



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09566/2017

THE IMMIGRATION ACTS

Heard at Field House
On 8 March 2019

Decision & Reasons Promulgated
On 27 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

VV (SRI LANKA)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Charlotte Bayati, Counsel instructed by A&P Solicitors
For the Respondent: Mr Lawrence Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge Shore sitting at Taylor House on 13 November 2018) dismissing his appeal against the decision of the Secretary of State for the Home Department (“the Department”) to refuse his human rights claim in which it was maintained that his removal to Sri Lanka would breach Articles 3 and 8 ECHR on suicide risk/mental health grounds.

The Reasons for the Grant of Permission to Appeal

2. Permission to appeal was refused by First-tier Tribunal Judge Holmes, but following a renewed application to the Upper Tribunal, permission was granted by Upper Tribunal Judge McWilliam on 4 February 2019 for the following reasons:

“(1) It is arguable that the Judge misunderstood the scope of the appeal. It is arguable that the Judge should have considered whether there had been a change of circumstances. So far as the grounds relate to the assessment of evidence they are lacking in focus, but it is arguable that the Judge did not engage with the evidence of risk of suicide.

(2) It is expected that the grounds are presented [in] more focused form before the UT.”

Relevant Background

3. The appellant is a national of Sri Lanka, whose date of birth is 25 November 1979. He applied for a visit visa in the United Kingdom on 4 January 2008, and this was refused on 23 January 2008. He applied again for a visit visa on 6 February 2008, and this was issued on 10 March 2008 so as to expire on 10 September 2008. However, the appellant claims to have entered the UK illegally by lorry on 17 January 2009. He claimed asylum on 19 January 2009 and his asylum claim was refused on 22 June 2009. His appeal was struck out on 10 March 2010 because it had been lodged out of time.
4. In May 2012 Dr Zapata examined the Appellant, who gave an account of torture in detention in 2008. He also reported that his mother, with whom he was in contact, had told him that the Sri Lankan Police and CID personnel had been making enquiries about him in April 2012. The Appellant reported that his symptoms of mental ill health had been causing him significant distress, *“resulting in social isolation”*. Dr Zapata opined in his subsequent report that he was suffering from PTSD and a Major Depressive Disorder episode (Respondent’s Bundle, Section A).
5. On 29 July 2013, his legal representatives made further submissions to the effect that the appellant had a well-founded fear of persecution on return to Sri Lanka; or, in the alternative, that he was at risk on return to Sri Lanka on medical grounds as he suffered from a serious mental health condition.
6. On 3 August 2014 the Department gave their reasons for refusing to recognise the appellant as a refugee. His account of his past involvement with the LTTE and of his past detention as a result of such involvement was not accepted. This was due to internal and external inconsistencies. In any event, he would not face a risk on return having regard to the risk categories identified in **GJ -v- SSHD Sri Lanka [2013] UKUT 319** (IAC). It was not accepted that he was at risk of persecution prior to leaving Sri Lanka, or that he would be at risk on return. With regard to the question whether his removal would be in breach of Articles 2 and 3 ECHR, there did not appear to be substantial grounds for believing that there would be a real risk that he would face treatment contrary to his rights under either of these two articles.

However, it was deemed appropriate to grant him discretionary leave outside the Immigration Rules for 30 months.

