



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004585
First-tier Tribunal No: PA/55205/2021
IA/15700/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 18 September 2023**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department Appellant

And

M. T. Respondent
(ANONYMITY ORDER MADE)

Representation:

For the Appellant: Ms A Everett, Senior Presenting Officer.
For the Respondent: Ms K Wass, of Counsel, instructed by Amirthan & Suresh Solicitors.

Heard at Field House on 7 August 2023

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the original appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the original appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings. The parties at liberty to apply to discharge this order, with reasons.

I make this order because: (a) this is a protection claim; and (b) the original appellant suffers from a mental health condition.

DECISION

1. The Secretary of State has been granted permission to appeal the decision of Judge of the First-tier Tribunal Cas O'Garro (hereafter the "judge") who, in a decision promulgated on 21 June 2022 following a hearing on 30 May 2022, allowed the appeal of M.T. (hereafter the "claimant"), a national of Sri Lanka born on 28 January 1967, against a decision of the respondent of 8 October 2021 to refuse his further submissions of 19 September 2019 on his protection and human rights claims.
2. The claimant first made a protection and human rights claim on 23 July 2007, having entered illegally on 20 July 2007. This was refused in a decision dated 22

August 2007 which the claimant appealed. The appeal was dismissed by Immigration Judge Woolley in a decision promulgated on 11 October 2007.

3. I shall refer to Judge O'Garro hereafter as the "judge" to distinguish her from Judge Woolley.
4. The claimant attended the hearing before the judge but did not give evidence. The judge had before her a psychiatric report from Dr Dhumad which stated that the claimant was suffering from Post-Traumatic Stress Disorder (PTSD) symptoms with depression and was unfit to give oral evidence in Court. The appeal proceeded by way of submissions only.
5. The judge dismissed the appeal on asylum grounds, humanitarian protection grounds and the related Article 3 claim (hereafter the "protections grounds" or the "protection claim"). She allowed his appeal under Article 3 of the ECHR (as to medical condition) and, for the same reasons, found that there would be very significant obstacles to his reintegration in Sri Lanka and therefore also allowed his appeal under Article 8.
6. The First-tier Tribunal refused the claimant's application for permission to appeal against the decision of the judge to dismiss his appeal on the protection grounds. The claimant did not renew his application for permission to appeal to the Upper Tribunal against the judge's decision to dismiss his appeal on the protection grounds.
7. The First-tier Tribunal also refused the Secretary of State's application for permission to appeal against the judge's decision to allow the claimant's appeal under Articles 3 and 8. The Secretary of State renewed her application to the Upper Tribunal. Permission was granted by the Upper Tribunal.
8. Accordingly, this appeal is about whether the judge materially erred in law in allowing the claimant's appeal on human rights grounds, Article 3 (as to his medical condition) and Article 8.
9. The judge gave her reasons at paras 61-65 for allowing the appeal under Article 3 and at para 66 for allowing the appeal under Article 8. I quote these below. For present purposes, it is sufficient to say that she found (at paras 63 and 66) that the claimant had a subjective fear and that this fear "*will impact on his seeking and accessing the mental health treatment he needs if he is returned to Sri Lanka and this will cause deterioration in his mental health*". In relation to Article 3, she found that the ill-treatment feared was "*particularly severe given the risk of suicide*" and that there was a causal link between the claimant's removal and the risk of suicide or self-harm (para 64). In relation to Article 8, she found that there would therefore be very significant obstacles to the claimant's reintegration in Sri Lanka.
10. The judge's finding that the claimant had a subjective fear of persecution does not sit well (to say the least) with para 59 where (in the context of her assessment of the protection claim) she said, inter alia, "*I do not accept the appellant's claim that he fears returning to Sri Lanka for the reasons he has given*".
11. The Secretary of State's grounds allude to this tension in the judge's findings but did not raise it, in terms, as a ground.
12. At the commencement of the hearing, I asked the parties to address me on whether the judge's finding at para 59 contradicted her findings at paras 63 and 66 that the

claimant had a subjective fear of persecution. I considered that it was not possible for me to fairly assess the Secretary of State's grounds without resolving this as an issue in this appeal. In addition, if the Secretary of State succeeded in any of her grounds and the decision of the judge was set aside, it would be impossible for the decision on the claimant's appeal to be re-made on the basis of such inconsistent findings, if they are inconsistent.

13. Both parties addressed me on the issue as to whether the judge had made inconsistent findings in this regard and whether any such inconsistency was material to the outcome, without objection.
14. Ms Wass submitted, in essence, that although the judge could have expressed herself better, there was no inconsistency because, at para 59, the judge was considering whether the claimant's fear was well-founded whereas, at paras 63 and 66, she took into account his genuine subjective fear as a result of having been detained and ill-treated by the Sri Lankan authorities as had been accepted by Judge Woolley, as a factor that will impact upon him seeking and accessing treatment.
15. In order to resolve this issue and in view of the submission of Ms Wass, it is necessary for me to set out the relevant background in relation to the claimant's protection claim in greater detail than would otherwise have been necessary.

