Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11084/2019 (P)

THE IMMIGRATION ACTS

Decided Under Rule 34	**Decision & Reasons Promulgated**
On 28th August 2020	**On 2nd September 2020**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MS
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. Directions were issued by the Upper Tribunal on 16 April 2020 indicating the provisional view, in light of the need to take precautions against the spread of Covid-19 and the overriding objective, that this case was suitable to determine whether there was an error of law in the First-tier Tribunal's decision and if so, whether that decision should be set aside, without a hearing.

2. The Appellant conditionally opposes the determination of these issues on the papers if the Respondent opposes the appeal, but if the Respondent concedes that there is a material error of law such that the First-Tier

Tribunal's decision should be set aside in its entirety, then the Appellant is content for the issues to be decided without a hearing. A determination of the error of law issues without a hearing is opposed on the basis on the basis that although there is no intention to call evidence on the Appellant's behalf as to whether there was an error of law below, a decision on the papers would be contrary to the overriding objective because the Appellant would not, through his Counsel, be able to fully participate in the decision-making process of his appeal. A number of authorities are then cited in support of the importance of oral argument and it is said that to deny the Appellant the opportunity of influencing the Tribunal's decision by oral argument would deny him access to a 'central' component of the legal system in England and Wales meaning that his case would not have been dealt with fairly or justly. Finally, on the Appellant's behalf, submissions are made about correspondence between ILPA and the President of the Upper Tribunal and that making a decision without a hearing risks a Judge making an erroneous decision.

3. The Respondent has made no submissions as to whether the error of law stage of this appeal could or should be determined on the papers, such that there has been no objection by her in proceeding with the provisional view. Further, despite being resent the directions with an inquiry as to whether the Respondent wishes to respond, there have been no written submissions from the Respondent as to the substance of the appeal and no rule 24 response has been filed.

4. Whilst the Appellant has made a number of principled objections to a determination of the error of law issues being determined without a hearings; these were general in nature rather than identifying anything specific on the facts of this case for which a hearing was required in the interests of justice and all of the generic points made would of course apply to both parties, fairness and the interests of justice not being relevant only to an individual or an Appellant. The conditional opposition to a decision without a hearing unless the Respondent concedes the appeal therefore somewhat undermines those points and it is further presumed that if the Upper Tribunal were to find an error of law on the papers, there would also have been no objection to such a determination without a hearing.

5. In any event, in my view, this is a case in which it is suitable for the issues of whether the First-tier Tribunal's decision materially erred in law and if so, whether the decision should be set aside, to be determined on the papers on the basis of the written submissions made. This is in light of the unprecedented circumstances surrounding Covid-19 and the need to take precautions to prevent the spread of the disease; is in accordance with the overriding objective for the Upper Tribunal to deal with cases fairly and justly in rule 2(1), (2) and (4) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and in circumstances where on the facts; there are comprehensive written submissions from the Appellant and the Respondent has chosen not to make any written submissions; from which, for the reasons set out below, I find an error of law in the decision of the

First-tier Tribunal which requires the decision to be set aside. This decision has therefore been made under rule 34 to avoid any further delay to the determination of the issues.

6. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Moffatt promulgated on 14 January 2020, in which the Appellant's appeal against the decision to refuse his protection and human rights claim dated 23 October 2019 was allowed.

7. The Appellant is a national of Sri Lanka, born on 21 April 1988, who last entered the United Kingdom in July 2009 and made an asylum claim that month; which was ultimately refused on 25 March 2014 and his appeal against refusal was dismissed on 18 February 2015 by First-tier Tribunal Judge Callender Smith. The Appellant subsequently made further submissions, the refusal of which on 23 October 2019 is the subject of this appeal. The further submissions were primarily made on the basis of a new psychiatric report including a diagnosis of PTSD, severe depression and significant anxiety together with a heightened risk of suicide and self harm; which together formed a claim based on Articles 3 and 8 of the European Convention on Human Rights.

8. The Respondent refused the application, essentially the basis that there would be appropriate medical care and family support available to the Appellant on return to Sri Lanka; that there was no objectively well-founded fear on return to Sri Lanka; that the Appellant did not meet the requirements of the Immigration Rules for a grant of leave to remain on private life grounds and there were no exceptional or compassionate circumstances to warrant a grant of leave to remain.

