentionally caused injuries with a hot object shaped as described by the Appellant. Dr Martin stated that alternative causes (dermatological conditions such as abscesses or infection such as chickenpox) could result in similar scars however it is very unlikely in view of the pattern of distribution of the scars and their presence in a limited area. Accidental injury was possible but less likely as the duration of exposure with the source of injury necessary to produce this type of burn is longer than the reflex withdrawal time needed to remove the affected part of the body after.
29. Self-inflicted injuries are in Dr Martin's opinion extremely unlikely in view of the position of the scars in an area difficult to self-reach. In addition, self-inflicted injuries tend to be more superficial. He considered whether they were caused by agreement with a third party. In his opinion although self - infliction by proxy (SIBP) is a possible cause which cannot be disregarded he considered that there were no presenting facts to make it more than a remote possibility.
30. In relation to the scars on the Appellant's legs the Appellant told Dr Martin that they were caused after being repetitively kicked on the legs during his detention in 2004.

In Dr Martin's opinion the appearance of the scars was consistent with intentionally forced injuries by repetitive blunt trauma as described by the Appellant. Alternative causes were considered and Dr Martin stated that the scars were less likely to have been caused by skin infections or other inflammatory skin conditions. It was possible that they could have been caused by accidental injuries for example repetitive falls during professional sport or training (for example military) or everyday activities. Other possible intentional causes apart from torture are self-infliction. Although this is theoretically possible it was unlikely in view of the appearance and position of the injuries. Another possible intentional cause is causation by agreement and Dr Martin opined that there were no presenting facts to make it more than another possibility.

31. All scars are fully matured and this is consistent with injuries that are more than one year old.
32. Dr Martin concluded that the scars, taken together, were highly consistent with the account of torture. In respect of SIBP it was impossible to fully discard this as a possible cause but he did not find evidence to support it and it remained in the opinion of Dr Martin just a remote possibility.

Other Medical Evidence

33. There was a Home Treatment Team (HTT) discharge summary plan relating to the Appellant. In response to a referral from the psychiatric liaison service. The diagnosis described as the principal diagnosis is PTSD mild depressive episode. Referral followed attendance to the Accident and Emergency department when the Appellant complained of low mood and recurrent suicidal ideations. On assessment he reported that he was experiencing recurrent dreams and hearing the voices of soldiers who had captured and tortured him. He stated that he had taken an overdose five years ago and had not repeated it. There is no record indicating any earlier experience of self-harm. The Appellant was discharged from the care of the home treatment on 7 July 2016 back to the CMHT.
34. There was a letter of 18 August 2016 to the Appellant's then GP Dr N Merali from Central and Northwest London NHS Foundation Trust. The document is a new patient assessment and indicates that the Appellant was diagnosed with PTSD and schizophrenia unspecified. It is indicated that the Appellant claimed to have flashbacks and hear voices. He stated that during the war he was tortured. He reported that he had been admitted to Northwick Park Hospital on several occasions as an informal patient during which time the length of his stay had been three to four months. On examination the Appellant was found not to be suicidal. He was found to have an established diagnosis of PTSD.
35. There is a letter of 5 June 2017 "To Whom It May Concern" from Dr S Saleem (the Appellant's GP). He stated that the Appellant came to see him on 5 June 2017 with "worsening of depression and post-traumatic stress disorder symptoms". The doctor stated that the Appellant was having severe flashbacks and strong suicidal thoughts.

The Appellant stated to his doctor that would not be able to cope with interrogation and cross-questioning. In the doctor's opinion asking critical questions about his situation in Sri Lanka and his past would worsen his symptoms and could likely lead to a suicide attempt. Dr Saleem stated that the Appellant is waiting for counselling sessions.

