Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24875/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8 May 2014	**On 6 June 2014**

Before

THE HONOURABLE MRS JUSTICE ANDREWS DBE.

UPPER TRIBUNAL JUDGE PINKERTON

Between

MS MN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Wilding
For the Respondent: Mr P Nath

DETERMINATION AND REASONS

1. The parties are hereafter referred to as they were in the First-tier Tribunal so that MN is the appellant and the Secretary of State for the Home Department is the respondent.

2. The appellant's future is still uncertain, and although we were not addressed on the matter, we direct that the current direction granting anonymity continue until further order.

History

3. The appellant applied for leave to remain in the United Kingdom. That application was refused by a decision that is dated 11 June 2013 under Articles 3 and 8 ECHR. A decision was also taken to remove the appellant from the United Kingdom to her home country of Japan.

4. The appellant appealed the decision to the First-tier Tribunal. The appeal was heard on 3 December 2013. In a determination promulgated on 28 February 2014 the First-tier Judge allowed the appeal under Articles 3 and 8 ECHR.

5. The respondent applied for permission to appeal that determination to the Upper Tribunal. In granting the application the judge doing so found that it is arguable that having provided a detailed record of the evidence and the submissions of the representatives over the course of some 55 paragraphs, the Tribunal thereafter provided inadequate reasons for its factual findings in the following 9 brief paragraphs of the determination. It was found arguable also that the Tribunal failed to address the issue of internal relocation within the context of Article 3 ill-treatment in Japan and that it failed to provide a proper analysis of the Article 8 issues in line with the decision in **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)**.

6. Before us Ms Wilding of counsel appeared for the appellant as she had done before the First-tier Judge. We record our thanks to her for appearing pro bono as we found her submissions most helpful. This being an error of law hearing, at least initially, Ms Wilding fought valiantly to seek to persuade us that although she felt in some difficulty in submitting that the judge had dealt with the Article 8 position, nevertheless in as far as the judge's Article 3 reasoning and findings were concerned the determination bore scrutiny and the judge was entitled to conclude as she did for the reasons given.

7. After careful consideration we find that the determination has to be set aside.

8. A party to adversarial proceedings is entitled to know the reasons why a decision has or has not gone in their favour. In this appeal it was not sufficient for the judge to set out the evidence that she heard from the appellant together with details of her cross-examination (which was extensive) and then state in one sentence that she finds that the starting point is an assessment of credibility "and I find the appellant to be a credible witness" without providing any specified reason or reasons why she came to that finding.

9. Another example is that the appellant gave evidence that she fears return to Japan because of her family that lives there. The judge stated in paragraph 79 that she considered carefully Professor Goodman's detailed country report on Japan. The judge found that "(the report) provides useful insights and information" from which the judge concludes that if the appellant were returned "it would be likely to be possible for her family to locate her there". However, the judge does not spell out what consequences that would have for the appellant such as would lead to an Article 3 finding in her favour.

10. Although the judge goes on to say in paragraph 82 that the current evidence does not indicate that a sufficiency of protection would be available to the appellant in Japan because of police attitudes to what is regarded as a family matter, nowhere has the judge provided an analysis of the evidence or articulated reasons as to why she concluded as she did.

11. Ms Wilding submitted that if we found that the judge had erred materially we should then proceed to substitute our own decision on all the evidence that we had before us. Mr Nath, on behalf of the respondent, did not seek to persuade us to do otherwise.

12. We heard submissions from both representatives, have noted them and have taken them into account in arriving at our decision.

13. The Appellant was present in court. She was not called to give evidence. The risk that the appellant takes in not giving evidence and tendering herself for cross-examination is that the Tribunal may have difficulty in making positive credibility findings or feel unable to give such weight as it might otherwise have done had oral evidence been presented.

14. There is a further point that the Tribunal is deprived of information that may be of assistance in coming to its findings on the matters of credibility and in assessing the experts' reports in the context of those findings. The lack of oral evidence from the appellant makes the analysis of those matters more difficult and the findings less secure.

15. Having said that, and although we set aside the determination, it is helpful to have the record of the proceedings before the First-tier Judge as set out in the determination. This includes the questions asked and replies given in cross-examination. There is no challenge to the judge's record as set down. We anticipate also that if the respondent's representative was seriously seeking to challenge the appellant's evidence he would have made submissions on the point when considering the future conduct of this appeal. Whatever the position is it is incumbent upon us to make findings in relation to the appellant's credibility and to give reasons for so doing lest we fall into error as did the First-tier Judge.

Our Credibility Findings

16. The appellant has been consistent in the history given by her leading to her application for leave to remain. She made an initial statement dated 13 May 2013 that accompanied the application. That statement went into considerable detail. A supplementary statement was prepared for the First-tier Tribunal hearing and the appellant was cross-examined at that hearing. On reading the judge's record of the cross-examination the appellant did not seek to provide answers where she was unable to provide the information being sought. There was no embellishment apparent and her evidence remained consistent throughout.