The decision of Judge Woolley

16. Judge Woolley found the claimant credible in part. The claimant is an ethnic Tamil from north Sri Lanka. He was a fisherman. He owned boats and employed people.
17. Judge Woolley accepted that the Liberation Tigers of Tamil Eelam (LTTE) took two of the claimant's boats for their own use and also one of the fishermen who used his boat and who gave his name to the security forces. He accepted that the LTTE may have taken another boat at a later stage (para 35). He accepted that the claimant was seized and taken by EPDP members to the army camp at Point Pedro and ill-treated (para 36).
18. Judge Woolley found that, at the time that the claimant was released, he was no longer of interest to the army and had no well-founded fear of persecution or serious harm by the army (para 36). He did not accept that the claimant's fingerprints and photograph were taken or that he signed a confession (para 37). He found it very unlikely that the claimant's detention would have been on record (para 38). He found that there would be no criminal records against the claimant; that he was not on any wanted list; and that there was no arrest warrant out for him (para 40). The claimant had his national identity card which he had provided to the Home Office. He had obtained a passport earlier in the year (para 41).
19. Judge Woolley did not accept that the claimant did not have contacts in Colombo, as a businessman who had travelled to Colombo regularly. He did not accept that the claimant would have to live in a lodge in Colombo because, on his own evidence, he was well off as a businessman and had put money into a bank in Colombo. He has family in Sri Lanka (para 42). Judge Woolley found that the claimant would not be at risk from the LTTE or the Sri Lankan army in his home area in Jaffna (paras 48-49). He would not be at risk from the LTTE or the authorities in Colombo or Negombo (paras 51-53).

The decision of the judge on the claimant's protection claim

20. With regard to the protection claim, the fresh evidence before the judge consisted of the evidence of the claimant's *sur place* activities and his evidence that there had been visits by the Sri Lankan authorities to his family which were to do with his *sur place* activities in the United Kingdom.
21. The judge did not accept the claimant's evidence that his father was being harassed by the Sri Lankan authorities (para 39). She noted that the claimant had a brother in Sri Lanka (para 40). The judge found that the claimant had not displaced the findings of Judge Woolley that the Sri Lankan authorities have no further interest in him.
22. The judge considered the evidence of the claimant's *sur place* activities. She accepted that the claimant had attended some demonstrations of The Transnational Government of Tamil Eelam (TGTE) in the United Kingdom and that he had engaged in some activities for the TGTE (para 47). She said that it could not be ruled out that the Sri Lankan authorities were likely to have information regarding the claimant's activities with the TGTE (para 48). At para 49, the judge said:

“49. For this reason, even though the [claimant] may not be a genuine activist, I find on the low standard, that the Sri Lankan authorities is [sic] likely to be aware of the appellant's *sur place* activities and will have an interest in him, because of it.”

23. The judge then considered whether the claimant would be on a 'stop list' or a 'watch list' and the associated risk of persecution, at paras 50-58. It is necessary to set out her reasoning and further findings at paras 50-58 as well as her conclusion on the protection claim at paras 59-60.

“50. The Upper Tribunal in *KK and RS* held that: ‘A stop list and watch list are still in use and that the Government of Sri Lanka operates a general electronic database which stores all relevant information held on an individual, whether this has been obtained from the United Kingdom or from within Sri Lanka itself This database is accessible at the Sri Lankan High Commission, Sri Lankan Airport and anywhere else within Sri Lanka and that the contents of this data base will in general determine the immediate or short-term consequences for a returnee. The Tribunal said that persons being returned on a Temporary Travel Document (TTD), will be questioned on arrival at the airport and additional questioning over and above the confirmation of identity is only reasonably likely to occur where the individual is already on either the stop list or the watch list. That those in possession of a valid passport will only be questioned on arrival if they appear on either the stop list or the watch list.

51. In relation to the stop list the Upper Tribunal said that only those against whom there is an extant arrest warrant and/or a court order will appear on the stop list and returnees falling within this category will be detained at the airport. However returnees who appear on the watch list will fall into one of two subcategories:

- i. those who, because of their existing profile, are deemed to be of sufficiently strong adverse interest to warrant detention once the individual has travelled back to their home area or some other place of resettlement; and
- ii. (ii) those who are of interest, not at a level sufficient to justify detention at that point in time but will be monitored by the authorities in their home area or wherever else they may be able to resettle.

52. I find that there is a reasonable likelihood that the [claimant] will be on the Sri Lankan authorities “watch list ” because of his connection to the TGTE whom the Sri Lankan Government regard with a significant degree of hostility as it is perceived as a “front” for the LTTE. I bear in mind the Upper Tribunal said that the Government of Sri Lanka will seek to identify those whom it perceives as constituting a threat to the integrity of the Sri

Lankan state by reason of their committed activism in furtherance of the establishment of Tamil Eelam.