9. Judge Moffatt dismissed the appeal in a decision promulgated on 14 January 2020 on all grounds. In summary, the First-tier Tribunal referred to the previous Tribunal decision as the starting point and found that the Appellant is suffering from PTSD, although concerns were raised as to the reliability of some of the Appellant's claims in relation to events in Sri Lanka and what he told the Respondent and medical practitioners at different times. The First-tier Tribunal found that the Appellant did not have a well-founded fear of being detained and tortured on return to Sri Lanka or of any of the events that triggered his PTSD and the suggestion from the Appellant that there is an objective foundation to his fear because the PTSD was caused by events in Sri Lanka was rejected because of what was found to be material inconsistencies in the Appellant's claims as to what did happen.

10. In relation to the Appellant's suicide risk and facilities on return, the First-tier Tribunal found that there are a number of protective factors in place in the United Kingdom which would also be in place in Sri Lanka (family and his cultural background and faith) and that the management of the Appellant's mental health to date by medication would also be available in Sri Lanka, even if there would be a real risk that adequate therapeutic treatment for PTSD would not be available. Overall, the First-tier Tribunal

found that the Appellant's mental health would not be materially worse off in Sri Lanka than it has been in the United Kingdom hitherto and that there would be no breach of Article 3 of the European Convention on Human Rights on health grounds.

The appeal

11. The Appellant appeals on three grounds as follows. First, that the First-tier Tribunal materially erred in law in failing to consider, in accordance with the fifth principle in J v Secretary of State for the Home Department [2005] EWCA Civ 629, as added to in Y (Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 362, whether the Appellant had a genuine subjective fear on return to Sri Lanka in circumstances where it was accepted that he suffered from PTSD from past experiences in Sri Lanka, being the cumulative trauma of living in a warzone and relying only on the absence of an objective risk on return. Secondly, that the First-tier Tribunal materially erred in law in finding that the Appellant would be at no greater risk of suicide in Sri Lanka than he currently was in the United Kingdom because of the availability of the same protective factors but without expressly taking into account the medical evidence that the Appellant's risk of suicide would increase by removal and that a further protective factor in the United Kingdom was the Appellant's hope that he would be given permission to stay here, given that in the United Kingdom he felt relatively safe compared to his fear if removed to Sri Lanka. Thirdly, that the First-tier Tribunal materially erred in law in finding that the Appellant would not be deprived of effective therapy in Sri Lanka as he had only been in receipt of medication as treatment in the United Kingdom and medication would be available on return; in circumstances where the First-tier Tribunal had failed to take into account that on return the Appellant's need for treatment would likely be greater than it is in the United Kingdom.

12. As above, further written submissions in support of the appeal were received on behalf of the Appellant on 17 April 2020, in which the original grounds of appeal were relied upon with more detailed submissions in support of the same. In relation to the first ground of appeal, the principles in J and Y are set out and it is submitted that the First-tier Tribunal has failed to follow these and erred in finding that the risk of suicide was undermined by the Appellant giving materially different accounts of the causation of his PTSD. However, it is submitted that it was not for the Appellant to explain how his condition was caused, that is a matter for the expert and in any event, any difference in the Appellant's account was not material to the question of how the PTSD was caused. The psychiatric report concludes that the Appellant's PTSD was caused by 'the cumulative traumas of living in a war zone' which is consistent with the background evidence as to what was happening in Sri Lanka up to 2007 when the Appellant left and further, the Appellant had in any event

been consistent about elements of his claim, including being detained by the Sri Lankan army with emotional torture.

13. In relation to the second ground of appeal, the Appellant challenges the conclusion that there would be no greater risk of suicide in Sri Lanka than in the United Kingdom; which if correct, contradicts the causal nexus between return and suicide for the purposes of the second principle in J. The First-tier Tribunal refers to protective factors being the Appellant's family and his faith and assumes that as both will be present in the United Kingdom and in Sri Lanka, that the risk of suicide would be the same; but in doing so, the First-tier Tribunal has failed to take into account the psychiatric evidence that the Appellant's mental health was likely to deteriorate on removal, such that those protective factors may no longer be sufficient and fails to take into account a further inhibitory factor that the Appellant feels relatively safe in the United Kingdom but has a significant, at least subjective fear on return.

14. In relation to the third ground of appeal, the Appellant submits that the First-tier Tribunal erred (on a similar basis to in ground 2) by failing to take into account the likely deterioration in the Appellant's mental health on return to Sri Lanka such that his current treatment by medication alone may no longer be sufficient and more extensive treatment is likely to be needed.

