Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10156/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd January 2018	**On 2nd March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR S T S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Harvey (Counsel)
For the Respondent: Mr E Tufan (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge IJ T Davidson, promulgated on 5th June 2017, following a hearing at Taylor House on 1st December 2016. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of India, who was born on [ ] 1980. He appealed against a decision of the Respondent dated 24th June 2015, refusing his application for asylum and humanitarian protection under paragraph 339C of HC 395.

3. The essence of the Appellant's claim is that he fears the Indian police authorities in India, especially the "Q" Branch, because they consider him to be a member of the Sri Lankan LTTE, a proscribed terrorist organisation in India. His father was an inspector of police in India but is now retired. The Appellant himself has a Masters in Physics and a MPhil in Physics in India. He worked there as a science teacher from 2002 to 2003. He worked in a secondary school from 2005 to 2007. He worked as a lecturer at an engineering college until the end of December 2008. In the United Kingdom, he undertook a course at the University of Greenwich and completed an MSc in wireless communication systems in September 2010.

The Judge's Findings

4. The judge found the Appellant's claim to have been lacking in credibility. He held that the Appellant was in the UK the majority of the time between 2008 until 2015 but did not claim asylum until he had been refused further leave to remain. His application for an EEA residence permit was refused. He was arrested as an overstayer in Plymouth in January 2014. Having entered the UK on 16th January 2009, he did not make an asylum claim until 19th January 2015. This was six years later. It was also after all other avenues had been closed off to him to remain in the UK (paragraph 37).

5. Second, the Appellant claimed to have been arrested and tortured by the Indian authorities in January or February 2012. Yet he returned back to the UK without a problem using his own passport. He did not immediately claim asylum upon return either on 28th February 2012. This was despite claiming that he had been tortured. This appeal was not plausible (paragraph 38).

6. Third, notwithstanding ill-treatment which allegedly involved being stripped naked, beaten with plastic pipes, suspended upside down, having his head submerged in a bucket of water, and being deprived of sleep, the Appellant was able to leave India, claiming that he was able to bribe officials, and yet the authorities thereafter went to his house looking for him in March 2012. This too was not credible (paragraph 39).

7. Fourth, the Appellant submitted an application for a residence card on 29th December 2012, claiming to be the partner of Mireilla Adele Manoka Monguma, who was an EEA national exercising treaty rights in the UK, and this was refused on 14th February 2014. The Appellant did not claim asylum, as noted above, because he feared being deported. Yet, he did

not fear being deported despite making two applications for residence cards, both of which were refused, and both of which were then appealed by him (paragraph 40).

8. Fifth, the Appellant did not claim asylum after he had been arrested as an overstayer in Plymouth on 30th January 2014 when he visited a friend (paragraph 41).

9. Finally, even after being arrested as an overstayer in January 2014, the Appellant did not claim asylum. The judge concluded his reasons with the observation that,

> "The whole history of the behaviour of the Appellant persuades me that he thought that if he kept his head down and ignored the law and the directions of immigration officials, something might turn up, and as a last resort he could claim asylum, which is in fact what he has now done" (paragraph 42).

10. The judge dismissed the appeal.

Grounds of Application

11. The Grounds of Appeal raise issues that were not the primary focus of the judge below. They state that the Appellant was recognised to have developed "quite severe" mental health problems. In fact, at the hearing he did not give evidence on medical advice. Second, he had undertaken sur place activities connected with the TGTE in the United Kingdom. Third, the decision of the judge below took too long to be promulgated. There was a period of some six months between the hearing of the appeal in December 2016 and the promulgation of the determination in June 2017. The judge failed to have regard to the medical evidence. He placed too much weight on the Appellant having left India on his own passport and delayed in claiming asylum. Fourth, the judge made no reference to the medical evidence of Dr Dhumad that the Appellant had PTSD. Fifth, neither did the judge take into proper account the evidence of the country expert, Dr Chris Smith, that the Appellant's sur place activities would case him to be arrested and tortured on return to India. Finally, the Appellant presented with a suicide risk, which was exceptionally high, such that Article 3 ECHR was engaged.