53. I find from their extensive intelligence, the Sri Lankan authorities will know that the [claimant] has been attending TGTE meetings and demonstrations but did not hold a prominent part in any of the TGTE meetings or demonstrations he attended, had no following on social media and no relevant history in Sri Lanka (The [claimant's] account of being of interest to the authorities when he lived in Sri Lanka was rejected by Judge Woolley and indeed by this Tribunal) .
54. I find for this reason, on return to Sri Lanka, although the Sri Lankan authorities will have the [claimant] on their watch list, he will not be detained at the airport but will be monitored by the authorities wherever he choose to settle. The Upper Tribunal said that the monitoring undertaken by the authorities in respect of returnees such as the [claimant], will not, in general, amount to persecution or ill-treatment contrary to Article 3 ECHR.
55. I have also considered whether the [claimant] will face any risk on return due to his political opinion. The Upper Tribunal in KK and RS said the principles of HJ (Iran) must be considered. HJ (Iran) principle applies to any person who has political beliefs and is obliged to conceal them in order to avoid the persecution that he would suffer if he were to reveal them. The right to freedom of thought, opinion and expression protects non-believers as well as believers and extends to the freedom not to hold and not to have to express opinions.
56. If the [claimant] holds deeply held political opinion on separatist beliefs then I accept that he would be at real risk of serious ill-treatment on return to Sri Lanka. The case depends entirely on whether or not I believe the [claimant's] claim about his political convictions. Before reaching a conclusion, I remind myself that the [claimant] only has to prove his case to the low "real risk" standard.
57. I do not find the [claimant] a man of deep political thought or principle. For example he has provided no evidence that satisfies me that he has read any major political writers. I know nothing about him that supports his claim that he has genuine political beliefs. **I find the [claimant's] claim to hold separatist beliefs and his criticism of the Government of Sri Lanka is all part of a ruse to bolster his claim for asylum** and not because he has a deeply held political opinion, which is fundamental to his identity.
58. I am required to consider all the evidence in the round and in doing so I bear in mind that the [claimant] only has to prove his case to the low "real risk" standard. I did not find the [claimant] credible, and for that reason I do not find him to be genuine in his claim to have separatist belief which he will want to express on his return to Sri Lanka. The [claimant] had no political profile that brought him to the interest of the authorities before he left Sri Lanka and I do not find that the [claimant] on return will engage in any political activities or that he will be acting "discreetly" in order to avoid persecution when he returns to Sri Lanka.
59. Having considered the evidence in the round **I do not accept the [claimant's] claim that he fears returning to Sri Lanka for the reasons he has given.** I do not find that the [claimant] will be at risk from the authorities if he is returned to Sri Lanka. I am not satisfied that the [claimant] has discharged the low burden on him to prove that if he were to be returned to Sri Lanka there is a reasonable degree of likelihood that he would suffer persecution for a Convention reason.
60. Also I do not find that the [claimant's] claim meets the threshold required for a grant of Humanitarian Protection, as he has not persuaded me that he will be subjected to a real risk of serious harm on his return."

(My emphasis)

The judge's reasons for allowing the claimant's human rights claim

24. I now set out the judge's reasons for allowing the claimant's human rights claims under Articles 3 and 8:

"Human rights Health-Article 3

61. In his initial medical reports, Dr Dhumad opinion is that the [claimant] is suffering from Post-Traumatic Stress Disorder and has attempted suicide and self-harmed in the past. In his addendum report Dr Dhumad said that since he saw the [claimant] in 2019 he has become more hopeless and has feelings of worthlessness. He said hopelessness has a serious and significant association with suicide risk and that the [claimant's] risk of suicide remains moderate and is very likely to increase in the context of removal to Sri Lanka. He said that the threat of removal in his opinion, will trigger a significant deterioration in the [claimant's] mental suffering and subsequently increases the risk of suicide.
62. According to the objective evidence there is [sic] mental health facilities in Sri Lanka and the [claimant] should be able to get the medication he has been prescribed for his mental illness. Dr Dhumad said that the [claimant] will benefit from the continuation of anti-depressant treatment and psychological treatment in the form of Trauma Focused Cognitive Behavioural Therapy. Dr Dhumad also said that the [claimant] will need to feel safe before therapy can be fully effectively delivered.
63. The [claimant] has a subjective fear that he will be at risk if he is returned to Sri Lanka and **even though his fear is not well founded, I find this fear will impact on his seeking and accessing the mental health treatment he needs if he is returned to Sri Lanka and this will cause deterioration in his mental health. In those circumstances, I find that there is a real risk the [claimant] would harm himself or commit suicide on return to Sri Lanka and that this would be a breach of article 3 of the ECHR.**
64. I have had regard to the guidance given by the Court of Appeal in J v SSHD [2005] EWCA Civ 629. I have considered the available medical evidence and rely on the opinion of Dr Dhumad. **I find that the ill-treatment feared is particularly severe given the risk of suicide. I find that there is a causal link between the [claimant's] removal and the risk of suicide or self-harm. I find that there is no evidence that there would be effective mechanisms in Sri Lanka to reduce the risk of harm to the [claimant] even if he have family support there.**
65. Although there was no specific evidence before me of the steps the respondent would take to minimize the risk to the appellant before removal or during the removal process, I infer that she would take all reasonable steps to discharge her obligations under section 6 of the Human Rights Act 1998 and I take notice of the arrangements the respondent puts in place to escort vulnerable people during removal. **I find that the greatest risk to the [claimant] would be on return and that in light of his particular circumstances, the threshold for demonstrating a real risk of a breach of article 3 of the ECHR is met.**

Article 8 claim

66. In relation to article 8 and paragraph 276ADE (1) (vi), I find, for the same reasons given for the Article 3 findings, the [claimant] has a subjective fear that he will be at risk if he is returned to Sri Lanka and even though his fear is not well founded, **I find this fear will impact on his seeking and accessing the mental health treatment he needs if he is returned to Sri Lanka and this will cause deterioration in his mental health. In those circumstances there would be very significant obstacles to the [claimant's] integration into Sri Lanka.**

