IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06622/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 April 2016	**On 6 May 2016**

Before

UPPER TRIBUNAL JUDGE WARR

Between

VSJ
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss A Benfield, Counsel, instructed by CK Law Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka, born in June 1986. He left Sri Lanka on 20 August 2010 and, although the chronology is somewhat confused, it was agreed at the hearing that he arrived in this country on the same day. He came with a student visa and an application of extension of stay as a

student was granted until 18 July 2013. Leave was curtailed on 15 May 2013. He applied for asylum in September 2013. The application was refused on 29 March 2015. The appellant appealed and his appeal came before the First-tier Tribunal on 9 February 2016. The appellant was represented then, as he is now, by Miss Benfield. Miss Mepstead appeared for the respondent.

2. There is a procedural issue on the question of whether it was fair to refuse an adjournment application made at the hearing and in order to do justice to that submission it is right that I reproduce the relevant part of the judge's decision as follows:-

> "Earlier Proceedings
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> 8. The appellant was not represented at the Case Management Review hearing on 10 July 2015; the NHS representatives made written submissions. At the flexibility policy hearing on 24 July, the appellant's Counsel applied for an adjournment. According to the Record of Proceedings the appellant's solicitors were concerned that he was not fit to give evidence in a court environment, and the application was made on the basis that an adjournment was required in order that Dr Balasubramaniam could comment on whether he was fit to do so. On 26 and 29 January, the appellant's solicitors made written applications for a further adjournment, which were refused.
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> 9. At the start of the hearing, Miss Benfield again sought an adjournment. She referred to a letter from Dr Balasubramaniam dated 29 January 2016, in which he responded to a request that he comment on the appellant's ability to give evidence. He referred to the recommendation in his earlier report for treatment for the appellant's mental disorders, and advised that the appellant should be re-examined for the purpose of an opinion as to his current ability to give evidence. However, he himself was on holiday abroad until 17 February. Miss Benfield told me that whilst the appellant's solicitors had been aware of the need for an addendum report, that they waited until four weeks before the adjourned hearing so as to obtain an up-to-date report. Unfortunately, it then transpired that the psychiatrist was unavailable. As a consequence of his medical condition, the appellant had not engaged with his solicitors. It was not his fault that Dr Balasubramaniam was not currently available. Although the appellant was at the hearing, he did not want to give evidence. He was suffering from headaches and lack of memory, and did not feel able to answer questions in court.
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> 10. Miss Mepstead opposed the application. She maintained that the psychiatrist's report did not say that he was unfit to give evidence. Following the earlier adjournment, there had been

ample opportunity for an addendum report to be obtained, either from Dr Balasubramaniam or from another psychiatrist Dr Balasubramaniam had recommended that the appellant seek treatment, but he had failed to do so.

11. I refused the application. The earlier adjournment had been granted in order to enable the appellant to provide a report on his ability to give evidence, and no such report had been provided. It was not clear that there was a satisfactory reason for that. While Miss Benfield's instructions were that the solicitors had delayed in seeking his second report, there was no evidence from the solicitors as to why they had done so, or as to any lack of engagement by the appellant in the preparation for the hearing. Although the letter from Dr Balasubramaniam referred to a letter from the solicitors dated 11 February, no such letter had been produced. There was, however an email from Dr Balasubramaniam dated 21 January to which was attached an e-mail from the solicitors dated 18 January requesting his further comments. The appellant has had an ample opportunity since July 2015 to obtain a further opinion from a psychiatrist. In all the circumstances I was not satisfied that the appeal could not justly be determined without a further adjournment, or that such adjournment was warranted.

12. Miss Benfield then told me that although the appellant would not seek to give evidence, he did wish to explain to the Tribunal why he did not want to do so. Miss Mepstead told me that she had no objection. The appellant then told me that he did not want to give evidence because nobody seemed to trust him. He was facing problems on a daily basis, and could not sleep properly. He had had a blood clot on his eyelids but had not been able to go to the doctor for that: he did not want to go to the doctor. Further, his parent was giving him problems every day.