7. Under cover of a letter dated 1 February 2017, his representatives served an application for settlement on the appellant's behalf. The appellant was now married and had one child, who had born on 16 February 2016. He was currently working as a Customer Service Assistant earning around £1,750 per month. He had been on continuous medication for his mental illness. He had been involved with the LTTE prior to his departure in Sri Lanka. His wife's brother was a member of the LTTE and had been granted asylum in the UK. His wife had been heavily involved in Tamil diaspora activities, and their return to Sri Lanka would create serious problems for the family.
8. On 17 August 2017 the Department issued separate letters to the appellant's representatives. In the first letter, the Department said that as the appellant's asylum claim had been refused, any further evidence that he wished to provide to show that he qualified for protection had to be submitted in person in accordance with the published Home Office policy on further submissions. The Department would consider the further leave application, but they would not be considering the protection-based element of the application with reference to the representatives' covering letter.
9. In the second letter, also dated 17 August 2017, the Department gave their reasons for refusing the human rights application for leave to remain in the UK on the basis of family and private life, and on the basis of the appellant's medical circumstances (Articles 3 and 8 ECHR). The information provided indicated that he was making significant progress with his mental health. It was also necessary to take into account that the factors that were claimed to be the root cause of his mental health were the protection-based claims that he had previously presented and which the Department had refused. He had not provided any new medical reports, but he had provided his prescriptions which showed that he had received the following five medications on 8 December 2016, which the Department went on to list. Various psychotherapeutic medications were available in Sri Lanka, including Olanzapine, Sertraline, and Clonazepam. These were the three psychotherapeutic medications that had been prescribed to the appellant (the remaining two prescriptions being unrelated to mental health).
10. A Country of Origin Information Response on the topic of mental health and PTSD, dated 6 May 2016, identified that psychiatric treatment was available in Jaffna and Vavinuya.
11. Reference was made to the case law of **J -v- SSHD [2005] EWCA Civ 629**. The case law showed that Article 3 would not be breached in a suicide case where the applicant's fear of ill-treatment in the receiving state was not well-founded. It was considered that Sri Lanka had sufficient mechanisms to reduce the risk of suicide. In addition, the appellant still had family in Sri Lanka to support him. Therefore, with the support from his family, and with the facilities and medication available, and

taking into account the relevant case law, the UK's obligations under Article 3 ECHR would not be breached by removing him to Sri Lanka.

The Hearing Before, the Decision of, the First-tier Tribunal

12. Both parties were legally represented by Judge Shore. Ms Bayati appeared on behalf of the appellant. She had prepared a lengthy skeleton argument in which she developed the case that the appellant would be at risk of persecution in Sri Lanka and/or of ill-treatment at the hands of the Sri Lankan authorities of such severity as to cross the threshold of Article 3 ECHR; and/or that his removal would constitute a breach of his rights under Articles 3 and/or 8 ECHR on mental health grounds.
13. Most of her skeleton argument which ran from pages 1 to 13 was devoted to the first two issues. On the topic of the mental health claim, she submitted that the appellant was suffering from severe depression with psychosis and PTSD and that he had been continuously in receipt of treatment. His condition was enduring, and there had been little, if any, improvement over the years, despite the ongoing support provided by mental health services. There was evidence that he had attempted suicide in the past, and that his only protective factors are his wife and children. But, despite this, there was a continuous suicidal ideation. Those treating the appellant and Dr Dhumad (the Consultant Psychiatrist) were of the opinion that there was a significant risk of suicide in the context of removal.
14. At the outset of the hearing, Ms Bayati said that her instructing solicitors had not been served with a copy of the respondent's bundle, and the solicitors had therefore not been informed that the respondent had refused to consider the protection claim set out in his statement of additional grounds. The Judge said that he would disregard any mention of protection issues in her skeleton and that he would not consider the section in her skeleton argument entitled "*Scope of Appeal.*"
15. The Judge proceeded to hear oral evidence from the appellant's wife. She said he saw a Psychiatrist every three months and his Social Worker every two weeks. She had family in Sri Lanka. She spoke with her mother once in a while. The appellant was a loving father towards their children, but he could not always look after them because he was unpredictable. He had worked for 6-7 months in 2016. He had stopped work in April 2017. She took him to TGTE activities, shopping and the park. He was taking medication. The Social Worker had counselling sessions with him. He had never tried to harm himself while she had been with him, but he often said that he felt like dying.
16. The Judge set out his findings at paragraph [61] onwards. He began by recording his empathy with the position in which the appellant found himself. He plainly had a number of severe mental conditions and it must be extremely difficult for him and his family to deal with. The Judge then launched into a detailed discussion of the case law at paragraphs [62]-[68]. At paragraph [69], he directed himself that the starting point was the assessment of the appellant's condition as required in **I**. At paragraph [70], the Judge set out his findings of fact on the appellant's medical condition and family life. The appellant had attempted suicide twice, in 2009 and

