



**Upper Tribunal
(Immigration and Asylum Chamber)
AA/05554/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 6th June 2017

Decision & Reasons

**Promulgated
On 28th June 2017**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

**DKG
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Haywood, of Counsel, instructed by Duncan Lewis Solicitors

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Sri Lanka, who appeals against a decision dated 18th March 2015 refusing to grant him asylum or other protection in the United Kingdom.
2. By way of background the appellant entered the United Kingdom in 2008 as a student with leave until October 2011. Thereafter he made an application to remain as a post-study work migrant using false documents, including a false university degree certificate. His application was refused.

Thereafter he absconded, being encountered in April 2013 and detained. He claimed asylum. A screening interview was conducted in April 2013 but it was not until March 2015 that a substantive interview was arranged. However that was cancelled as the appellant was unfit to take part. Further submissions were made on his behalf leading to the decision now under challenge.

3. Thus it was that his appeal came for hearing before First-tier Tribunal Judge Wylie on 25th November 2016. The determination was promulgated on 16th February 2017.
4. There were, and remain, two distinct aspects of the claim; the first being the contention that, by reason of his activities in Sri Lanka, he would be at risk upon return. The second being his medical condition and the lack of treatment on return. It was his case that he worked as a sales executive selling mobile phone SIM cards across Sri Lanka. In January 2007 a suicide bomber from the LTTE detonated a bomb in Colombo and the mobile phone and SIM card of the bomber was found leading to the arrest of the appellant on the basis that he had sold the SIM card to the bomber. It is his case that he was twice arrested being ill-treated and tortured on those occasions. Finally he paid a bribe on condition that he report to Kandy Police Station twice a week, meanwhile arrangements were made for him to come to the United Kingdom which he did. It is his case that following his departure the authorities have continued to harass his parents and sister and that when they were attending a protest in November 2013 they were arrested and have not been in contact since. His case is that he would be of continuing interest to the authorities particularly upon his return.
5. It seems not to be in issue that the appellant suffers from post traumatic stress disorder and it was the part of the claim which he presented, relying particularly on the expert reports of Frederica Jansz and Dr Sharif and Dr Sodhi, that there would be inadequate medical treatment upon his return such as to worsen his condition and to engage with Article 3 of the ECHR.
6. The First-tier Tribunal Judge considered the credibility of the claim which was advanced and considered also the country guidance case of **GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)**. That case highlighted the conclusion of the Court that the government's present objective was to identify Tamil activists in the diaspora who were working for Tamil separatism and to destabilise the Sri Lankan state. It was the finding of the Judge applying the principles in **GJ** that the appellant's profile did not engage with the risk factors such as to mean that he had no risk upon return.
7. In terms of the mental health, although the medical reports were considered, it was the finding of the Judge that the overall jurisprudence of the cases of **N and D** was such as to defeat the contentions made. Thus it was that the appeal was dismissed in all respects.

8. Application was made on behalf of the appellant to challenge that decision. Leave to appeal was not granted in relation to the asylum aspect but was granted in relation to the mental health of the appellant, not least because of the decision in **Paposhvili v Belgium (Application No 41738/10)** dated 13th December 2016.
9. Subsequently permission was granted for amended grounds to be presented. They in effect resurrected the challenge to the asylum aspect of the decision and sought to argue further in relation to the mental health aspect.
10. Thus it was that the matter came before me in pursuance to that grant of permission, Mr Haywood of Counsel acting for the appellant and Mr Melvin acting for the respondent. I am grateful to both for the material presented.
11. It seems to me that a proper starting point for the challenge is to consider the refusal decision itself of 18th March 2015, which was a very detailed decision setting out fully the nature of the claim that was advanced. Also set out was a helpful chronology of matters. The account of his arrest and torture is considered in detail and a number of inconsistent statements were noted when comparing the Rule 35 application account of April 2013 with the witness statement account of March 2015. A number of conflicting matters were noted.
12. The activity sur place was also considered but it was the contention of the respondent that inadequate evidence had been presented as to his involvement. Challenge was also made to the credibility of the appellant, not least because of the deception that had been practised by him.
13. One of the complications in this case is the mental health of the appellant, who suffers markedly from post traumatic stress disorder such that he was said to be unable to attend the substantive asylum interview and indeed his wife has been appointed as his friend to assist in his claim. Because of his mental health he did not give evidence at the hearing, although it is right to note that his wife did together with two other witnesses.
14. The Judge, in the determination, noted the inconsistencies between the screening interview and the report of the medical practitioner and the witness statement. It was noted that because of his current mental health the appellant was unable to comment or assist in the clarification of those matters. Although his wife gave evidence at the hearing she had no direct knowledge of his claim as she met him in the United Kingdom rather than knowing him in Sri Lanka.
15. The Judge recognised the limitations that were imposed but nevertheless concluded that the account of experiences was not a credible one overall.
16. Challenge has been made specifically to the approach taken by the Judge as highlighted in paragraph 44 of the determination in which the Judge indicates as follows:-

“He has given two different accounts of mistreatment to family members, around the time of the protests in November 2013. It may be that a note made in December 2013, being contemporaneous, is more likely to be accurate, but I can make no finding of mistreatment to his family due to the inconsistency”.