The Evidence of MT

36. MT's gave evidence at the hearing before me. She made two witness statements one of 6 June 2017 (p 36 AB1) and a second of 15 December 2017 (p1 AB2). She adopted these statements as her evidence-in-chief.
37. Her evidence in her statement of 6 June 2017 is as follows. MT is the Appellant's sister. She is a British citizen. She is married and has two children who are similarly British citizens. The Appellant arrived in the UK on 20 July 2004. He fled Sri Lanka for his own safety. He lived with her family since his arrival from 2004 until May 2016. He is part of the family unit and her two children are attached to him. MT moved to High Wycombe to accommodate her children's schooling but arranged accommodation for the Appellant in the locality of the family home where they had resided together. He was registered with a GP in South Harrow and regularly has treatment for his unstable mental health. She was in regular contact with him every day by phone and visits and she tried her best to keep him normal by giving him support. The Appellant has family life here. They have another sister who has also been assisting him. MT has been supporting her brother morally and financially. She looked after him when he was hospitalised. His mental health was deteriorating and she was concerned about him.
38. MT's evidence in her most recent statement is that she and her husband told the Appellant's previous solicitors in 2004 that they were not willing to give evidence. They both travel frequently to Sri Lanka. Her brother was a wanted person and her father was facing problems. Until May 2009 Tamils were continuously monitored by the authorities and questioned on return. The Appellant could not collect documents from her father in Sri Lanka because he had lost contact with him. He was moved to Mullaitivu to avoid the difficulties from government and paramilitary forces. On the day of the hearing before Judge Pedro, she went to court with the Appellant and dropped him off and collected him. MT has been supporting her brother whose mental health is deteriorating.
39. MT gave oral evidence at the hearing before me. She could not remember whether the Appellant asked her to give evidence at the hearing before Judge Pedro. She did not know whether he knew why she did not do so. The Appellant's health has deteriorated since the report of Dr Dhumad. He found it difficult to cope. He went to his GP last week and he continued to take medication. She has not been asked by the Appellant's solicitors to obtain up to date evidence. He attended Bentley House which is a mental health centre whenever he had an appointment. He last went to Northwick Park hospital about 5 months ago and was there for a day. He was taken there by friends. Sometimes he has episodes where he does not sleep or take his

medication. He became exhausted and talked about torture and taking his own life. He was last sectioned in 2004. He always said that he wants to die.

40. The Appellant is not able to give evidence because he did not talk like a normal person. He became angry and did not talk about anything relevant. She spoke to the Appellant daily. He is lived in a shared house with her friends. She arranged it. She and her family had to move to enable her son to attend a grammar school. They decided that it was not good for the Appellant to move out of the area and away from his GP, mental health centre, his friends and familiar surroundings. The house is very close to the family home where he lived between 2004 - 2015. She paid the Appellant's rent of £300 per month and looked after everything. She attended four times a week when she travelled to Harrow for her children's tuition. It was a 30-minute drive. Each visit lasts 1 -1 ½ hrs. Sometimes when she attended he was asleep. He liked to go to the park with the children. She made sure that he ate food and took medication. She reminded him daily to take his medication otherwise he did consistently take it and had relapses. She tried to help him forget the past. She encouraged him to change his bed linen and often did it for him. At times she took him to the bathroom. Their parents were still alive in Sri Lanka but they were in their 80s. They were too old to look after him. She was effectively a mother to the Appellant. He depended on her for everything and thought of her as his mother. She did everything for him. He had no source of income and was financially dependent on her.

The Evidence of RCT

41. RCT's evidence is contained in his affidavit of 2 June 2017 (p 45, AB1) and his additional witness statement of 15 December 2017 (p 4, AB 2).
42. The evidence in the affidavit is difficult in parts to comprehend, but it can be summarised. The Appellant is RCT's fourth child. When the Appellant was in Sri Lanka he underwent "bodily harm several times". On 1 April 1998 two police officers came to arrest him. They said that they suspected him to be a member of the LTTE. They were arrested. On 2 April 1998 at noon RCT attended Anuradhapura prison. Later he arranged for a lawyer, Mr Zahir, to file a motion in court to enable them to be bailed. They were both given bail the next day. On 6 April 1998 they went to court and were "discharged". RCT attached an extract of his diary from 1 to 6 April 1998. Mr Zahir died on 5 August 2003 (attached to the affidavit is his death certificate).
43. In July 2004 there was a bomb blast in Colombo. CID and EPDP members went to the Appellant's office and tortured him. On 20 May 2017 officers came to the house and stated that they had seen the Appellant participating in a protest meeting in the UK. They said that if he continues he will be in danger. He was told that if the Appellant comes to Sri Lanka he should immediately inform the CID branch at Vavuniya.

