Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/01437/2014
AA/04362/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 March 2016	**On 13 May 2016**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R M M
P M
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr S Whitwell, HOPO
For the Respondents: Mr A Mackenzie, Counsel instructed by A J Paterson Solicitors

DECISION AND REASONS

1. The appellant, the Secretary of State, has been granted permission to appeal the decision of First-tier Tribunal Judge Scott allowing the appeals of the respondents on asylum and human rights (Article 3 of the ECHR) grounds.

2. The respondents are citizens of Sri Lanka born on [ ] 1968 and [ ] 1979. They are husband and wife and have three children together aged between 7 and 10. The two oldest children were born in Sri Lanka and the youngest child was born in France. All three children are present in the United Kingdom where they live with their mother, the second respondent.

3. The first respondent's appeal was against an automatic deportation order made against him on 2 July 2014. The second respondent's appeal was against the refusal of her asylum claim on 6 June 2014 and a decision made to remove her and the children from the United Kingdom.

4. The facts in these cases are rather complicated. However, the salient facts are that the first respondent arrived in the UK on 12 November 1994 and claimed asylum under the name of [DA]. His asylum claim was refused and his appeal was dismissed on 22 January 1999.

5. On 20 March 2003 the second respondent and the first respondent's brother, [M], got engaged.

6. In October 2003 the first respondent returned to Sri Lanka. [M] then persuaded the second respondent to marry his brother, the first respondent, instead of him because of [M]'s duties in the LTTE. On 20 October 2003 the respondents contracted a religious marriage in Colombo.

7. On 13 November 2003 the first respondent was detained by the security forces on suspicion of assisting the LTTE. He was also accused of being involved in the recent killing of a member of the EPDP. He was tortured by being suspended, asphyxiated with a plastic bag containing petrol, subjected to simulated drowning, subjected to electric shocks, beaten on his back and the soles of his feet (falaka) and cut with blades. He was detained for about a week in very poor conditions. Then, after being forced to sign blank pieces of paper, he was handed over to the EPDP and driven into a forest where he was accused again of killing an EPDP member. He was beaten unconscious and left for dead. He was found by a passer-by and taken to hospital. Fearing that he would be reported to the police, he contacted his uncle, discharged himself from the hospital and went to stay with a friend who helped him to obtain private medical treatment.

8. At the end of March 2004 the first respondent was again detained by the security forces and handed over to the anti-terror branch on suspicion of assisting the LTTE. He was again tortured by having objects pushed under his toenail, being subjected to freezing water and ice and being struck about the head, including across the bridge of his nose. He was bailed in May 2004 after payment of bribes. In June 2004 he jumped bail, left Sri Lanka and returned to the UK.

9. The second respondent, who was then pregnant, remained in Sri Lanka. She and [M] allowed people to assume that they were married to each

other. On [ ] 2004 the respondent's first child, [L] was born in Sri Lanka. On 17 September 2004 the first respondent contracted a civil marriage with a Portuguese national in the UK. On 3 December 2004 he was granted an EEA residence permit on the basis of that marriage. He travelled to India to meet the second respondent in March 2005 and the second respondent became pregnant with their second child, who was born on in Sri Lanka on [ ] 2006. On 28 April 2006, the second respondent was detailed, along with the children by the security forces who were looking for [M]. She was tortured and raped multiple times. She managed to escape in October or November 2006 when the LTTE attacked the camp where she was being held. She left Sri Lanka and went to France on 19 December 2006. The first respondent visited her in France. She became pregnant with their third child. He was born in France on [ ] 2008. The second respondent arrived in the UK on 1 March 2010 where was reunited with the first respondent. On 3 March 2010, the second respondent made a postal application for asylum through her solicitors.

10. The respondents feared persecution by the Sri Lankan authorities, in light of the country guidance decision of **GJ and Others (Sri Lanka) CG [2013] UKUT 00319 (IAC)**. It was also their contention that their removal would also be a breach of Article 3 of the ECHR because they are both at serious risk of suicide following torture in Sri Lanka. Furthermore removal would not be in the best interests of the children, as the respondents would not be fit to look after them because of their very poor mental health and no alternative arrangements for their care are available.