17. It is maintained by Mr Haywood in his grounds that that is an incorrect approach to take to the evidence and that it is for the Judge to make a finding on the facts as presented. There is of course trite law to indicate that Judges are asked to make findings of fact but there are occasions when no findings can properly be made. The two accounts in this matter are remarkably divergent in their nature, as is set out at paragraph 43 of the determination. In the witness statement of the appellant it was said that after his parents had participated in the protest in November 2013 they were arrested and that there has been no contact from them since then.
18. Notes however made by Dr Sodhi in 2013 record that the appellant indicated that he had been speaking to his family members in Sri Lanka on Skype and had seen their wounds sustained during alleged detention and torture.
19. It is difficult as a matter of common sense to reconcile those two accounts and it is entirely understandable, as I so find, that the Judge would be in some difficulty in determining which was more accurate.
20. Mr Haywood seeks to criticise the Judge for not relying upon the evidence of the appellant’s wife but that again is not entirely a proper challenge given that it is noted explicitly at paragraphs 42 and 43 of the determination, that when his wife gave evidence at the hearing, she said that there had been no news or information of the whereabouts of the appellant’s parents and sister. She had no direct knowledge as to the circumstances in which they came to be absent and there seems to have been little investigation conducted as to the whereabouts of both. If indeed they were arrested, it is surprising that there should not be some criminal procedures or solicitors’ involvement in their case. If they were arrested by protesting on their own account it is difficult also to consider how that would impact upon the safety of the appellant.
21. Although challenge is made to that particular passage it is right to note the overall challenges to credibility and accuracy which are set out in the refusal decision.
22. Even treating the appellant’s account of his experiences at its height, the Judge considered and applied the country guidance case of **GJ and Others** and concluded that there was no risk to the appellant. Indeed, the Judge cites **MP (Sri Lanka) and NT (Sri Lanka) [2014] EWCA Civ 829** and particularly the comments of Lord Justice Underhill at paragraph 50 of that judgment which emphasises that the clear message of the Upper Tribunal’s guidance is that a record of past LTTE activism does not as such

constitute a risk factor for Tamils returning to Sri Lanka. The events the appellant describes even if they are credible took place in 2007 and there was a paucity of information as to any sur place activities since then.

23. I do not find that there is an error of approach by the Judge in dealing with the aspect of asylum.
24. I turn therefore to the mental health of the appellant, in particular to the medical report of Dr Sodhi prepared on 11th November 2016, as relied upon by Mr Haywood in his submissions. The appellant was first referred to the mental health team in May 2013. Following his release from the detention centre he started behaving unusually claiming that he had been tortured as had his sister, and that he heard voices. He was assessed by a community psychiatric nurse on 8th May 2013 and seen then by a consultant psychiatrist. He was prescribed an antidepressant medication and discharged.
25. He again came to the attention of the Berkshire Healthcare NHS Foundation Trust in December 2013. Upon that assessment it was felt that he was suffering from post traumatic stress disorder. Medication was prescribed which seemed to bring about some improvement in his mental state and thus he was discharged in January 2014.
26. He was seen again in January 2015, seemingly in a poor state because he had not been taking his medication. It was noted in that connection that one of the causes of his anxiety was the lack of contact with his parents since November 2013. He was diagnosed with severe depression with post traumatic stress disorder and he re-started his medications. The notes of 19th February 2015 speak of a noticeable improvement in his health but at a subsequent review however it was noticed that the appellant was distracted and seemingly in a dissociated state which was also noticed in December 2015. It was noted that the appellant was hitting himself on the head with the palms of his hands and unable to respond to any of the questions that were asked of him. Thus it was that Dr Sodhi was asked to see him in March 2016 and again on 13th October. It was noted that the appellant receives medication but was not currently receiving any psychological therapy.
27. The doctor indicated that the cause of that stress was the appellant's experience in Sri Lanka followed by the absence of his parents. Although Dr Sodhi was not familiar with the healthcare system in Sri Lanka he comments that it is unlikely that psychological therapies would be as readily available as they would be in the United Kingdom. There was little basis for that comment but in any event, as I have indicated, there was no psychological therapies being conducted in the UK.
28. The appellant is under the care of the Reading Community Mental Health Team and seen in the outpatient clinic for regular reviews of his mental state. Depending upon the outcome and/or improvement that may be followed by psychological therapy.