13. Miss Benfield sought to rely on the appellant's evidence as contained in two witness statements. However, neither of those statements was signed by the appellant. Before inviting him to sign them, Miss Benfield asked him whether they had been read to him, or whether he had read them, so that he understood them. The appellant's reasons was 'I only told them to write. Somebody contacted my brother. My brother explained to them what happened. They didn't explain to me. That's the reasons I could not concentrate on this properly because of my mother's sickness. They tell me to read them, but I was not interested to read'.

14. Since that explanation did not indicate that the appellant wished to adopt the witness statements, I indicated that if they were to be relied upon they should first be read to the appellant. The

interpreter agreed to translate them, paragraph by paragraph. He then translated paragraphs 1-22 and, in the main, the appellant confirmed that the contents were correct. He made clear to me that he was not able to remember some of the dates referred to, and he drew attention to one error in relation to his siblings; he only had one brother, not two, he said that at the moment his sister was in Sri Lanka looking after his mother, and his brother was also in Sri Lanka.

15. Miss Benfield then made a further application for an adjournment, on the basis that the appellant should not be asked to continue with the exercise of going through his witness statement because it was traumatising him; he was showing signs of distress. He should not be penalised for any mistakes on the part of his solicitors. She referred to the judgments in **FP (Iran) v Secretary of State for the Home Department [2007] EWCA Civ 13**.

16. Miss Mepstead told me that the further application was, again, opposed.

17. I refused the further application. No explanation had been provided for the fact that signed witness statements by the appellant had not been filed before the hearing. The explanation that the appellant had given about the preparation of the statement indicated that he was aware that his brother had provided information for a statement and, subject to making clear that he was not able to recall certain dates, he had indicated that he agreed with the contents of paragraphs 1-22, with minor exceptions. There was no reason to find that the statements did not represent the solicitors' understanding of the appellant's case, and they might be taken as putting forward his case. I would not ask the interpreter to continue to translate the statements because of the distress to the appellant to which Miss Benfield had drawn attention: an adjournment was not warranted."

3. The judge found that it was plausible that the appellant had been warned by the Karuna Group in 2006 about his contacts with the LTTE. He attached some weight to the appellant's account of being detained in 2010. The appellant's account was not implausible and some support for it was provided by Dr Balasubramaniam's report. He considered the risk on return to Sri Lanka on the basis that the appellant was a supporter of the LTTE in the way that he described and was detained and interrogated in 2010 before being released after his father paid a bribe. He referred to the country guidance case of **GJ (Sri Lanka) [2013] UKUT 31 (IAC).** The judge had been provided with evidence from an attorney-at-law in Sri Lanka, Mr Sivanathan. He gave his assessment of this evidence and the risks on return in the following extract from his determination :

"61. In my judgement, little weight is to be attached to the evidence provided in the letter from Mr Sivanathan to the effect that an arrest warrant had been issued relating to the appellant. According to that letter, 'members of the authorities' came to the appellant's older brother's house in July 2015 looking for the appellant. Mr Sivanathan states that he was informed by officials at Batticoloa police station that 'the authorities are in possession of new evidence connecting [the appellant] with the LTTE and therefore, there is a warrant for his arrest in place'. On that basis, Mr Sivanathan's letter states that he 'can confirm that [the appellant] is wanted by authorities in Sri Lanka for his affiliation with the LTTE and therefore, his life would be in danger if he returned to Sri Lanka'.

62. I take account of the documentary evidence that Mr Sivathanan was admitted as an attorney-at-law in Sri Lanka. In my judgement that is not in itself a sufficient reason to find that the account given in his letter is reliable, in the light of the matters set out in the paragraphs below. I add that while it may be that he continues to be a member of the Bar Association in Sri Lanka, I observe that the certified copy of the membership card which was provided shows his category of membership as 'life member', but records that the card was valid only until 11 July 2015.