Findings and reasons

15. The main findings of the First-tier Tribunal in relation to the first ground of appeal are contained in paragraphs 41 and 42 as follows:

> *"41. In **J v SSHD [2005] EWCA Civ 629,** Dyson LJ (as he then was) set out six principles to be considered in relation to a claim for breach of Article 3 due to suicide risk on removal. In this particular case, it is the 5th and 6th principles that are of particular materiality. The 5th principle is that, in deciding whether there is a real risk of a breach of Article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based, is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that removal will be in breach of Article 3.*
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> *42. The appellant does not have a well-founded fear of being detained and tortured on return to Sri Lanka. He also does not have a well-founded fear of a recurrence of any of the events that triggered his PTSD. Dr Revill submits that the 5th principle in **J** does not tell the full story, as the applicant's fear has an objective foundation in the sense that it is caused by PTSD arising from events that did take place. However, as highlighted above, the account which the Appellant gave to Judge Callender Smith is materially different from that given for the purposes of the joint report, and the appellant has not been consistent about the triggering events for his PTSD. Of*

particular significance is that the appellant said in his previous appeal that he had never been ill-treated during round-ups by the Army. This is not consistent with his more recent claim that he was threatened with execution during the one round-up that he described in the joint report."

16. The First-tier Tribunal then moves on in paragraph 43 to consider the 6th principle in J as to whether there are effective mechanisms in place to reduce the risk of suicide. There is no further consideration of the 5th principle in J or its qualification in Y, to consider whether the Appellant has a subjective fear of return to Sri Lanka based on past experiences. Although neither the psychiatrist nor, to at least some extent, the Appellant put this in quite the right way by the referring to the PTSD being caused by events in Sri Lanka giving an objective foundation to the Appellant's fear on return as opposed to referring more clearly to subjective fear; it is an error of law for the First-tier Tribunal to fail to go on to consider the additional part of the 5th principles on the facts of this case.

17. The Appellant had previously claimed asylum on the basis of a well-founded fear of persecution on return to Sri Lanka based on his personal circumstances and country conditions which was refused and upheld on appeal in 2015. That claim was not pursued in the latest further submissions and appeal, there was no further evidence to support any claim that he would objectively be at risk on return from the authorities in Sri Lanka and therefore the previous decision on this, which is the starting point, stands. The claim made in the further submissions was focused only on the Appellant's mental health and risks on return in relation to that and suicide risk in particular and given the nature of the psychiatric evidence and what is said about the cause of the Appellant's PTSD, this was expressly and self-evidently a claim based on subjective fear on return which needed to be determined in accordance with both J and Y. The First-tier Tribunal simply failed to do so, which is a material error of law. The fact that the Appellant was found to be inconsistent about his claims as to events in Sri Lanka does not adequately address this point. First, because no actual findings were made as to what events did or did not occur and secondly, because the psychiatric evidence referred to the cause of PTSD as the cumulative effects of living in a war zone rather than relying on one or more specific events. In any event, there is little by way of reasoning as to what the actual inconsistencies were and none as to how this was relevant to the current claim or the issue of whether the Appellant had a subjective fear on return.

18. The error of law found in relation to the first ground of appeal is sufficient to undermine the overall conclusions on the appeal and requires the decision to be set aside for that reason alone. However, for completeness, I also find an error of law on the second and third grounds of appeal for the reasons given by the Appellant. The medical evidence before the First-tier Tribunal expressly dealt with the likely differences between the Appellant's mental health in the United Kingdom and its expected deterioration (with reasons given) on removal to Sri Lanka; which was not

expressly taken into account by the First-tier Tribunal, with a focus only on specific parts of the report when making findings about the Appellant's mental health and availability of treatment on return. To some extent, these findings follow on from the earlier failure to make findings on whether the Appellant had established a subjective fear on return to Sri Lanka which would be a relevant factor, together with the evidence contained in the psychiatric report, to consider when assessing the Appellant's relative mental health in the United Kingdom and on return to Sri Lanka. Such findings are required before a conclusion can be reached about the availability of treatment on return, particularly where the First-tier Tribunal expressly acknowledge a real risk that adequate therapeutic treatment for PTSD (beyond the medication currently prescribed in the United Kingdom) would not be available in Sri Lanka. For these additional reasons, the First-tier Tribunal erred in law and the decision is set aside in its entirety with no preserved findings of fact.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remit the appeal to the First-tier Tribunal (Taylor House hearing centre) to be heard de novo before any Judge except Judge Monson.

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.

Signed G Jackson Date 28th August 2020
Upper Tribunal Judge Jackson