44. In his additional statement, RCT states that he was continuously visited and abused by the authorities and he decided to move. In support of this he relied on a letter of 27 November 2017 purporting to be from the Village officer. He moved to a remote rural area and did not have contact with his son. He was therefore not able to provide any documents in support of his appeal in 2004. He was not contactable because he had moved between 19 September 2004 and 29 June 2015.

The Evidence of SN

45. SN has made two witness statements; one on 27 May 2016 (not in either bundle) and the second on 14 December 2017 (p 7, AB2).
46. SN's evidence is that he was a doctor in Canada specialising in clinical oncology. He was the Appellant's cousin (his mother's sister's son). The Appellant left Sri Lanka in 2004 following a "life threatening" situation in Sri Lanka. He was a successful entrepreneur after leaving school and he owned a lorry. He did building contracts in his home town, Vavuniya, with government departments and NGOs. His business involved building temporary makeshift huts in "no man area in Omantai, Vavuniya, Sri Lanka under government agent of Vavuniya's approval". From that work he faced "life threatening warnings" from various Tamil rebel groups. He left the country in 2004. He continued to face "high risk to his life" if deported to Sri Lanka. SN was in Sri Lanka between November and December 2016 for fourteen days to attend his mother's funeral. On the way he took the "London transit and talked to my cousins via phone". As a result of this, there were rumours back home in Vavuniya that his cousins including the Appellant were accompanying him in order to attend the funeral. The funeral was on 28 November 2016. There was tension at that time because it was the remembrance week for LTTE and the birthday of its leader. Security was very tight.
47. The funeral was held at the SN's aunt's house. Many relatives and friends attended and people that he did not recognise. Three strangers were there suspiciously looking at everyone. They did not believe that the Appellant had not come to the funeral. They accused SN of being the Appellant. He showed them his ID and they believed him. SN spoke with the Appellant's parents and they are worried for their safety.
48. In his latest statement and in oral evidence before me, SN focussed on the Appellant's mental health and the facilities in Sri Lanka. The nearest hospital to his home area was in Vavuniya, but he could not go there. His PTSD would get worse when he saw uniformed personnel. In the Northern Province the ratio of armed forces to civilians was 1:4 and in the North there were no military hospitals. The presence of uniformed army personnel was unavoidable. In addition, he would have to cope with check points. There was a lack of Tamil speaking psychologists and health care providers. The Appellant's parents were harassed. SN has worked in war zones and recognises typical symptoms of PTSD.

49. In the bundle there is a copy of the Canadian passport of SN. The passport has been submitted to establish that he travelled to Sri Lanka to attend a funeral. There are other documents in support of this.

The Law

50. I remind myself of the six elements of the test set out in J v SSHD [2005] EWCA Civ 629, which may be summarised thus:

- (1) ill-treatment relied upon must attain the minimum level of severity 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 paragraphs [38–39];
- (2) the Appellant must show a causal link between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant’s Article 3 rights. Examination of the Article 3 issue “must focus on the foreseeable consequences of the removal of the applicant to Sri Lanka ...”;
- (3) 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;
- (4) an Article 3 claim can in principle succeed in a suicide case;
- (5) where the applicant’s fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is not objectively well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of Article 3;
- (6) the decision maker must have regard to 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 the applicant’s claim that removal will violate his or her Article 3 rights.

51. I also add the observation of Lord Justice Sedley in Y (Sri Lanka) v SSHD [2009] EWCA Civ 362 at [16] 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.”

52. I note what the Upper Tribunal stated in GJ at [454] in respect of psychiatric services in Sri Lanka;

“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 institutions in capital cities, which are inaccessible and do not provide appropriate care for mentally ill people’.”