63. In my judgement, the account given in Mr Sivanathan's letter is not plausible, having regard to the appellant's account of his activities in Sri Lanka and the country guidance in **GJ (Sri Lanka).** By the appellant's account, he in fact played a very minor role in supporting the LTTE. At his asylum interview he explained that he would collect food for the LTTE through his cricket team, and that the team was 'helping them transport sand for century (I infer, sentry) points' and collecting money for them. He was a supporter but not an actual member of the LTTE, and did not take part in their operations. While I have accepted that it is plausible that he was detained and interrogated in 2010, which was after the end of the civil war, there is nothing in the appellant's account to indicate that he would now be of interest to the authorities because of his previous links to the LTTE; and he did not claim to have engaged in any political activities while in the UK.

64. The fact that the appellant's activities, viewed objectively, were not such as to explain why he would now be of interest to the authorities in Sri Lanka does not necessarily mean that he would not now be sought by them. There is, in theory, the possibility that false information about his activities has been given to the authorities that has caused them to seek his arrest. However I

have no reason to find that there is any real likelihood that this has occurred. Mr Sivanathan's letter refers to 'new evidence connecting [the appellant] with LTTE'. Yet the country guidance in **GJ (Sri Lanka)** makes clear that an individual's past links with the LTTE are no longer the government's concern. They are relevant only to the extent that they are perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan government.

65. Further, as noted above, the country guidance is that 'the Sri Lankan authorities' approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war'. That indicates that the authorities would not now be interested in the appellant, even if someone had provided false information about his former links with the LTTE, unless he was perceived to be a present risk to the unitary Sri Lankan state or the Sri Lankan government. If such information related to alleged activities in the UK, the authorities would be aware that he was not in Sri Lanka, and accordingly they would not be looking for him at his brother's home there as asserted in Mr Sivanathan's letter.

66. Finally, the documents in the respondent's bundle included a letter from an individual in Sri Lanka who described himself as a 'Justice of Peace', dated 18 March 2015, which was shortly before the date of the appellant's asylum interview. According to that letter, the appellant's 'family is facing some terrible problems here because of [the appellant]'. There is no reference to any such problem in Mr Sivanathan's letter. He explains that he was instructed in late November 2015, and he refers to an alleged attendance at the appellant's brother's home by members of the authorities on 11 July 2015. There is no reference to the family having faced a terrible problem earlier in the year. There is no other evidence to explain the reference in the letter of 18 March to a terrible problem. In my judgement, no weight is to be attached to that letter and its submission by or on behalf of the appellant is damaging to the credibility of the account of the authorities' present interest in him.

67. In the light of the matters to which I have referred, I am not willing to attach any credence to the accounts in Mr Sivanathan's letter of a search for the appellant and the issue of a warrant of arrest. I find that even if the appellant was detained in Sri Lanka in 2010 as he maintained, there is no serious possibility that he falls within the categories identified in paragraph 356(7)(a) or (d) of **GJ (Sri Lanka).**

68. Miss Benfield referred in her submissions to paragraph 50 of **MP**. Underhill LJ concluded that 'even apart from cases falling under heads (b)-(d) in paragraph 356(7), there may, though untypically, be other cases (of which NT may be an example) where evidence shows particular grounds for concluding that the government might regard the applicant as posing a current threat to the integrity of Sri Lanka as a single state even in the absence of evidence that he or she has been involved in diaspora activism. In my judgement, no such grounds have been shown in relation to the appellant."

4. The judge went on to find that the appellant did not qualify as a refugee and had not established a case for humanitarian protection. In relation to Article 3, the case was put on the basis that there was a risk arising out of conditions in prison in Sri Lanka and because of the appellant's mental health condition.