12. On 26th October 2017, the Upper Tribunal granted permission to appeal.

Submissions

13. At the hearing before me, Ms Alison Harvey, appearing as Counsel on behalf of the Appellant, began by relying upon her comprehensive and well crafted skeleton argument, which drew upon the 140 page bundle before the Tribunal dated 28th November 2016. She submitted that the

decision of Judge T Davidson was unsustainable for the following reasons. First, the appeal was heard on 1st December 2016. Various letters were sent by the Appellant's solicitors chasing up the determination. Only when the letter of 5th June 2017, which drew attention to the Appellant's severe mental health problems was sent, did the judge on that same day promulgate the determination. Second, the specialist psychiatrist, Dr Dhumad, did not have his report referred to. Third, four witnesses who gave oral evidence did not have their evidence questioned. The evidence of Mr Vijayarajah as to the Appellant's activities in India was accepted. The evidence of Mr Yogalingam as to the Appellant's activities in the UK was also accepted. The evidence of Mr Kesavan, with whom the Appellant lives and who provides him with practical and emotional support, was also accepted. Finally, the evidence of Mr Williamson, a counsellor and member of the Liberal Party who was familiar with the Appellant's activities in the UK was given, but not recorded or discussed anywhere in the determination. Fourth, the risk of suicide is nowhere addressed in the determination under Article 3 ECHR, although it is dealt with in the context of Article 8 at paragraph 56 of the determination.

14. Insofar as the judge does give reasons, and does engage with the evidence before him, the findings reached are unsustainable for the following reasons.

15. First, the only reason the judge gives for not believing the Appellant is the delay in claiming asylum, as well as his having left India on his own passport, but in doing so the judge failed to have any regard to the medical evidence in reaching his decision on credibility. There is no detailed examination of the medical evidence.

16. Second, the approach is contrary to established jurisprudence because in **Mibanga [2005] EWCA Civ 367**, the Court of Appeal stated that, "where the report is specially relied on as a factor relevant to credibility, the Adjudicator should deal with it as an integral part of the findings of credibility rather than just as an add-on".

17. Third, the judge applies Section 8(4) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, to the Appellant's failure to claim asylum in the UK between 2009 and 2015. In fact, the usual application of this Section is with regard to a person's failure to claim asylum in a safe third country. Ms Harvey argued that the judge's approach offends constitutional principles in that he has treated the delay in claiming asylum, as not merely damaging, but as destroying the credibility of the Appellant, rather than simply taking the timing of the claim into account and weighing it with the other evidence.

18. Fourth, the judge states that there has been a six year delay in claiming asylum (at paragraph 37), but this is not correct. This is because the Appellant had not been tortured when he arrived in the UK in 2008, as a student, when he had also the possibility to take up a post-study work visa. He had no reason to claim asylum at the time. The possibilities of

work and study existed for him. He was tortured in 2012, and in March of that year, just a month after he had been tortured, the Appellant followed the instructions of an agent, who had been arranged by his father, to apply for a residence card as a family member of an EEA national. The Appellant's evidence was not lacking in credibility that he feared deportation to India because his visa was to expire in December 2012. The Appellant only grasped the importance of applying for asylum, after he had attempted suicide and had been referred to the Home Treatment Team based at Northwick Park Hospital in Harrow, as it was they who told him that he should claim asylum as soon as possible if he could not return to India (see his witness statement at paragraph 32).

19. Fifth, the medical evidence of Dr Dhumad expressly referred to the Appellant's inability to concentrate, insomnia, nightmares, and fear and shame leading to antidepressant prescription. He suffered post traumatic stress disorder symptoms of intrusive memories, nightmares, flashbacks, avoidance behaviour and hypervigilance.

20. Sixth, the judge erred in not taking into account Dr Dhumad's expert report, and his diagnosis, which had been accepted by Dr Lange, and other medical professionals working with him, insofar as this report attested to the Appellant's suffering from post traumatic stress disorder (see the Appellant's bundle at page 89, 108, 110, and 112). On this basis, Ms Harvey submitted that the medical evidence was plainly relevant to an assessment of whether the Appellant was telling the truth about being tortured and thus being of interest to the authorities in India.

21. Seventh, insofar as there is a country expert from Dr Chris Smith, who had been commissioned by the Independent Advisory Group on Country Information, by the UK government itself, this report was not the subject of any proper analysis by the judge. Dr Smith's conclusion was that the Appellant's sur place activities would cause the Appellant to be arrested and tortured on return to India (see the Appellant's bundle at page 138). Dr Smith had also stated that it was plausible to get through the airport by paying a bribe (bundle at page 138) and this was not properly taken into account by the judge.

