



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

Appeal Number: PA/09132/2016

THE IMMIGRATION ACTS

Heard at Field House

On 13 April 2018

**Decision & Reasons
Promulgated
On 17 April 2018**

Before

Deputy Upper Tribunal Judge Pickup

Between

**CDD
[Anonymity direction made]**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Ms J Elliott-Kelly, instructed by MTC & Co Solicitors

For the respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Burnett promulgated 20.12.17, dismissing his appeal against the decision of the Secretary of State, dated 12.8.16, to refuse his protection claim.
2. First-tier Tribunal Judge Keith granted permission to appeal on 31.1.18.
3. Thus the matter came before me on 13.4.18 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons summarised below, I found an error of law in the making of the decision of the First-tier Tribunal such as to require the decision to be set aside and remade in the First-tier Tribunal, in accordance with the directions below.
5. However, I find no merit in the first and second grounds of appeal.
6. The first ground asserts that the judge attached too little weight to the expert medical report. However, matters of weight are within the judge's province. The judge gave adequate and cogent reasons at [63] for according limited weight to the report and it cannot be said that the reasoning was irrational or perverse; they were findings open to the judge. In this regard the grounds are no more than a disagreement with the judge's assessment and reasons and do not disclose any error of law.
7. The second ground asserts that the judge erred in making critical findings as to the appellant's credibility, based on discrepancies and inconsistencies in the evidence. The complaint is that in the decision the judge referred to only one inconsistency. The ground appears to attack the use of the plural when only a singular inconsistency was detailed at [64]. However, it was open to the judge to find the account inconsistent or discrepant. It is not necessary for the judge to detail all such inconsistencies, and the judge gave a cogent example within the decision, justifying the finding. In the circumstances, there is no merit in this ground.
8. It follows that there is no viable challenge to the judge's conclusions on the protection claim, based on the findings and conclusions made.
9. What remains of concern is the way in which the judge addressed the claimed mental health issues of the appellant. It is clear that the judge gave a very detailed assessment of the relevant medical evidence, but within the findings, the judge dealt with this issue rather briefly from [74] onwards and in particular [76] of the decision.
10. I accept the criticism that the judge appears to have conflated two issues: a risk of suicide or other self-harm on return arising from the rejected asylum claim. At [75] the judge rejected any causal connection between the appellant's PTSD risk of suicide and his claimed experiences in Sri Lanka, concluding at [76] that as the appellant had fabricated his asylum claim, there was no heightened risk of suicide on forced return to Sri Lanka.
11. What the decision does not adequately address is the free-standing article 3 ECHR risk of suicide or self-harm on return arising from the existing mental health issues of the appellant independently of the Convention claim, in respect of which measures to alleviate the risk and the extent of appropriate treatment in Sri Lanka are highly relevant. In effect, the article

3 claim dismissed in two sentences within [76]: “He will have the continued support of his wife and his family in Sri Lanka if he is returned. He has family whom he could turn to in Sri Lanka to assist him access the medical facilities that he needs.”

12. The leading decision on this issue is J v Secretary of State for the Home Department [2005] EWCA Civ 629, as modified by Y v Secretary of State for the Home Department [2009] EWCA Civ 362. More recently, the Court of Appeal has promulgated the decision in AM (Zimbabwe) [2018] EWCA Civ 64.
13. As held in J, it is for the appellant to show a causal link between the removal and the alleged inhuman treatment relied on as violating his article 3 rights, based on the foreseeable consequences of his removal. In the context of a foreign case, which this is, the article 3 threshold is particularly high, 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.*” Further, where the fear of ill-treatment on return 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. 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 an appellant’s claim that removal will violate his or her article 3 rights.*”
14. Lord Justice Sedley in Y stated, “*...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.*”
15. As noted in AM (Zimbabwe), removal of an alien suffering from a serious mental or physical illness to a country where the facilities for treatment are inferior to those in the UK may raise an article 3 claim, but only in a very exceptional case, where the humanitarian grounds are compelling. The Court of Appeal accepted that the article 3 threshold has been relaxed since Paposhvili, but only to a very modest extent. It is not confined to deathbed cases, but extends to cases where substantial grounds have been shown for believing that the appellant, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in state of health resulting in intense suffering or to a significant reduction in life expectancy. Neither appellant in AM (Zimbabwe) succeeded, nor did the applicant in Paposhvili.
16. Applying the above case law, I find that having dismissed the appellant’s protection claim as not well-founded, and for adequate and cogent reasoning, the judge failed to make an adequate assessment of the

independent or free-standing article 3 risk on return that may arise even though the Convention claim is not well-founded. Having regard to the still high threshold, even if modified slightly, it is not clear that the appellant in the present case can succeed. However, he deserves at the very least a careful assessment of the independent article 3 claim arising outside of his dismissed asylum claim.

17. In the circumstances, the decision of the First-tier Tribunal must be set aside to be remade. However, there is no error in the finding of the First-tier Tribunal in relation to the core protection claim. All that remains is the free-standing article 3 claim based on the appellant's mental health and, if found to be sufficiently high, an assessment of effective mechanisms to alleviate or reduce the risk of suicide.
18. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. I relist this appeal in the First-tier Tribunal, on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the article 3 claim alone afresh, independent of the dismissed asylum claim.

Conclusion & Decision

19. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I preserved the findings in relation to the asylum claim;

I remit the appeal to be decided in the First-tier Tribunal, limited to the article 3 ECHR claim arising from the appellant's mental health issues only.

A handwritten signature in black ink, appearing to be 'James', written in a cursive style.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

20. The appeal is remitted to the First-tier Tribunal sitting at Taylor House;
21. The decision in respect of asylum is preserved together with the factual findings as to the core events in Sri Lanka;
22. The appeal is limited to the article 3 ECHR claim arising in respect of the appellant's mental health independently of the core asylum claim;
23. The ELH is 3 hours;
24. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Burnett and Judge Keith;

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made to me on the issue. The First-tier Tribunal did make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. Given the circumstances, I continue the anonymity order.

Direction Regarding Anonymity - Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

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 his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to proceedings for contempt of court.

Fee Award

Note: this is not part of the determination.

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.



Signed

Deputy Upper Tribunal Judge Pickup

Dated