5. The judge dealt with these matters and concluded his determination as follows:

"72. In my judgement, I have no reason to find that there is any reasonable likelihood that the appellant would be imprisoned. Miss Benfield submitted that the Sri Lankan authorities have particular concerns about those returning to Sri Lanka from the UK. Further, if the appellant were questioned, because of his metal health condition there was an increased risk that he would be viewed suspiciously, since if he were questioned he might be unable to provide satisfactory answers and might therefore be regarded as having dissembled.

73. I am not satisfied that there is any serious possibility that the appellant's name would appear on either a 'stop' list or a 'watch' listed in Sri Lanka. I have not accepted as credible the evidence that there is an arrest warrant against him. Paragraph 356 (9) of **GJ (Sri Lanka)** refers to the maintenance of a computerised intelligence-led 'watch' list. Having regard to the limited support which the appellant claims to have given to the LTTE and the fact that he has not engaged in any pro-Tamil activities in the UK no basis has been established for a concern that he is now on a 'watch' list or would face interrogation in Sri Lanka. I find that there is no reasonable likelihood that he would face serious harm as a consequence of detention, such as to constitute a breach of his rights under Article 3.

74. In **GJ (Sri Lanka)**, the Article 3 claim by the third appellant, MP, succeeded on the basis of his mental illness. He had injuries which were described by one of the medical experts as highly consistent with his account of being subjected to very

considerable ill-treatment, including being beaten and burned. The consultant psychiatrist who examined him referred to him having severe post traumatic stress disorder and severe depression; he shows a high degree of suicidality and apparently a clear suicidal plan and a serious determination to kill himself in case he was forced to go back to Sri Lanka. The psychiatrist's firm opinion was that if he were deported, his already severe mental state would deteriorate further, and his already significant suicide risk would become extremely high. If he were removed to Sri Lanka, this would cause severe mental suffering to him. Even if there were adequate mental health services in Sri Lanka, his suspicions of professionals there would be too great to trust them sufficiently to accept any treatment or support, and it would therefore also be impossible for him to seek out treatment by himself in Sri Lanka. There were limited facilities for psychiatric treatment in Sri Lanka; resources were sparse, and limited to cities. At paragraph 456, the Upper Tribunal concluded that in the light of the severity of his mental illness, his claim under Article 3 should succeed.

75. The evidence does not indicate that the present appellant suffers from a comparable severity of mental illness. Dr Balasubramaniam does not provide an opinion on the degree of risk that the appellant would commit suicide, stating that it was not possible to predict it with any certainty but that the incidence of suicide was higher in the case of people suffering from PTSD and depression; the risk to the appellant would be reduced if his application for asylum was successful. There is no indication that Dr Balasubramaniam considered the risk to be high, or that the appellant's PTSD or depressive disorder was severe.

76. Further, according to Dr Balasubramaniam's report the appellant needed to be treated with antidepressants and cognitive behavioural therapy. Antidepressants would provide some treatment for both his PTSD and his depressive disorder. I was given no reason to find that antidepressants would not be available in Sri Lanka, even if he would have difficulty in obtaining cognitive behavioural therapy.

77. I have regard to the references in **GJ (Sri Lanka)**, at paragraphs 450-451, to the test set out in **J v Secretary of State for the Home Department [2005] EWCA Civ 629** as to threshold in relation to Article 3, and the observation of Sedley in **Y (Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 362** in relation to the risk of suicide. Miss Benfield told me that it was accepted that the appellant's claim could not succeed on the grounds of the risk of suicide alone. She maintained that the risk of suicide was a factor in the overall assessment of the implications for the appellant of being

returned to Sri Lanka. I take account of Dr Balasubramaniam's opinion, in Section 9 of his report that deportation to Sri Lanka is likely to worsen his conditions; there is no reference to the extent of the deterioration that can be expected. In my judgement, the evidence does not establish that the implications for the appellant's health of his return to Sri Lankan are such that his return would breach the UK's obligations under Article 3.