Findings

53. I have taken into account that the Appellant is a vulnerable witness and the guidance in *AM (Afghanistan) v SSHD* [2017] EWCA Civ 1123. I have taken into account his vulnerability in assessing the evidence. I have taken into account the First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses Practice Direction which was issued by the Senior President, Sir Robert Carnwath, with the agreement of the Lord Chancellor on 30 October 2008 and the Joint Presidential Guidance Note 2 of 2010 which was issued by the then President of UTIAC, Blake J and the Acting President of the FTT (IAC) Judge Arfon-Jones. This Appellant is unfit to give evidence and his credibility is in no way undermined by this.

Asylum

54. I did not find that MT or RCT were credible witnesses in respect of what had happened to the Appellant in Sri Lanka and their failure to advance evidence at the hearing before the first judge. MT did not give evidence before the first judge and he found that this undermined the Appellant’s credibility. There was no evidence before the judge seeking to explain her absence and lack of evidence. She gave evidence before the second judge that she had lost contact with her father from time to time. There was no mention of why she had not given evidence before the first judge. MT asserted in her most recent witness statement that she did not give evidence because of security issues. RCT in his evidence contained in his affidavit before the second judge is silent in relation to the lack of evidence from him before the first judge. His most recent statement addresses the issue. In support there is evidence from a village officer. It is the Appellant’s case that his father was not contactable during the relevant period so it was not possible to obtain evidence from him. RCT now asserts that he was not contactable between 19 September 2004 and 29 June 2015. However, the evidence before the first judge was that the Appellant was in contact with his father until December 2004 and that he had lost contact with him because of the Tsunami. RCT’s evidence remains silent on the issues raised by the first judge namely the lack of evidence about the letter buried in the garden. Significantly the reason the Appellant gave the first judge for failing to obtain evidence from his father was not loss of contact but because they did not discuss such matters. The Appellant at the hearing before the first judge implied that his father moved after the Tsunami. There was no evidence of him having been harassed by the authorities before the first or second judge.
55. Both MT and RCT have attempted to plug holes in their evidence before the first judge with evidence that was not before him or the second judge. It was obtained in

response to the error of law decision in which I raised matters of concern that the second judge did not grapple with. There are very serious credibility issues arising from the evidence of these witnesses. Having considered their evidence in the round, I do not accept it.

56. SN's evidence is of a different nature, it concerns events after the date of the hearing of the first-judge. He expanded his evidence in his statement before me in oral evidence. His evidence is capable of corroborating the Appellant's account. However, having considered it in the round, I find that it is unreliable.
57. There was no medical evidence before the first judge. There was no reason advanced at the hearing before me to explain its absence. However, from the evidence it is clear that the Appellant had mental health problems at that time and I have taken this into account when assessing credibility. I note that he was sectioned in 2004. I accept that the Appellant has scarring and the diagnosis of Dr Dhumad. There was no challenge to this evidence at the hearing before me. The various pieces of medical evidence before me and the Appellant's medical notes all of which were before Dr Dhumad support his opinion and that the Appellant has a history of mental health going back to 2004.
58. The starting point is the findings of the first judge. Notwithstanding that the Appellant has scarring and mental health issues as a result of ill-treatment probably torture, having considered the evidence in the round and properly applying *Devaseelan [2002] UKIAT 000702*, it does not undermine the findings of the first judge. I did not find the evidence of MT and RCT to be credible in respect of what happened in Sri Lanka. I do not find that RN's evidence is reliable having considered it in the round. I do not accept that the Appellant has established that he would be of any interest to the authorities. It is reasonably likely that mental health problems and scarring have been caused by detention in 1998. There is no good reason to depart from the findings of the first judge.
59. I will very briefly engage with Mr Saini's argument articulated in his skeleton argument. Applying *Ladd v Marshall [1954] 1 WLR 1489*, I conclude that it has not been shown that the evidence of the Appellant's sister and her father could not have been obtained with reasonable diligence for the hearing before the FtT and the evidence is not credible for the reasons I have given. In light of their evidence and the evidence as a whole, I attach limited weight to the evidence of N.

