



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

Appeal Number: PA/04982/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 27<sup>th</sup> September 2018**

**Decision & Reasons  
Promulgated  
On 15<sup>th</sup> October 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE KELLY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR M S S H  
(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr Coleman, Counsel instructed by Linga and Co  
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. An anonymity direction has been made in this appeal which I extend.

2. This is an appeal by the Secretary of State against the decision of Judge Lloyd to dismiss the Appellant's appeal insofar as it was made upon protection grounds, but to allow it on the ground that his removal would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention. For these purposes the facts can be shortly stated. The Appellant's protection claim was based on what he claimed to be a well-founded fear of persecution by reason of his LTTE activities and sympathies when he was in Sri Lanka. For reasons that are not challenged by way of a cross-appeal, the judge roundly rejected that claim by wholly disbelieving the Appellant as to the circumstances he claimed had given rise to that fear. That finding is potentially significant within the context of one of the two grounds of appeal now raised by the Secretary of State.
3. Part of the evidence that the Appellant relied on in support of his protection claim was a medical report by Dr Lawrence in which he opined that the Appellant was suffering from post-traumatic stress disorder. It was the Appellant's case that he was suffering from that condition as a direct result of his experiences in Sri Lanka as an LTTE activist.
4. At paragraph 34 of his decision, Judge Lloyd held that in view of his factual findings concerning claimed events in Sri Lanka, the Appellant did not fall within any of the risk categories listed in **GJ and Others (Post-Civil War: Returnees) Sri Lanka CG** [2013] UKUT 00319. That decision is uncontroversial. However, it is what the judge said thereafter that gives rise to the Secretary of State's appeal:-

"35. However, the matter does not quite end there. Although I have not accepted his account of persecution, I come back to Dr Lawrence's report which I do find provides strong evidence that, regardless of the cause, the Appellant is suffering the pronounced effects of PTSD and depression. I accept those diagnoses although make no further findings as to the root cause of the PTSD.

36. I note on page 25 of his report, Dr Lawrence goes on to talk about treatment and prognosis. He confirmed that whatever the cause of the PTSD and major depressive episode, those conditions would be treatable in the UK but would not be effective if in a situation where the Appellant was still afraid of returning to the source of whatever the threat is. Dr Lawrence went on to give his opinion regarding treatment and recommended increased and altered medication. He then goes on to talk about the facilities available in Sri Lanka. Dr Lawrence visited Sri Lanka personally at the time of the tsunami noted that medication was available but that psychotherapy was only available to the expatriate community. Even that did not include proper trauma reduction therapy. He was however aware of changes in available medical treatment in Sri Lanka since that time and adopted the findings of a 2015 report indicating that psychiatric counselling and other treatments were available, most of which was at the mental health unit at the University of Jaffna.

37. However, Dr Lawrence was also of the opinion, which I accept, that despite the improvement in available treatment, the Appellant's

symptoms would undoubtedly be made worse by return to Sri Lanka. Although I have not accepted the Appellant's account of the cause of these conditions, Dr Lawrence was very clear in his view that the Appellant was still afraid of return to Sri Lanka. He also concluded that the Appellant would be at a greatly increased risk of suicide if any attempt were made to remove him.

38. I accept those elements of Dr Lawrence's report as his clinical findings. Accepting those findings does not undermine my conclusions with regard to the Appellant's account of persecution. Dr Lawrence's conclusions do not lead me to find that the very high threshold for Article 3 protection under N (FC) v SSHD 2005 UKHL 31 would be met. That being said, I'm also reminded that in Ullah and Do (2003) Imm AR 317, the Court of Appeal confirmed that mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development and pointed out that the preservation of mental stability is an indispensable precondition to the effective enjoyment of the right to a private life. The physical and moral integrity aspect of an individual's right to a private life can be engaged by removal.
39. On that basis, I find article 8 engaged. The risk to the Appellant's mental health is well documented by Dr Lawrence and I accept his findings on that relatively narrow point. The Appellant has been present in the UK since 2009. He clearly does not meet the requirements under the Immigration Rules under paragraph 276ADE for 20-years' residence, nonetheless he has been here for an appreciable period. I do however find that his mental health difficulties would present a very significant obstacle to integration in Sri Lanka and so would meet the requirements of paragraph 276ADE in that regard. I note the considerations under section 117B of the Nationality, Immigration and Asylum Act 2002. Some of those considerations weigh against the Appellant. There is no evidence that he is financially independent and his presence in the UK is (sic) at all times been precarious. However, I have found, as above, that there is a significant risk to the Appellants (sic) moral and physical integrity and that there are very significant obstacles to return. I find that these outweigh the public interest in effective immigration control.
40. Accordingly, I allow the appeal on Article 8 grounds."