29. One criticism, which seems to be mounted to his going to Sri Lanka, is that there would not be the opportunity of that psychological therapy, although even in the United Kingdom as I have indicated it is not currently being undertaken in any event.
30. My attention was also drawn to the report of Dr Sharif Ghali of 15th December 2015, which that deals more fundamentally with the actual condition of the appellant.
31. The decision in **Paposhvili** promulgated on 13th December 2016 dealt with an individual who had developed lymphocytic lymphoma and who showed a lack of response to chemotherapy and a progression of the disease in the lymph nodes and the liver. Clearly a condition far more serious than that which the appellant is experiencing. The Court stressed that every case as to whether or not there is appropriate or sufficiently accessible treatment in the receiving country must be examined carefully on a case by case basis. In that particular case, as I have indicated, it was of an appellant with particular vulnerability, his leukaemia having reached the most serious stage.
32. In paragraph 183 the court considers that the “other very exceptional cases” within the meaning of the judgment in **N v United Kingdom** which may raise an issue under Article 3, should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, though not at imminent risk of dying, would face a real risk on account of the absence of appropriate treatment in the receiving country or a lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The court pointed out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.
33. In the context of these procedures it is for the appellant to adduce evidence capable of demonstrating that there were substantial grounds for believing that if treatment required was not to be implemented, the appellant would be exposed to a real risk of being subject to treatment contrary to Article 3.
34. To what extent the case of **Paposhvili** amounts to a significant departure from the general rule will no doubt be a matter of discussion in other decisions. It seems to me, however, that the degree of illness and risk envisaged in that case is not one that is present in this.
35. Mr Haywood seeks to argue that there is a very limited amount of specialist treatment available and that clearly is a matter that was addressed by the Judge in the determination. The report of Frederica Jansz was noted in paragraph 70 of the determination and in particular that the support systems available were extremely limited in quantity and quality. Another point which is made by the Judge, and one which seems

to me entirely and properly open to be made, is that there was no evidence that the appellant at any time has needed or will need inpatient treatment. Currently and for a few years past he has had his condition dealt with by adequate medication and therapy has not yet started and will not start until his condition has calmed down somewhat. It is difficult therefore to understand what will cause him to need that treatment in any event.

36. In terms of deprivation of life or treatment prohibited by Article 3 it is noted by the Judge that the appellant will be returning with the support of his family.
37. A further matter that has been prayed in aid by Mr Haywood is the subjective fear of risk which will pray upon the mind of the appellant such as to make his situation and circumstances in Sri Lanka very much worse. In that context I note the comments made in the Court of Appeal decision of **MP and NT [2014] EWCA Civ 829** and in particular paragraphs 47 and 48 thereof. It was recognised that there was an overlap between protection under the Refugee Convention and protection under Article 3 of the EHCR but they are not completely co-extensive. It was the view of the court that the Qualification Directive was not intended to catch Article 3 cases where the risk is to health or of suicide rather than of persecution. Attention was drawn to the health cases, particularly **N v United Kingdom [2008] 47 EHRR 39** at paragraph 43 thereof.
38. The judgment concludes as follows:-
- “Mr Hussain seeks to circumnavigate this by holding the Sri Lankan authorities responsible for MP’s post traumatic stress order and depression, together with the resultant suicide risk. However, in my judgment that is to stretch the concept too far. I am satisfied that the Qualification Directive does not do that. Accordingly I would dismiss MP’s appeal in relation to asylum and humanitarian protection. He remains properly protected under Article 3”.
39. It is particularly significant to note, in connection with the appellant’s condition, that part of it is said to have arisen from his experiences in Sri Lanka but part from his concerns and worries about his parents. This was a condition that arose in 2013 after he had left Sri Lanka. It may be a matter that his fear of returning would increase his anxiety but this is to some extent speculative given the nature of family support and the availability no doubt of medication. It will also depend as to whether indeed his parents are absent or present in Sri Lanka. Currently **GS (India) and Others v Secretary of State for the Home Department [2015] EWCA Civ 40** is the existing authority on the application of **D and N**.
40. I find that the First-tier Tribunal Judge has properly and adequately considered the medical evidence and the issues raised on behalf of the appellant so far as his condition is concerned and has properly applied the relevant case law to those issues.

41. In all the circumstances I do not find there to be a material error of law in either the assessment of asylum or humanitarian protection or in the application of Article 3.
42. In those circumstances the appellant's appeal against the decision is dismissed. The decision of the First-tier Tribunal Judge shall stand, namely that the appellant's appeal is dismissed on asylum grounds, on humanitarian protection grounds and on human rights grounds.

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 his 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

Date 28 June 2017

Upper Tribunal Judge King TD