(My emphasis)

The issues

25. The first issue concerns whether the judge's finding at para 59 is inconsistent with her finding that the claimant has a subjective fear of persecution at paras 63 and 66 and, if so, whether the inconsistency is material to the outcome (paras 10-15 above).
26. The issues arising from the Secretary of State's grounds may be summarised as follows:
- (i) In relation to her decision to allow the Article 3 claim based on the claimant's medical condition, the grounds contend that the judge materially erred in as follows:

Ground 1: Given that the treatment that the claimant requires is available in Sri Lanka, the judge erred in finding that the claimant would not avail himself of the available treatment due to an unfounded fear. In reaching her finding that there was a causal link between the claimant's subjective fear and his removal, the judge erred by failing to apply the rationale at para 132 of AM (Art 3; health cases) (Zimbabwe) [2022] UKUT 00131 (IAC). The judge gave no reasons for the correlation between the claimant's fear and the "*seeking medical help*" (para 7 of the grounds). In other words, the judge gave no reasons for finding that there was a causal link between the claimant's fear and its impact on the claimant seeking and accessing medical treatment.

Ground 2: Given that the treatment that the claimant requires is available in Sri Lanka, the judge gave inadequate reasons for finding that there were no effective mechanisms to reduce the risk of harm even if the claimant has family support. In addition, the claimant's father is in Sri Lanka (para 39 of the judge's decision) and he has extended family members in Sri Lanka (AB/85). The judge gave no reasons why the claimant's family could not help him access treatment or reintegrate.

- (ii) Ground 3: In relation to her decision to allow the Article 8 claim, the judge materially erred in as follows. She gave little or no consideration to the public interest in the claimant's removal, including the impact on the public purse, as required by s.117B of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"). The judge has erred in law for the above reasons.

ASSESSMENT

(A) Whether the judge's findings re subjective fear are contradictory

27. Ms Wass submitted that there was no conflict in the judge's findings. I summarise her reasons for her submission as follows:
- (i) At para 59, the judge did not accept the claimant's claim that he feared returning "*for the reasons he has given*". This encompassed the claimant's political beliefs and his diaspora activities whereas the subjective fear that the judge accepted at paras 63 and 66 was due, in part, to his previous ill-treatment in detention by the Sri Lankan authorities which had been accepted by Judge Woolley and due, in part, to the situation he faces on return now. The claimant's past experience was intrinsically linked to his mental health difficulties.

- (ii) At para 59, the judge was considering whether the claimant's fear of persecution was well-founded whereas at paras 63 and 66 she found that he nevertheless had a subjective fear of persecution.
- (iii) Ms Wass referred me to the Upper Tribunal's decision in MY (Suicide risk after Paposhvili) [2021] UKUT 232 (IAC). This decision is referred to in the claimant's Rule 24 response. Para 17 of MY deals with the weight that can be given to subjective fear that is not objectively well-founded. In the instant case, the judge accepted at para 63 that the claimant has a subjective fear of persecution based on his past experience. The judge accorded weight to that subjective fear. There was therefore no contradiction between paras 59 and 63 of the judge's decision.
28. Ms Everett submitted that the judge had not made it clear in the first sentence of para 59 that she was considering whether the claimant's fear was well-founded. In her submission, it was a bit of a leap to say that the judge was dealing with the well-foundedness of the claimant's fear in the first sentence of para 59 but that she accepted at paras 63 and 66 that he had a subjective fear based on his past experience of torture. Ms Everett submitted that the judge's finding in the first sentence of para 59 did contradict her findings at paras 63 and 66 that the claimant had a subjective fear that will impact upon his access to treatment. This is because she (the judge) said, on the one hand, that the claimant did not have a fear for the reasons given and, on the other hand, that he did.
29. Dealing first with the interpretation suggested by Ms Wass summarised at para 27(i) above, there is simply no basis for saying that the words "*for the reasons given*" at para 59 of the judge's decision mean that the subjective fear that the judge was referring to in the first sentence of para 59 concerned the claimant's evidence of his political beliefs and his diaspora activities whereas the subjective fear that she found at paras 63 and 66 concerned his past experience of being held in detention and ill-treated/tortured. The interpretation suggested by Ms Wass is contrived and would necessitate my reading words into the first sentence of para 59 and the findings as to subjective fear at paras 63 and 66 to such an extent that the relevant sentences are radically altered.
30. The judge had before her the decision of Judge Woolley. Indeed, she summarised the findings of Judge Woolley. Accordingly, the findings of Judge Woolley, including his finding that the claimant had been detained and ill-treated, formed part of the factual matrix and evidence before the judge.
31. Furthermore, at para 58, i.e. the paragraph immediately before para 59, the judge specifically referred to the claimant having no political profile that brought him to the interest of the authorities before he left Sri Lanka. She therefore referred back to his past experience before going on, in the first sentence of the very next paragraph, to find "*Having considered the evidence in the round I do not accept the [claimant's] claim that he fears returning to Sri Lanka for the reasons he has given*". The words "*having considered the evidence in the round*" make it abundantly clear that she must have had in mind all of the evidence, including the findings of Judge Woolley, when she said, in the first sentence of para 59, that she did not accept the claimant's claim that he feared returning to Sri Lanka "*for the reasons he has given*".
32. For the reasons given above, I reject the submission of Ms Wass summarised at para 27(i) above.