5. The grounds extend to eight paragraphs but can be summarised as two specific grounds. The first ground, as set out in paragraphs 6 and 7, is that having rejected the Appellant's claimed reason for fearing return to Sri Lanka, it was not reasonably open to the judge nevertheless to accept Dr Lawrence's conclusion that he was suffering from post-traumatic stress disorder due to some other reason. I agree that it is something of a stretch on the one hand to reject the causes of the PTSD as the Appellant claimed them to be, whilst also accepting Dr Lawrence's diagnosis. Nevertheless, I conclude that this was a finding that was open to the judge. I am reminded by Mr Coleman that findings of fact such as these should not be lightly disturbed. I agree. In my view, it was open to the judge to accept that the appellant had suffered psychological trauma

whilst rejecting his account of the circumstances in which he had suffered it. I therefore reject this ground of appeal.

6. I now turn to the Ground of Appeal as set out in paragraphs 3 and 4. This has given me considerably more pause for thought. The Secretary of State relies on the well-known case of **GS (India) & Ors v The Secretary of State for the Home Department [2015] EWCA Civ 40** in which Lord Justice Laws held as follows:-

“86. If the Article 3 claim fails (as I would hold it does here), Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm. That approach was, as it seems to me, applied by Moses LJ (with whom McFarlane LJ and the Master of the Rolls agreed) in *MM (Zimbabwe)* [2012] EWCA Civ 279 at paragraph 23:

‘The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the Appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish ‘private life’ under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the Appellant is to be deported.’

87. With great respect this seems to me to be entirely right. It means that a specific case has to be made under Article 8. It is to be noted that *MM (Zimbabwe)* also shows that the rigour of the *D* exception for the purpose of Article 3 in such cases as these applies with no less force when the claim is put under Article 8:

‘17. The essential principle is that the ECHR does not impose any obligation on the contracting states to provide those liable to deportation with medical treatment lacking in their ‘home countries’. This principle applies even where the consequence will be that the deportee’s life will be significantly shortened (see Lord Nicholls in *N v Home Secretary* [2005] 2 AC 296, 304 [15] and *N v UK* [2008] 47 EHRR 885 (paragraph 44)).

18. Although that principle was expressed in those cases in relation to Article 3, it is a principle which must apply to Article 8. It makes no sense to refuse to recognise a 'medical care' obligation in relation to Article 3, but to acknowledge it in relation to Article 8."
7. Mr Coleman reminded me that the decision in **MM (Zimbabwe)** was concerned with an appeal against deportation. However, its principles are in my view applicable equally to all cases of removal, as are those set out in the judgement of the conjoined appeals in **GS (India)**.
8. Mr Coleman also reminded me that the judge decided this appeal within the context of paragraph 276ADE(vi) of the Immigration Rules, and he thus argued that the judge was entitled to find that the Appellant's mental health difficulties constituted the "very significant difficulties" which is the test under that provision. I do not however accept that one can consider paragraph 276ADE as an entirely self-contained code that operates outside the scope of Article 8 jurisprudence. As is clear from its heading ("requirements ... for leave to remain on grounds of private life") paragraph 276ADE is intended to reflect the Secretary of State's view of the operation of Article 8 in private life cases. It is often said that Article 8 cases must be viewed through the lens of the Immigration Rules. In my judgement the reverse is also true, namely, that the Immigration Rules should be viewed through the lens of Article 8 jurisprudence.
9. Whilst it is true that the judge also referred to the Appellant having been in the UK for "an appreciable period", this was said by way of explanation for why he found that the Appellant did not meet the requirement under paragraph 276ADE(iii) of having been in the United Kingdom for a period of at least 20 years. It is thus clear, from the passage I cited at paragraph 4 (above), that the sole reason that the judge gave for his conclusion that the Appellant's removal would constitute a breach of his rights under Article 8 was that he was suffering from mental health difficulties. That much is clear from the following sentence: "I do however find that his mental health difficulties would present a very significant obstacle to integration in Sri Lanka and so would meet the requirements of paragraph 276ADE in that regard".
10. It is in my view clear from the judgements in **GS (India) & Ors v The Secretary of State for the Home Department** that mental health difficulties cannot of themselves suffice to engage Article 8, particularly where (as the judge found in this case) those mental health difficulties do not cross the high threshold necessary to engage Article 3. Were it otherwise, anybody who could not succeed under Article 3 would nevertheless succeed under Article 8 on precisely the same grounds. As was said in **GS (India)**, Article 8 cannot prosper without some separate and additional factual element where it has failed under Article 3. Given that the judge made no reference to any separate and additional factual element whereby it could succeed, it follows that he fell into error in holding that the appellant's rights under Article 8 would be breached upon

removal. Moreover, given that the Appellant's mental health difficulties were the sole basis upon which the judge concluded that Article 8 was engaged, it follows that dismissal was the only permissible outcome of the appeal.

**Notice of Decision**

11. The appeal by the Secretary of State to the Upper Tribunal is allowed.
12. The decision of the First-tier Tribunal to allow the appeal is set aside and substituted by a decision to dismiss the appeal.

**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

Date: 10<sup>th</sup> October 2018

Deputy Upper Tribunal Judge Kelly