22. Eighth, and perhaps most importantly, the Appellant's suicide risk had not been taken into account properly as being one which was exceptionally high and therefore would engage Article 3 of the ECHR. This would bring into pray the European Court jurisprudence in **Paposhvili [2016] ECHR 11**. The judge instead, wrongly refers to the outdated judgment in **N v SSHD [2005] UKHL 31**. Given the risk of suicide, it was necessary for the judge to determine whether Article 3 was engaged. The Appellant, after all, had made three attempts on his life. Dr Dhumad had concluded that the Appellant was at high risk of committing suicide and accords his own "severe concerns about committing a successful suicide" (see bundle at page 91 to 93).

23. Finally, Ms Harvey quite properly recognised that, insofar as there had been a six month delay in the judge promulgating his determination, this still did not of its own render the determination to be suspect. What had to be shown was that there was a nexus between the late promulgation, and the recollection of the evidence and its proper assessment in the determination. My attention was drawn to the jurisprudence in **RK (Algeria) [2007] EWCA Civ 868** and **Arusha & Demushi [2012] UKUT 80**.

24. For his part, Mr Tufan, appearing as Senior Home Office Presenting Officer, on behalf of the Respondent Secretary of State, submitted that there was no nexus between the late promulgation (however undesirable that was) and the assessment of the evidence. It is true that Dr Smith's report has not been considered. The question, however, is the extent to which it is materially relevant. The suggestion that the Indian authorities keep a close eye on dissident elements (see page 137 to 138) does not mean that a Tamil separatist sympathiser who may be suspected of LTTE involvement, would necessarily be at risk in India. Even in Sri Lanka such a person would have to comply with the requirements set out in **GJ (Sri Lanka) [2013] UKUT 319**, where the Appellant had to show that he presented a threat to the unitary nature of the Sri Lankan state in his diaspora activities. This is not the case here.

25. Second, insofar as there is a reference in Dr Smith's (at page 140) to the National Investigatory Agency (at paragraph 25) having been set up in India following terrorist attacks in that country, this was after the Mumbai attacks, and there is no suggestion it has anything whatsoever to do with LTTE activities which the Indian authorities want to monitor.

26. Third, in 2014 the Appellant actually went back to Sri Lanka voluntarily. He thereafter absconded. None of this suggests that he was ever at risk.

27. Fourth, insofar as the Appellant has PTSD, he has to put forward an exceptional case. This is what is required under **EA (Article 3 medical cases – Paposhvili not applicable) [2017] UKUT 00445**, which was the latest Tribunal jurisprudence that had now to be taken into account.

28. It ought also not to be forgotten, submitted Mr Tufan, that the risk of suicide here was all about what the Appellant himself had said, and there was nothing at page 90 of the report to suggest otherwise.

29. In reply, Ms Harvey submitted that Dr Smith was a renowned expert used by the government itself and at page 138 he had stated that there was a risk from the Indian authorities to the Appellant for his diaspora activities. Dr Smith was careful to say several times that credibility was a matter for the Tribunal.

30. In **Y & Z (Sri Lanka) [2009] EWCA Civ 362**, moreover, the Court of Appeal rejected the argument that a track record in failed suicide attempts

did not present with a real risk in the future for an applicant. It stated that,

> "The effect is that, apart from an asylum seeker who actually commits suicide, only one who comes close enough to succeeding to manifest a serious intent is going to be regarded as presenting a serious risk of suicide on return. Yet the medical logic is exactly the reverse: it is that individuals who are at risk of suicide if returned can be stabilised, using therapy and medication, and kept from self-harm so long as they feel safe here. For such individuals the recent past may be no guide at all to the immediate future" (paragraph 36).

31. The Court of Appeal went on to conclude that the Tribunal's finding below would be rejected because, "the concomitant findings that their fear is no longer objectively well-founded and that there exists a local health service capable of affording treatment do not materially attenuate this risk, which is subjective, immediate and acute" (paragraph 63).

32. To this, Mr Tufan intervened to say that the Court of Appeal had taken a very different approach in **KH (Afghanistan) [2009] EWCA Civ 1354**, and therefore, such a statement was not a statement of law.