2010. The recent medical evidence was that of Dr Dhumad's report of 6 November 2018. The appellant felt suicidal when assessed, and his main protective factor was his wife and child. At paragraph [70.9], the Judge said: *"The appellant's medical condition shows no appreciable worsening in recent years and, in fact, appears to have improved with his increased sociability, family life and brief period of being fit to work."*

17. At paragraph [72], the Judge held as follows: *"The foreseeable consequences of returning to Sri Lanka are not so severe as to satisfy the test of a real risk of suicide. The medical evidence simply does not support such a conclusion in the context of the appellant who seems to be improving and has not attempted suicide for 8 years. He is no longer socially isolated and has a caring family. I took into account the report of Dr Dhumad was specifically written for these proceedings and that the Appellant must have been all too conscious of the precarious nature of his immigration status when he was assessed, so would have been naturally anxious."*
18. At paragraph [73], the Judge found the appellant's fear to be genuine, but without objective foundation. He found that treatment was available for the appellant in Sri Lanka, because he had not shown to the required standard that it was not available.
19. At paragraph [74], he found that the appellant had not shown to the required standard that his medical condition had reached such a critical state, *"that there are compelling humanitarian grounds for not removing him to a place which lacks the medical and social services which he would need to prevent acute suffering."*
20. At paragraphs [76] onwards, the Judge gave his reasons for dismissing the appeal on Article 8 grounds. His reasoning included consideration of **Bensaid -v- United Kingdom** [2001] INLR 325, **MM (Zimbabwe) -v- SSHD** [2012] EWCA Civ 279, **GS (India) & Others** [2015] EWCA Civ 40, **MM (Zimbabwe)** [2007] EWCA Civ 797 and **SL (St Lucia)** [2018] EWCA Civ 1894.
21. At paragraph [83], he found that the appellant had not shown that there were very significant obstacles to his reintegration to Sri Lanka. He had his mother in Sri Lanka; he spoke Tamil; he had spent most of his life in Sri Lanka and he was familiar with its customs and culture; his family unit could return with him, giving him emotional support; and treatment for his illnesses was available.

The Hearing in the Upper Tribunal

22. At the hearing before me to determine whether an error of law was made out, Ms Bayati developed the case that the Judge had misunderstood the scope of the appeal and that the Judge should have considered whether there had been a change in circumstances since the previous grant of discretionary leave. In deference to the direction made by Upper Tribunal Judge McWilliam, she also provided a four page document entitled: *"Focused Grounds on the Judge's Consideration of the Medical Evidence."* She submitted that it was not open to the Judge to find that his condition had improved; and that he had made inconsistent findings on the risk of suicide. Mr Tarlow submitted that no error of law was made out, for the reasons given by Judge Holmes when initially refusing permission.

Discussion

23. Ground 1 relates to the scope of the appeal. On analysis, Ms Bayati's contention is not that the Judge misunderstood the scope of the appeal, but that he erred in law in not considering and determining the appellant's asylum claim.
24. So far as the Department was concerned, the scope of the appeal was confined to the appellant's human rights claim. The Judge correctly understood this. I am wholly unpersuaded that the Judge erred in law in not extending the scope of the appeal to cover the appellant's unexamined protection claim.
25. With regard to the letter from the Department of 17 August 2017 stating that the protection claim element of the application was not going to be considered, it is pleaded that this was "*allegedly*" sent with the refusal decision, but not received. There is no affidavit or witness statement from the instructing solicitors verifying the alleged non-receipt of this letter. In any event, it would have been apparent to the reasonable reader of the RFRL that the protection claim element of the application was not being entertained by the Department.
26. Ms Bayati relies on the fact that the protection claim was raised in a statement of additional grounds served in response to the section 120 notice issued by the Department; and by the fact that no objection was raised by the Department in response. But silence does not indicate consent. Judge Shore was confronted with a situation where the Department had not consented to the appellant advancing a protection claim by way of appeal, and indeed Ms Bayati did not contend in her skeleton argument before the First-tier Tribunal that such consent was to be inferred.
27. For the above reasons, there was no procedural irregularity or unfairness in the Judge proceeding to hear and determine the appeal in accordance with the limited scope of the RFRL.
28. Ground 2 relates to the Asylum Policy Instructions on Discretionary Leave. Version 7.0 published on 18 August 2015 provides in section 3 as follows: "*ECHR Article 8 may also be raised where a person is suffering from a medication condition. Article 8 deals with respect to private life, which includes a person's moral and physical integrity. The consequence to a person's physical or mental health in removing them from the UK can, in principle, engage Article 8.*"
29. The evidence before the First-tier Tribunal indicated that the appellant had been granted discretionary leave to remain on the above basis. At paragraph [69] of his decision, Judge Shore said that he did not agree with Ms Bayati's submission that the starting point was a comparison between the condition of the appellant when he was granted discretionary leave and his position now, because the test was whether there was currently a real risk of suicide.