Article 3 (health grounds)

60. Applying the *J* and *Y* principles, and reminding myself of the gravity of the Appellant's past experience of ill-treatment and his current grave mental health problems. I have considered whether returning the Appellant to Sri Lanka will breach the United Kingdom's international obligations under Article 3.
61. The Appellant has severe PTSD; severe depressive episode with psychotic symptoms and it is likely he is suffering from schizophrenia. He is on medication including

antipsychotic medication. MT and SN's evidence about the Appellant's mental health was credible. Their evidence on the issue of the Appellant's health was not challenged in any meaningful way. Whilst there was no up to date medical evidence, their evidence was able to fill the gap, which was relatively short in duration consideration the seriousness of the Appellant's health and history of significant mental health problems. I accept that there has been no material change in the Appellant's health since he Dr Dhumad produced his report. The witnesses were ill-prepared for the hearing; particularly MT. Her witness statements were woefully inadequate. It may be that the Appellant has been poorly served by those representing him, but I do not speculate about this. However, the witnesses, particularly MT were asked many questions at the hearing about the Appellant's medical condition to enable the Tribunal to assess the current position. Her evidence about her brother's mental health was credible.

62. I accept that there has been no improvement in the Appellant's medical condition and no significant deterioration since the report of Dr Dhumad. He visits his GP here regularly and has appointments every few months with a psychiatrist. He has periodic lapses when he does not take his medication and when this occurs he attends Northwick park hospital.
63. I find that the Appellant is dependent on his sister here in the UK (emotionally and financially). He does not cooperate with treatment including taking his medication and needs a support network around him. The main support is his sister who ensures that he takes his medication. Even with her considerable help and support he is prone to relapse. I find that their relationship is akin to that of mother and child. I accept her evidence about the dependency and support she gives to the Appellant.
64. There was no evidence before me that the Appellant would not be able to obtain medication in Sri Lanka. The Respondent did not rely on evidence that would support that the position in respect of mental health services in Sri Lanka has changed since *GJ*. There is no evidence that there has been an improvement in mental health services since *GJ*, which in the context of the Appellant's serious condition raises real concerns, especially in the light of the prospect of absence of his main support, MT. I accept that the Appellant's elderly parents could offer some emotional support but this would be limited.
65. The Appellant has severe mental health problems. I find that his condition will on return significantly deteriorate. Deterioration will occur as a result of return because of his subjective fear of repeat torture and because the treatment available in Sri Lanka is inadequate. However, even if there was adequate treatment, I find that he would not be able to properly access it without the support of his sister. The fear of seeing army personnel would act as a further barrier to treatment. (SN did not attend the hearing as an expert witness, but I accept his evidence as the Appellant's cousin and as someone who is likely to have some insight into hospitals in Sri Lanka). I find that he would not properly take his medication without his sister's support. There is a significant risk of suicide as found by Dr Dhumad, in the context of fear of removal. There was no medical evidence before me that the Appellant presently has clear

plans to take his own life. However, there was evidence that the Appellant has made at least two attempts to end his life by way of an overdose whilst here in the UK (Dr Dhumad's report at [11.3]) and that he has suffered suicidal ideation. I accept that he tells MT that he wants to die and talks with her about taking his life. It would be possible for the Respondent to return the Appellant to Sri Lanka without his coming to harm, but once there, without MT's support he would stop taking his medication. Without access to adequate mental health services, his condition would significantly deteriorate which would put him at risk of suicide. There is no rationality to serious mental illness and there was no suggestion that his fears will disappear should they not materialise, particularly when he ceases to take his medication and receive treatment which is my view would be the inevitable consequence of return. I conclude that returning the Appellant to Sri Lanka will not comply with the UK's obligations under Article 3.

66. The appeal is dismissed on asylum grounds.

67. The appeal is allowed under Article 3.

Notice of Decision

The appeal is allowed under Article 3.

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 him or any member of their 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.

Signed

Joanna McWilliam

Date 14 June 2018

Upper Tribunal Judge McWilliam