Error of Law

33. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and re-make the decision. This is, however, not an easy case to determine. There is force in much of what Mr Tufan has submitted. On the other hand, there are matters that have been left unconsidered by the judge below, which can only be the result of a much delayed determination, and one which was eventually promulgated only after the judge was alerted to the risk of suicide by the Appellant's solicitors, following which the determination was then promptly promulgated.

34. First, there is Dr Chris Smith's report. He states that the Appellant's *sur place* activities would cause him to be arrested on return to India. Dr Smith explains (at page 130) that he has over the last ten years completed a large number of expert witness reports in the British courts. His report is not considered. Had the report been considered, it would have been to the fact-finding Tribunal to decide the impact of his report on the Appellant. Without such a consideration, it is not possible to know what the actual finding would have been in the light of the report. For example, it is true that the expert observes that, "the war in Sri Lanka ended in 2009 but security considerations continue to concern both Colombo and New Delhi" (at paragraph 11). However, Dr Smith does not necessarily confirm that the Appellant would be at risk. What he states is that, "the Indian authorities may well have a watch list and a stop list" (paragraph 14). He may have stated that, "the Appellant is clearly known

to the Indian authorities in relation to his Tamil nationalist activities" (paragraph 15), but that does not mean to say that the Appellant would be at risk of ill-treatment and persecution upon return to India (given that even in Sri Lanka he would have had to show that he came under the strictures of **GJ (Sri Lanka) [2013] UKUT 319**).

35. Second, Mr Tufan was also arguably right in relation to the report by Dr Dhumad. He states (at page 90) that the Appellant's presentation, "is consistent with a diagnosis of severe depressive episode, with psychotic symptoms ..." (paragraph 17.1). He also states that the Appellant, "also suffers from post traumatic stress disorder symptoms such as avoidance, flashbacks and nightmares" (paragraph 17.2). In relation to the risk of suicide, however, he goes on to observe (at paragraph 17.3) that, "the risk of suicide is significant; the main risk factors are severe depression, PTSD, hopelessness. He reported three attempts to end his life due to fear of deportation".

36. This is, as Mr Tufan submitted, a case of self-reporting. That aside, the expert's report deals only with the consistency of the diagnosis of severe depressive episode that the Appellant claims to have suffered. In the same way, Dr Dhumad goes on to say (at paragraph 11.5) that, "he reported frequent nightmares". He similarly observes (at paragraph 11.4) that, "he also described intrusive memories of torture". It is, of course, for the fact-finding Tribunal to decide whether this engages Article 3 of the ECHR. This was not considered by the judge below.

37. As against this, there is substance in Ms Harvey's submission that given the Appellant's post traumatic stress disorder, and the alleged risk of suicide, the latest case law did not stop with what was said more than a decade ago in **N v SSHD [2005] UKHL 31**. It was necessary also to consider the European Court's decision in **Paposhvili [2016] ECHR 11**. It is, of course, true that the Tribunal has given guidance in relation to the application of that decision in **EA (Article 3 medical cases – Paposhvili not applicable) [2017] UKUT 00445**. Even so, failure to consider these matters, in a determination which appears to have been rushed after the latest request from the Appellant's solicitors on 5th June 2017 was made, suggests that there is a nexus between what was considered and what was left unconsidered. This brings one to what was actually considered. This is the second reason why permission should be granted.

38. Third, the judge's emphasis on the fact that the Appellant had consistently failed to claim asylum, although meticulously set out in a way which shows that the period of delay in the promulgation of the determination did not detract from the quality of the analysis in this regard (see paragraphs 37 to 42), should have been nevertheless undertaken in the context of the evidence as a whole, which included the medical evidence as well as the country report, and not separately from these items of evidence. The focus on the Appellant's lack of credibility went so far as to an incorrect approach being taken in relation to Section 8(4) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, in the manner

alleged by Ms Harvey, because the judge applied the perspective of a person who had failed to avail himself of the opportunities for asylum in a safe third country, which was not applicable to the facts of this case. All in all, therefore, 'anxious scrutiny' has not been exercised in this appeal and there are sufficient areas of the evidence, such as the medical evidence and the country report which do need to be properly evaluated, even if the decision-maker then decides to reject such evidence as not showing a well-founded fear of persecution, or of a risk of suicide as is being alleged by the Appellant.

Notice of Decision

39. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge T Davidson under Practice Statement 7.2(b) because 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.

40. An anonymity order is made.

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 his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Juss 26th February 2018