11. The judge failed to consider the position of the respondents under Article 8 with particular reference to the best interests of the children. This was because he had allowed the appeals of the respondents on asylum grounds and Article 3 of the ECHR.

12. Mr Mackenzie accepted that the judge should have dealt with Article 8 and whether the three children could return to Sri Lanka when both parents had mental health problems. He submitted, and I agreed, that this ground would be arguable if I found that the judge's decision allowing the respondents' appeals on asylum grounds and Article 3 of the ECHR was flawed.

13. First-tier Tribunal Judge Robertson granted the appellants permission as follows:

> "In relation to the Appellants' asylum claims, it is submitted in ground one, at paragraphs 2-13, that the Judge materially misdirected himself in law and failed to give adequate reasons for findings on material matters because he failed to take the credibility findings of the Tribunal that assessed A1's claim in 1999 as the starting point for his assessment and failed to engage with the matters set out in the reasons for refusal letter in relation to the assessment of A2's claim. Whilst it is likely that there is significant new evidence in A1's claim which enabled the Judge to go behind the findings of

> the first Tribunal, the Judge has made no mention of the first Tribunal's findings and this point is therefore arguable. Similarly, whilst there may be good reason for finding A2's account credible on the basis of the evidence before him, the Judge does not engage with the reasons given for refusal or A2's asylum claim or give reasons for as to why the evidence before him answered the Respondent's case. These grounds are therefore arguable.
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> At paras 28-36 of the grounds, the Respondent challenges the Judge's assessment of the Appellants' appeals under Article 3. It is not the case, as asserted in the grounds, that the Judge failed to have regard to the healthcare available in Sri Lanka. He heard evidence on it from Professor Katona (at para 17) and the likelihood of both appellants accessing treatment in Sri Lanka from both Professor Katona and Dr Singh (at paras 12-17 and 32-42). However, it is arguable that the Judge gave insufficient reasons for his finding that the evidence before him reached the high threshold for engagement of Article 3 on medical grounds in the light of **N v UK** and the absence of evidence as to family members in Sri Lanka."

14. Mr Whitwell relied on the grounds save for three amendments which were highlighted in Mr Mackenzie's Rule 24 response.

15. At paragraph 12 of the appellant's grounds, it was submitted that, like the first respondent, the second respondent sought asylum after being informed of proposed removal action. Mr Whitwell acceded that this was incorrect and that the second respondent had claimed asylum two days after her entry into the UK as stated at paragraph 23 of the Rule 24 response. He also submitted that it was incorrect as stated in paragraph 13 of their grounds that the second respondent had a previous appeal which had been dismissed. Rather it was the first respondent whose previous appeal had been dismissed. Thirdly, the grounds at paragraph 28 said that the first respondent would have family support available in Sri Lanka. This was incorrect as he does not have family in Sri Lanka.

16. Mr Whitwell proceeded to challenge the judge's findings in respect of the first respondent's credibility. He said it is common ground that the starting point for the judge's assessment should have been the credibility findings of the Tribunal of the first respondent's asylum claim in 1998. The Tribunal found that there were inconsistencies as to the respondent's place of detention and date of detention, whether or not it was his sister or sister-in-law who was killed by the security forces, had embellished his evidence in respect of a signing on condition imposed on him n September 1994 and the particular incident when his business was raided. Mr Whitwell submitted that although the first respondent's current fear stems from events after his return to Sri Lanka in 2002/2003, that the judge should nevertheless have considered the findings made by the previous Tribunal as his starting point.

17. In respect of Judge Scott's determination, Mr Whitwell acknowledged that the judge made a number of positive findings based on the account given to Dr Arnold in 2011. However the judge's disregard of the past evidence must have an effect on the remainder of his findings. Mr Whitwell further

submitted that the judge did not take into account the delay by the first respondent in claiming asylum. The first respondent returned to Sri Lanka in October 2003. He made an entry clearance application for a family visit which did not sit well with an application he made on 6 July 2009 for indefinite leave to remain in the UK based on the claim that he had been living and working in the UK for fourteen years. He then obtained a residence card on the basis of his marriage to an EEA national. He then returned to Sri Lanka where he fathered two children and engaged in a marriage ceremony with the second respondent. Mr Whitwell submitted that all these factors have a bearing on the determination of the first respondent's case which the judge failed to consider.