33. Turning to the submission of Ms Wass summarised at para 27(ii) above, I do not accept that the judge was dealing with the well-foundedness of the claimant's fear in the first sentence of para 59. It is plain, in my judgment, that the first sentence of para 59 concerned the claimant's subjective fear and that it is the *second* sentence of para 59 that concerned the well-foundedness of his alleged subjective fear.
34. The reliance in the Rule 24 response and by Ms Wass on MY does not help to resolve whether or not the first sentence of para 59 contradicts the finding that the claimant has a subjective fear at paras 63 and 66. The fact that a judge may accord weight to an individual's subjective fear does not assist in deciding whether or not the judge in the instant case had made contradictory findings on this issue.
35. In my judgment, it is impossible to reconcile the judge's finding in the first sentence of para 59 with her findings at paras 63 and 66 that the claimant had a subjective fear. I agree with Ms Everett that the first sentence of para 59 plainly contradicts the finding that the claimant has a subjective fear at paras 63 and 66.
36. The next question is whether the contradiction in these findings is material to the judge's decision to allow the appeal under Article 3 and Article 8.
- (B) Whether the contradiction in the findings as to subjective fear is material
37. Ms Wass submitted that, even if I decided that the judge's findings on whether the claimant has a subjective fear are contradictory, this was not material to her decision to allow the appeal under Article 3 and Article 8. This is because (in her submission) the fact that the claimant was previously accepted by Judge Woolley to have been detained and ill-treated in detention means that the judge's findings at paras 63 and 66 that the claimant has a subjective fear are not undermined.
38. There is no substance in this submission. Ms Wass was effectively asking me to prefer the findings at paras 63 and 66 over the finding at para 59, in the event that I decided that the findings were contradictory. I cannot see any principled or reasoned basis upon which I can do so. As I have said, the claimant's case as advanced to Judge Woolley was before the judge; his findings were summarised in her own decision. She reminded herself (at para 58) of his conclusion that the claimant had no political profile that had brought him to the interest of the authorities in Sri Lanka before he left Sri Lanka. If I were to prefer the findings at para 63 and 66 over the finding in the first sentence of para 59, I would be acting in a wholly arbitrary way, rather than on the basis of any reasoned analysis or legal principles.
39. It is plain that the judge's decision to allow the Article 3 and Article 8 claims was based upon her finding that his subjective fear "*will impact on his seeking and accessing the mental health treatment he needs if he is returned to Sri Lanka and this will cause deterioration in his mental health*" (paras 63 and 66) and that in those circumstances "*there is a real risk that he would harm himself or commit suicide*" (para 63, in relation to Article 3) and that "*there would be very significant obstacles to his reintegration in Sri Lanka*" (para 66, in relation to Article 8).
40. I am therefore satisfied that the contradiction in the judge's findings as to whether the claimant has a subjective fear is fatal to her decision to allow the appeal under Article 3 and also under Article 8, irrespective of whether the Secretary of State's grounds are established.

41. Ms Everett submitted that the contradiction in the judge's findings is not material because of the Secretary of State's grounds. She submitted that the Secretary of State's grounds establish that the judge had materially erred in law notwithstanding any contradiction in her findings at para 59 and paras 63/66.
42. It is not clear to me whether Ms Everett was submitting that the Upper Tribunal therefore does not need to decide whether or not the judge's findings were contradictory. In the event that she was making that submission, I do not accept it. If the Secretary of State succeeds in her grounds, it would follow that the decision on the claimant's appeal must be re-made. The Tribunal (whether the First-tier Tribunal or the Upper Tribunal) will need to have clarity as to whether the finding in the first sentence of para 59 stands or the findings as to subjective fear in paras 63 and 66 stand. The findings in paras 59 and 63/66 cannot both be left standing.
43. I therefore agree with Ms Wass in her submission that, in the event that I was against her, it would be necessary for the Tribunal to reach its own finding on whether the claimant has a subjective fear of persecution.
44. Given my conclusion that the contradiction in the judge's findings as to whether or not the claimant has a subjective fear is fatal to her decision to allow the appeal under Article 3 as well as Article 8, her decision to allow the claimant's Article 3 and Article 8 claims stands to be set aside irrespective of whether the Secretary of State's grounds are established. Accordingly, strictly speaking, it is unnecessary for me to consider grounds 1 and 2. However, I will do so, not least because this will assist in re-making of the decision on the claimant's appeal.