78. The appellant also relied on Article 3, on the basis that his private life included his physical and moral integrity including his mental health. In that regard, I adopt the approach set out in **Razgar, R (on the application of) v Secretary of State for the Home Department [2004] UKHL 27**.

79. The appellant has been living in the UK since August 2013. In my judgement he is to be regarded as having developed a degree of private life here such that his removal would constitute an interference with the exercise of his right to respect for his private life, with consequences of such gravity potentially to engage the operation of Article 8. Such interference is in accordance with the law.

80. In considering whether such interference is necessary in a democratic society, and proportionate to the legitimate public end sought to be achieved, I find that the relevant public interest is the economic wellbeing of the country, through immigration control. Section 117A of the Nationality, Immigration and Asylum Act 2002 requires that, in considering whether an interference with a person's right to respect for private life is justified under Article 8(2), the Tribunal must (in particular) have regard to the consideration listed in Section 1217B.

81. The consideration in Section 117B(1) is that the maintenance of effective immigration controls is in the public interest. I have found that the appellant is not entitled to be granted asylum, or humanitarian protection under the Immigration Rules and he did not maintain that he met the requirements of paragraph 276ADE(1) of Appendix FM for the grant of leave to remain on the basis of private or family life in the UK.

82. I have regard to the findings by the Upper Tribunal in **Akhalu (Health claim: ECHR Article 8) [2013] UKUT 400 (IAC)**, and the reference at paragraph 46 to the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended. My findings in respect of the appellant's mental condition, and the likely implications for him of being returned to Sri Lanka, in relation to the appeal by reference to Article 3 are relevant also to the considerations of his rights under Article 8. I

take account of the evidence as to the limited facilities for psychiatric treatment in Sri Lanka. I am not satisfied that there are compelling circumstances such as to warrant a grant of leave to remain outside the provisions of the Immigration Rules. I find that removal of the appellant would be a proportionate interference with the exercise of his rights under Article 8."

6. The appellant's appeal on asylum, humanitarian protection and human rights grounds were dismissed.

7. Permission to appeal was applied for and was granted by the First-tier Tribunal on 4 March 2016. The judge found it arguable that the decision not to grant an adjournment for an addendum psychiatric report was unfair, referring to **SH (Afghanistan) v Secretary of State [2011] EWCA Civ 1284** and **Nwaigwe [2014] UKUT 00418**. The refusal to adjourn had precluded proper consideration of the Article 3 claim. The judge had erred in failing to make clear findings in relation to the events of July 2015 and had erred in rejecting the evidence of the attorney. She had adopted too narrow a view of the plausibility of adverse interest in 2015. She had not had regard to the findings in the country guidance case in relation to the returns process having found that the appellant was credible in relation to having been an LTTE supporter between 2002 and 2009.

8. Miss Benfield relied on the grounds. In relation to the psychiatric reports efforts had been made and, while it was accepted that more could have been done by the representatives, the judge had acted unfairly, indeed punitively.

9. The judge had not found the appellant to be a wholly incredible witness. Article 3 was in issue and without a proper diagnosis the appeal could not be justly determined. No clear findings had been made on the incident in July 2015. Clear reasons should have been given for rejecting key aspects of the appellant's claim. The appellant had provided a clear account and no adequate reason had been given for rejecting the evidence of the attorney regarding the 2015 events. It was implied that the statement was a false one. The judge had not properly applied country guidance. The appellant had accepted he had been involved with the LTTE and would be questioned about this and he would be likely to be detained even for a short period in breach of Article 3.