18. I accept that the judge failed to take into account the first respondent's delay in claiming asylum. Mr Mackenzie submitted that there was no need for him to claim asylum because he had a residence card. Whilst there is some validity to that argument, the submissions made by Mr Whitwell showed that the first respondent was being deceitful in his actions. First, he applied for leave to enter the UK on a family visit. Whilst here, he made an application on the basis of fourteen years' long residence which was clearly dishonest given the fact that there had been a break in his residence from October 2003 to June 2004, when he had been in Sri Lanka. During the currency of his residence card, he continued to maintain his relationship with the second respondent which led to the birth of their second child. I accept that the judge failed to consider these factors in his assessment of the first respondent's case. It is not clear from the determination that these matters were drawn to the judge's attention by the HOPO below as adversely affecting the first respondent's credibility. I also note that Mr. Whitwell's arguments did not form part of the grounds upon which the Secretary of State sought permission. In any event I am of the view that these matters would not have undermined the judge's findings on the core issues of this particular claim.

19. I accept that the judge did not use the previous determination as the starting point. I do not find that the error is material. This is because the previous decision, which was made in 1999, was in relation to the first respondent's experiences in Sri Lanka in 1989 to 1994. I agreed with Mr Mackenzie's submission that by contrast, the judge's finding related to the first respondent's experiences following his return to Sri Lanka in 2003, as to which the 1999 determination could have had no direct bearing. In any event the judge was aware of the circumstances in which the first respondent claimed asylum for the second time, which he set out in a detailed chronology in his determination.

20. Mr Whitwell submitted that the judge did not grapple with the credibility points made in the Reasons for Refusal Letters. He challenged the judge's finding at paragraph 54 that the second respondent would be on a "stop list" and that she falls into the risk category identified at 7(d) of **GJ**. He submitted that there was no reference to an arrest warrant or court order for the second respondent for her to be on a "stop list".

21. He further submitted that the Secretary of State's Reasons for Refusal Letters in respect of both respondents stated that certain medication was available in Sri Lanka, albeit there was a limited medical system in place. Mr Whitwell submitted that given the prevalence of evidence on this issue by the appellant, the judge did not explain why the evidence before him reached the threshold of **N**. He submitted that if the last sentence of paragraph 62 is taken out, the judge's findings at paragraph 62 do not reach the high threshold of **N**. In the last sentence of paragraph 62 the judge said that he has also taken into account the fact that he has found their fears of persecution to be objectively justified. This was not relevant to his findings to his findings on their medical claims.

Findings

22. I find that the appellant's arguments do not show an error of law.

23. In respect of the first respondent, I find that the judge gave reasons for finding that there would be an outstanding warrant for his arrest. He found that the first respondent had been detailed and tortured in 2003 and 2004 not only on suspicion of helping the LTTE, but also on suspicion of being implicated in the killing of EPDP member. He had jumped bail after paying a bribe. The judge had the benefit of a medical report from Dr. Arnold, who identified numerous scars attributable to torture, most of which were attributed by the first respondent to tortured suffered after returning to Sri Lanka in 2003.

24. In the case of the second respondent, the judge found that there is a real risk that her name too will feature on a "stop list". This was because of her real and perceived connection with Manoharan, a known senior LTTE member, and her escape from detention, for which there is reasonably likely to be continuing adverse interest in her, as her detention and torture occurred after the end of the civil war. Consequently, I find that the judge was entitled to conclude that she too fell into risk category 7(d) of ***GJ.***

25 I accept Mr. Mackenzie's submission that the judge had a significant amount of medical and other evidence before him, as well as a very lengthy and detailed statement by the second respondent which he said at paragraph 49 made "compelling and convincing reading on its own". A scarring report by Dr Soon Lim identified numerous burns from heated iron rods and lighted cigarettes, regarded by Dr Lim as diagnostic of ill-treatment, as well as numerous other scars regarded by him as consistent with the second respondent's account. The substantial psychiatric evidence supported the view that the second respondent had suffered extensive and grievous torture. I find that the judge was entitled to give all that evidence such weight as he reasonably saw fit.