(C) Ground 1 – causal link between fear and removal

45. Ms Everett submitted that, given the judge's finding that the claimant's fear was not well-founded, she erred in finding a causal link between the subjective fear and removal. Given that his fear was not well-founded, there is no causal link between his inability to access medical treatment and removal. His inability to access treatment arises from his own mistaken belief, i.e. his subjective fear generated from a mistaken belief.
46. Ms Everett submitted that the judge's finding at para 64, that there were no effective mechanisms in Sri Lanka to reduce the risk of harm to the claimant even if he has family support in Sri Lanka, is inadequately reasoned. The judge took Dr Dhumad's report at face value.
47. Ms Wass relied upon the claimant's Rule 24 response. Para 132 of AM (Zimbabwe) which is quoted at para 3 of the grounds, would mean that the claimant could not succeed in an Article 3 claim. However, the factual nexus in AM (Zimbabwe) and the reasons for the appellant in that case ceasing to adhere to his treatment could be distinguished from instant case. In AM (Zimbabwe), the appellant's explanation for ceasing treatment was due to the potential side effects of antiretroviral (ARV) treatment. There were significant adverse credibility findings against the appellant in AM (Zimbabwe). His credibility was rejected. It was not accepted that he had stopped accessing treatment (para 109 of AM (Zimbabwe)). The Upper Tribunal considered that he was capable of prioritising his treatment. In contrast, it was not suggested by the judge in the instant appeal that the claimant was feigning or exaggerating in any way. In addition, it had been accepted in the previous appeal that he had been detained and ill-treated. The instant case therefore could not be compared with AM (Zimbabwe). Para 132 could not be applied to the instant case.

48. Ms Wass submitted that the Secretary of State's alternative ground, that the judge gave inadequate reasons for her finding that there were no effective mechanisms to reduce the risk of harm even if there was family support, ignores paras 63 and 64 of the judge's decision where she specifically dealt with this issue. The judge noted at para 62 that, according to Dr Dhumad, the claimant would need to feel safe before therapy could be effectively delivered.
49. I have carefully considered ground 1, the parties' submissions, and the claimant's Rule 24 response. I have considered the judge's decision very carefully.
50. The judge said at para 65 that the Article 3 threshold was reached and that the greatest risk to the claimant would be on return. At para 64, she found that there was a causal link between the claimant's removal and the risk of suicide or self-harm. However, I noted that:
- (i) Although the judge said at para 64 that she had had regard to the guidance given by the Court of Appeal in J v SSHD [2005] EWCA Civ 629 [2005] Imm. A.R. 409, she failed to address paras 16-19 of MY; in particular, paras 18-19 which refer to the six-part test set out in J v SSHD as re-formulated in Y (Sri Lanka) v SSHD [2009] EWCA Civ 362 [2009] 4 WLUK 522 and which read:
- “18. The fifth point was reformulated as follows: -
- “[...] 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]”
19. Sir Duncan Ouseley in R (Carlos) v SSHD [2021] EWHC 986 (Admin) stated at [159]:
- “Article 3 and suicide risk: this is another facet to which Paposhvili and AM (Zimbabwe) apply. It is for EC to establish the real risk of a completed act of suicide. Of course, the risk must stem, not from a voluntary act, but **from impulses which he is not able to control because of his mental state**”.
- (my emphasis)
- (ii) The reasoning of Sir Duncan Ouseley in R (Carlos) v SSHD [2021] EWHC 986 (Admin) [2021] 4WLUK 351 at para 159 applies equally to cases where the risk of suicide arises on account of an individual's asserted subjective fear being such as to impact upon his ability to seek or access the mental health treatment that he needs. It is necessary to show that the risk (to the appropriate standard of proof) of the individual not seeking or accessing treatment stems from impulses that he is unable to control because of his fear. It is only if this is shown that the necessary causal link (the second of the six-point test in J v SSHD) between removal and the risk of the individual not accessing medical treatment when needed and (if asserted) the consequent risk of suicide will be established.
- (iii) In my view, the mere fact that an individual has a genuine subjective fear does not mean that he will be unable to access medical treatment when that is needed. Evidence which may assist a judge in reaching a finding that an individual's subjective fear is such that he will be unable to seek or access treatment may include, for example, evidence of an inability on his part to distinguish between members of the police and security forces, on the one hand, and members of the medical profession; medical evidence of an inability to prioritise his treatment; medical evidence that the individual suffers from

delusions or false unshakable beliefs etc; evidence as to the availability of family support to seek and access treatment; and the judge's general assessment of credibility.

- (iv) Even when there is medical evidence, a judge deciding an appeal would be entitled to reach his or her own finding on the issue whether there is a risk (to the appropriate standard of proof) of the individual not seeking or accessing treatment which stems from impulses that he is unable to control because of his fear, provided the medical evidence is taken into account in reaching that finding and reasons given (which may include the judge's general assessment of credibility) for arriving at a different conclusion.
- (v) The judge's summary of Dr Dhumad's report, at paras 61-62, does not make it self-evident that the claimant's subjective fear is such that any impulse on his part not to seek or access treatment is one that he would be unable to control because of his fear and/or that the deterioration in his condition, if removed, would be such that, in the words of Sir Duncan Ouseley in R (Carlos) v SSHD, the risk of completed suicide would stem "*not from a voluntary act, but from impulses which he is not able to control because of his mental state*".
- (vi) Although I have noted that the judge said that the claimant had attempted suicide previously and self-harmed, I agree with Ms Everett that she accepted the opinion of Dr Dhumad at face value and failed to factor in the fact that Dr Dhumad accepted the claimant's evidence that his father had been harassed (para 4.2 of Dr Dhumad's report) and/or captured by the military who had been torturing him (first paragraph on page 4 of Dr Dhumad's report) on account of his (the claimant's) *sur place* activities; that he (the claimant) felt guilty and blamed himself for his father's suffering; and that he had put his hand in hot cooking oil (para 4.2 of Dr Dhumad's report and the first paragraph on page 4 of his report (AB/95)). The implication, from para 4.2 of Dr Dhumad's report, is that the reason for the claimant's act of self-harm/attempted suicide by putting his hand in hot cooking oil is that he blamed himself for the suffering of his father at the hands of the Sri Lankan authorities.
- (vii) The judge failed to factor in the fact that she had rejected the claimant's evidence that his father was harassed, at para 39 of her decision. It was therefore incumbent upon her to explain why she nevertheless accepted at face value Dr Dhumad's opinion about the likelihood of the future risk of suicide. She did not do so.
- (viii) In addition, the judge failed to factor in the fact that Dr Dhumad stated that there was no evidence of thought disorder (para 4.8 of his report); no evidence of delusions or false unshakable beliefs and no psychotic symptoms (para 4.10 of his report).