30. It is apparent from the Judge's earlier recording of Ms Bayati's submissions that he understood her to conflate the question of whether there had been a change of circumstances since the grant of discretionary leave to remain in 2014 with the separate question of whether the "*real risk of suicide*" test was made out so as to engage Article 3 ECHR. If he misunderstood Ms Bayati on this point, his error is not material with regard to the disposal of the claim under Article 3 ECHR. For he applied the right test with regard to Article 3 ECHR, and Ms Bayati does not contend otherwise.
31. As discretionary leave was granted in 2014 under Article 8 ECHR, the issue of whether there had been a material change of the appellant's circumstances for the better arose in an Article 8 context, not in an Article 3 one. Although the Judge did not specifically address the argument in the context of Article 8, his omission is not material as he made a specific finding of fact at [70.9] that the appellant's condition had improved since 2014 with his increased sociability, family life and brief period of being fit to work.
32. Ground 3 is that the finding at paragraph [70.9] is unsustainable because it was not supported by the medical evidence before the Judge. Having carefully reviewed Ms Bayati's detailed summary of the medical evidence from March 2010 to November 2018, I am not persuaded that the Judge's finding at paragraph [70.9] is unsustainable, perverse or inadequately reasoned. There was a brief period of the appellant being fit to work. The Judge did not suggest that the appellant had continued to be fit to work. It was open to the Judge to find that the appellant had displayed and continued to display increased sociability, reflected, for instance, in him engaging in Tamil diaspora activities with his wife. It was also open to the Judge to find that the family life which the appellant enjoyed with his wife and children constituted a significant protective factor which had not existed at the time when he was granted discretionary leave to remain in 2014.
33. Ground 4 is that the Judge erred in failing to engage with the fact that the appellant's mental health condition had been caused by the trauma and torture that he suffered in Sri Lanka. However, for the reasons given in earlier in this decision, it would have been procedurally irregular for the Judge to proceed on the premise that the appellant's account of past persecution and future risk was an established fact.
34. Ground 5 is that the Judge erred in his assessment of the expert opinion of Dr Dhumad and, in particular, that he made inconsistent findings on it. At [70.7] the Judge quoted verbatim from Dr Dhumad's report. Dr Dhumad opined that the risk of suicide was currently significant and was very likely to increase to a very severe level in the context of deportation. In his opinion, the threat of removal would trigger a significant deterioration in the appellant's mental suffering and would subsequently increase the risk of suicide. Ms Bayati points out that all the sub-paragraphs of paragraph [70] are prefaced by the description of them as being the Judge's "*findings of fact*" in respect of the appellant's medical condition and family life. Accordingly, she submits that the Judge has adopted as a finding of fact the

opinion of Dr Dhumad as set out in paragraph [70.7], and accordingly his subsequent findings at paragraphs [71] to [74] are incompatible with that finding of fact.

35. However, it is clear from the context that the Judge has simply found as a fact that Dr Dhumad has expressed the opinions reported at paragraph [70.7], and he is not purporting to adopt these opinions as his own.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

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 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 16 March 2019

Deputy Upper Tribunal Judge Monson