10. Mr Avery submitted that the judge had set out his reasons for not agreeing to adjourn the matter. The appeal had already been adjourned once. More force would be given to the submission had the appellant provided an updated medical report and no medical report had been provided, even today. The judge had had a report which was relevant to the issues before him and at the hearing today the Upper Tribunal was none the wiser. The judge had dealt with all the matters in contention although specific reference had not been given to the appellant's

statement about the events in 2015. Weight had been given to the account in 2010. The judge had dealt with all material aspects of the case. He had rejected the attorney's account as not plausible. He had found that the appellant had not been involved in activities in the UK and there was nothing to suggest that the appellant would now be of interest. The weight to be given to the letter from the attorney was a matter for the judge. The grounds merely expressed disagreement with the judge's assessment.

11. In relation to Article 3 it was said that there would be a risk to the appellant which would be exacerbated by his previous history with the LTTE. The appellant had helped the LTTE and supported the LTTE but was not a member. He could be honest on return and it was commonplace that there had been widespread involvement in the LTTE in the north of Sri Lanka. The judge had given careful consideration to the appellant's claim as a low level member.

12. In her reply Counsel reiterated her criticism of the judge's findings in relation to the letter from the attorney. The attorney had written the material as a professional person.

13. At the conclusion of the submissions I reserved my decision. I can only interfere with the judge's decision if it was infected by an error of law. The first point taken is in relation to the refusal of the application for the adjournment and I have set out the judge's treatment of this application in full above.

14. In my view the judge went into the application and indeed the renewed application with great care. He exercised his discretion appropriately in my view. It is of course true that a discretion must be exercised fairly but it does not follow that a refusal to grant an application is unfair. In this case there was a history and it was clear that opportunity had been given for a report to be filed. The judge addressed himself to all relevant matters. With hindsight it can be seen that an adjournment would not necessarily have achieved anything. As was confirmed before me there has still been no report provided. In my view the judge's decision to proceed was not unfair to the appellant. It was a properly exercised discretion.

15. It is said that the judge erred in finding the appellant credible in relation to aspects of his claim but failed to make clear findings in relation to the events of July 2015.

16. I can see no merit in this ground. The judge gave full attention to the letter from the attorney and gave proper emphasis to his professional status in Sri Lanka. He noted the certified copy of the membership card relied upon was only valid until 11 July 2015. He found the account not plausible and gave satisfactory reasons for taking that view. As Mr Avery

submitted, the grounds are simply expressions of disagreement with the First-tier Judge's conclusions.

17. The judge accepted aspects of the appellant's case but not all of the appellant's case. His approach throughout was in my view fair. Having accepted one aspect he was not obliged to accept another. In my view and with respect there is nothing lacking in clarity in the judge's assessment. He attached no weight to the evidence about a search for the appellant and the issue of the arrest warrant. It is quite clear that the judge had well in mind the appellant's witness statement to which he makes reference during the course of his decision. However he did not accept the evidence relating to the events in 2015, as is clearly indicated in the determination and it was not incumbent on the judge to make a further reference to the appellant's witness statement. The judge gave full reasons for finding that the appellant would not now be of interest and that the letter from the attorney was not plausible in paragraphs 63 to 66 of the determination. Paragraph 67 makes the judge's findings perfectly clear.

18. In relation to the country guidance the judge again properly directed himself. He considered the issue of detention and the submission that on questioning there was an increased risk the appellant would be viewed suspiciously – see paragraph 72. He was entitled to conclude as he did in paragraph 73 on the issue of detention.

19. He explored fully the impact on the appellant's mental health of removal in paragraphs 74 to 77. I am not satisfied that it is established that the judge overlooked or misdirected himself in any material respect during the course of a long and carefully considered decision. Further, I find no evidence of any unfairness in the judge's approach to the various issues before him.

20. For the reasons I have given this appeal is dismissed and the judge's decision is confirmed.

Notice of Decision

21. Appeal dismissed.

Anonymity Order

22. The First-tier Judge made an anonymity order and I confirm that order.

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.

Fee Award

24. The First-tier Tribunal Judge made no fee award and I make none.

Signed Date 3 May 2016

G Warr
Judge of the Upper Tribunal