51. In my view, the submission of Ms Wass that para 132 of AM (Zimbabwe) could not be applied to the instant case because the Tribunal's reasoning in that case can be distinguished from the instant case for the reasons she gave, is misconceived. In the first place, the claimant was not found wholly credible. Secondly, para 4.2 of Dr Dhumad's report suggests that the reason the claimant gave for his previous act of self-harm/suicide was a reason that the judge had rejected. Finally, and in any event, the principle that underlined the Tribunal's reasoning in para 132 of AM (Zimbabwe) is that the act relied upon must arise not from a voluntary act but from an act which

the individual is unable to control, as Sir Duncan Ouseley explained in R (Carlos). As I have explained above, the judge failed to engage with that issue, notwithstanding that she said that she had had regard to J v SSHD.

52. Para 6 of the claimant's Reply advances an additional reason for distinguishing the claimant's case from that of the claimant in AM (Zimbabwe), i.e. that the claimant in AM (Zimbabwe) was suffering from a physical illness whereas the claimant in the instant appeal is suffering from a mental illness and that he has a subjective fear. However, even if a person has a subjective fear, it does not follow that the risk (if it exists) of the individual not seeking or accessing treatment stems from impulses that he/she is unable to control because of his fear. As I have said above (para 50 (viii) above), Dr Dhumad stated that there was no evidence of thought disorder (para 4.8 of his report); no evidence of delusions or false unshakable beliefs and no psychotic symptoms (para 4.10 of his report). Given this evidence, the judge should have explained why the claimant's subjective fear (even if there is no contradiction between the first sentence of para 59 and paras 63 and 66) was such that he would not be able to distinguish between, on the one hand, doctors and other medical professionals, and, on the other hand, agents of the state's security such as the army and the police.
53. For the reasons given above, I am satisfied that the judge materially erred in law in finding that there was a causal link between the claimant's removal and the risk of suicide or self-harm. By failing to engage with the relevant case-law as explained above, she did not give any or any adequate reasons for finding that there was a causal link between the claimant's removal and the risk of suicide or self-harm.
54. There is no substance in the submission of Ms Wass (para 48 above) that the Secretary of State's alternative ground, that the judge gave inadequate reasons for her finding that there were no effective mechanisms to reduce the risk of harm even if there was family support, ignores paras 63 and 64 of the judge's decision. The fact is that the judge simply failed to explain why the availability of family support would not enable the claimant to seek and access treatment.
55. Ms Wass referred me to the fact that the judge had noted, at para 62 that, according to Dr Dhumad, the claimant would need to feel safe before therapy could be effectively delivered. However, this submission ignores the fact that, for Article 3 to apply, it is necessary to establish, amongst other things, that the individual is at real risk 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. Article 3 is not intended to deliver a means by which therapy can effectively be delivered in the United Kingdom to an individual.
56. For all of the reasons given above, I have concluded that the judge materially erred in law in reaching her finding that there was a causal link between the claimant's removal and her finding (at paras 63 and 66) that he has a subjective fear, in that, she failed to engage with the principle underlying para 132 of AM (Zimbabwe), as explained by Sir Duncan Ouseley at para 159 of R (Carlos) and she failed to give adequate reasons for accepting Dr Dhumad's opinion/report at face value and reaching her finding that there was such a causal link. She also failed to give adequate reasons for accepting Dr Dhumad's report at face value by failing to factor in the fact that Dr Dhumad had accepted the claimant's evidence that his father was harassed and/or tortured on account of his *sur place* activities whereas she had rejected that evidence.

57. Ground 1 is therefore established, even if the judge's finding in the first sentence of para 59 is not contradictory to her findings at paras 63 and 66 that he has a subjective fear.

(D) Ground 2

58. Ms Everett submitted that, on the findings of the judge and Judge Woolley, the claimant has family in Sri Lanka. The judge failed to make any finding as to whether or not the claimant has family support in Sri Lanka. It was incumbent upon her to make such a finding. It is not clear why the judge was dismissive of availability of family support.

59. In response, Ms Wass submitted that the judge had made an adequate finding in relation to family support because the judge found at para 64 that the risk of harm would not be reduced. In other words, the judge considered the risk of harm on the basis of both scenarios, i.e. there being family support and there being no family support. The judge therefore made adequate findings.

60. I agree with Ms Wass that the words "*even if he have [sic] family support there*" suggests that she took into account the possibility of the claimant having family support. However, she did not explain *why* family support would not assist the claimant to seek and access treatment. That is the essential point raised at para 6 of the grounds.