26. I find that in the light of the medical evidence that was before him, the judge's decision to allow the respondents' appeals on Article 3 EHCR grounds discloses no error of law.

27. Professor Katona, Consultant Psychiatrist, prepared four reports on the first respondent. He diagnosed the first respondent with a psychotic illness, most likely to be schizophrenia. The judge noted that in his latest reports Dr Katona had maintained various opinions which included the opinion that without the help and support which he currently receives, there would be a significant risk of the first appellant behaving aggressively towards his wife, as he did in April 2011 during a period of severe mental deterioration with clearly adverse consequences for his wife and children. He was also of the opinion that if returned to Sri Lanka the first respondent would be at a high risk of suicide. Professor Katona also gave oral evidence in which he confirmed his view that the first respondent was suffering from schizophrenia. He pointed out that the appellant's country of origin information made no reference to schizophrenia or to the medication which is available in the United Kingdom.

28. The judge also heard evidence from Ms [A] who said she acts as an informal carer for the first respondent. She has seen the serious adverse effects on him of not taking his tablets at the right time. She has heard him express the intention of killing himself if he were to be returned to Sri Lanka. Ms [A] was concerned that if the first respondent and his wife were sent back together, they would not be able to support each other because of their mental illnesses. She was even more concerned for their children. His wife would not be able to help him because she is mentally ill herself.

29. The evidence with regard to the second respondent was that she was detained, tortured and raped in Sri Lanka. Her helper is Mrs [G] who assists with domestic tasks. Mrs [G] oversees her medication regime, checking that she takes the right amounts at the right times. She lives with the children separately from the first respondent who lives nearby, but visits them every day now that his schizophrenia is under control. She has also expressed that she would prefer to kill herself rather than seek psychiatric treatment in Sri Lanka. She has the "tiger stripe" scars on her back from torture which would be discovered if she were to be stopped and questioned on arrival.

30. The respondent's bundle contained a letter from a Sri Lankan human rights lawyer, Mr Gangatharan, who stated that he was contacted by a friend of [M] in November 2009 and asked to find out why the second respondent had been detained on her return to Sri Lanka from Malaysia. He contacted the terrorist investigation department on 5 November 2009 and was told that she was being detained "due to suspicion of terrorist activities". He called them again on 7 November 2009 and was told that she was deemed to be "the wife of a senior LTTE leader" (that is [M]). Mr Gangatharan was denied access to her and was unable to progress the

case. He was later told that the second respondent had been handed over to the EPDP and had fled the country.

31. The judge also heard from Dr Mala Singh, a Consultant Psychiatrist who adopted her three medical reports relating to the second respondent. She diagnosed the second respondent as suffering from PTSD and severe depression with psychotic symptoms. If removed to Sri Lanka her mental state would deteriorate significantly and lead to an increased risk of suicide. Dr Singh expressly considered whether the second respondent might be fabricating or manufacturing her symptoms but concluded that she was not.

32. The judge also noted that the children have their own social worker.

33. In the light of the evidence the judge found that both respondents suffer from serious mental illnesses which require special treatment, as well as carer's support on a daily basis, all of which they are currently receiving in the United Kingdom. If returned to Sri Lanka they will not seek treatment, for the reasons explained by him and even if they did, it is very unlikely that the appropriate treatment would be available to them. They would have no one to support them and supervise their adherence to any drug regime. They would not be able to support and help each other because they are both seriously ill. The results would be a serious deterioration in their conditions. They already both present a high risk of suicide on return. I find that in all the circumstances the judge was entitled to find that this was one of those rare or exceptional cases in which the very high threshold established in the case of **N v United Kingdom** is reached and that the appeals fall to be allowed also under Article 3 of the ECHR in respect of their mental conditions.

34. I find in light of the judge's acceptance of the evidence of the respondents and in the light of the significant amount of cogent medical evidence that was before the judge, he made findings that were properly reasoned and properly open to him. His decision discloses no error of law.

35. Consequently, I find that it was not necessary for the judge to consider the Article 8 ECHR claims of the respondents.

Notice of Decision

36. The judge's decision allowing the appeals of the respondents shall stand.

Signed Date: 6 May 2016

Upper Tribunal Judge Eshun