61. Plainly, the judge failed to give reasons why the claimant would not be able to rely upon family support in order to seek and access treatment. In this regard, ground 2 is linked to ground 1.

62. It is obvious that the judge's view that, even if the claimant has family support, this would not reduce the risk of harm was material to her decision to allow the appeal under Article 3.

63. Ground 2 is therefore established, even if the judge's finding in the first sentence of para 59 is not contradictory to her findings at paras 63 and 66 that he has a subjective fear.

(E) Article 8 – Ground 3

64. This can be dealt with briefly. The judge relied upon the reasons she had given for allowing the Article 3 claim in order to find that there would be very significant obstacles to the claimant's reintegration in Sri Lanka.

65. Given my conclusion that she materially erred in law in reaching her decision to allow the Article 3 claim, she also materially erred in law in reaching her finding that there would be very significant obstacles to the claimant's reintegration in Sri Lanka, for the reasons given above.

66. Ground 3 is therefore established, even if the judge's finding in the first sentence of para 59 is not contradictory to her findings at paras 63 and 66 that he has a subjective fear.

67. For all of the reasons given above, I am satisfied that the judge materially erred in law in allowing the claimant's appeal under Articles 3 and 8. I make it clear that, even if it is the case that there is no contradiction between the judge's finding as to

subjective fear in the first sentence of para 59 and her findings as to subjective fear at paras 63 and 66, I would still have reached the conclusion that she had materially erred in law and set aside her decision to allow the appeals under Articles 3 and 8, for the reasons given at paras 45-66 above.

68. Before moving on to consider the appropriate means of re-making the decision on the claimant's appeal, I should deal with para 10 of the claimant's Reply. This contends that the judge did not make a finding that the necessary treatment for the claimant is available in Sri Lanka. In view of the fact that the submission is made at para 10 of the Reply that the lack of a finding in this regard is not material, I do not think that para 10 is an attempt to raise a ground of appeal or advance the submission that the judge's decision should be upheld for different reasons. However, in the event that I am wrong about that, the claimant does not have permission to argue that the judge failed to make a finding that the treatment that the claimant requires is available in Sri Lanka, not only because no such permission has been granted but also because the Rule 24 reply was received out of time and no application was made for time to be extended.

69. If it is the case that the judge did not make a finding that the necessary treatment for the claimant is available in Sri Lanka, then that is another flaw in her decision.

(F) Setting aside and re-making the decision on the claimant's appeal

70. For all of the reasons given above, I set aside paras 61-66 of the judge's decision and her decision to allow the claimant's appeal under Articles 3 and 8.

71. The judge's assessment of the claimant's protection claim and her decision to dismiss the appeal on asylum grounds, on humanitarian protection grounds and the related Article 3 claim stand. Paras 25-60 of the judge's decision therefore stand except that the first sentence of para 59 shall not stand (the "preserved findings of the judge"). However, there is no need to re-visit the judge's decision to dismiss the claimant's appeal on asylum grounds, humanitarian protection and the related Article 3 claim given her finding that any subjective fear is not well-founded.

72. The re-making of the decision on the claimant's appeal is therefore limited to the claimant's Article 3 claim based on his medical condition and his Article 8 claim. In order to reach a conclusion on these issues, it will be necessary to make relevant findings of fact, including whether the claimant has a genuine subjective fear, based on the findings of fact made by Judge Woolley and the preserved findings of the judge; and, if so, whether its impact upon him would be such that he would be unable owing to impulses he is unable to control to seek and access treatment in Sri Lanka.

73. Ms Wass and Ms Everett both agreed that, if I concluded that the judge's finding in the first sentence of para 59 is contradictory to her findings at paras 63 and 66 that he has a subjective fear, the appropriate course of action would be a remittal to the First-tier Tribunal. I have reached the conclusion that the said findings are contradictory.

74. I have reminded myself of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements"). This states that in the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. Para 7.2 of the recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

- “(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”

75. Although the issues in the instant case are limited, I take into account that the claimant won his appeal before the First-tier Tribunal in relation to Articles 3 and 8. Having regard to the Court of Appeal’s judgment in JD (Congo) & Others [2012] EWCA Civ 327 [2012] Imm. A.R. 719 and that the evidence and fact-finding is likely to be extensive notwithstanding the reduced number of issues, I am of the view that a remittal to the First-tier Tribunal is the right course of action.

76. I therefore remit this appeal to the First-tier Tribunal for a judge of that Tribunal other than Judge O’Garro and Judge Woolley to re-make the decision on the claimant’s appeal limited to the issues specified at para 70 above.

Decision

The making of the decision of the First-tier Tribunal did involve the making of errors of law sufficient to require it to be set aside.

The decision of the First-tier Tribunal to allow the claimant’s appeal with regard to Article 3 on the basis of his medical condition and with regard to Article 8 is set aside.

The decision of the First-tier Tribunal to dismiss the claimant’s appeal on asylum grounds, humanitarian protection grounds and the related Article 3 grounds stands.

This appeal is remitted to the First-tier Tribunal for a judge of that Tribunal other than Judge O’Garro and Judge Woolley to re-make the decision on the claimant’s appeal limited to the claimant’s Article 3 claim based on his medical condition and his Article 8 claim.

Signed
Upper Tribunal Judge Gill

Date: 31 August 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal’s decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is “sent” is that appearing on the covering letter or covering email