17. The few points that might be said could be taken against her did not in our finding even mildly shake the foundation of her story. For instance, at paragraph 22 of the determination the appellant was asked why the medical certificate relied on makes no mention of the cause of the injuries or that she had been attacked by her father. The appellant did not know why that was not mentioned but believed it might be because her father is a doctor and was known at the hospital. She did not know whether the security guard had filed a report of the incident. What is not in doubt is that in support of the appellant's story that she was hit by her father there are photographs and a medical report, and these give credence to her history of events on her birthday in 2012.

18. The reports of Dr Rachel Thomas are also supportive of the appellant's history of abuse. The first report is dated 21 June 2013 and the second, a psychotherapy treatment report, is dated 17 November 2013. The first report provides a history that the appellant gave to Dr Thomas and the second records the treatment that the appellant received after she joined Dr Thomas's psychotherapy group in September 2013. It is quite clear from that report that the appellant has not only maintained the history of suffering that she experienced at the hands of her family members but revealed during the course of treatment far more about herself and what had happened to her.

19. All of this leads us to conclude that the appellant's evidence is to be believed and we proceed on the basis that events took place as she has maintained throughout. We find that subjectively she fears her family and what would happen to her on her return to Japan at the hands of her family.

The Appellant's History

20. We do not set out here the entirety of the appellant's story. Suffice to say that we have read her statements, the psychologist's reports and the country report from Professor Roger Goodman carefully. We have also considered the submissions that have been made to us.

21. The appellant is now 32 years old. She was born in Tokyo and her parents are still living. She has two sisters who live with her parents in Tokyo. The appellant has said that historically her family was part of the Royal Family many years ago and her family name is prestigious. Research undertaken

by Professor Goodman finds that no significant information is available on the internet and he is unable to detect any strong ties to the imperial family. Nevertheless, it sounded to him that the family came from prominent Samurai stock.

22. The appellant was schooled in Tokyo. She suffered abuse from her father, in particular, from the age of 3. He began abusing her sexually at the age of 9 and she was raped anally from that age until she was about 14. An uncle also abused her from the age of 11 until she left to come to the United Kingdom. The appellant's mother witnessed the physical abuse and indeed physically abused the appellant herself. Her mother was aware of the sexual abuse also. The appellant told her what her father had done from the beginning and at the time it happened and was told that she should not make her father angry and that it was her fault. Neither of the appellant's sisters were abused physically or sexually. The appellant's parents seemed to blame her for interfering with their career plans. Her performance in school and appearance was not good enough for them.

23. Dr Thomas relates in the second report that the appellant was increasingly able to reveal to the group more detail about the nature of her past abuse. She disclosed to the group, for instance, information such as not currently having her own hair due to excessive stress induced hair pulling and difficulties using the toilet and washing (bathrooms being where much of her early abuse took place) and asking for help with these difficult and humiliating problems (p. 46 in the appellant's bundle).

24. The appellant came to the United Kingdom to study at a boarding school at age 16. The cost of her studies was paid for by her great aunt. Her progress, or at least the perceived lack of progress, annoyed her parents and she continued to suffer physical abuse when in Japan during the boarding school breaks as well as further sexual abuse from her father. The appellant continued to come back and forth to the United Kingdom studying molecular cell biology at University College London where she obtained a degree.

25. In 2004 she returned to Japan and went to Nara instead of Tokyo and began work in a corner shop. She rented a flat and lived on her own to avoid the abuse from her parents. However, her parents tracked her down. She took out cash with her card and was obliged to register her residence in Nara. She believed that her parents used a private investigator to find her. She had been there only two weeks when on leaving the apartment she discovered her parents were outside. Her father told her to open the door. He then threw her inside onto the floor and attacked her. Her parents demanded that she went back with them to Tokyo and she did so.

26. The appellant applied for a Masters Degree at UCL in chemical engineering and obtained a visa to enable her to do so. She returned to Japan around eight times during the time that she was on that course. Her mother

phoned and demanded that she return to Japan to meet potential marriage partners. In 2009 she met a man, a British national of Chinese extraction, and was due to marry him. Ultimately the marriage did not take place. The relationship broke down ten days before the wedding. Her parents arrived in the UK letting her know that they were coming only the day before, and the appellant met them in a restaurant with a friend of hers. At the time her father grabbed her arm and squeezed it so hard that it left a bruise. The appellant walked out of the restaurant with her friend.

27. Following the cancellation of the wedding the appellant travelled to Japan on 4 October 2012 because she wanted to apologise to various people for the wedding not taking place. She stayed at her grandmother's house. On the appellant's birthday she visited her sick grandmother in hospital. Her parents arrived. The appellant wanted to leave but her mother insisted that the appellant went for a coffee with her parents. The appellant's father was silent and she felt the tension and aggression from him. In the cafeteria her father picked up a chair and hit her over the head with it. The security guard separated them and her father was led out of the building. The appellant was left with swelling on her lip and a bruise to her forehead. She was examined by a doctor at the hospital and she requested a medical record of the injury.

28. The appellant then left the next day to go to Korea, returning to Japan a few days later. It was then that she attempted to make a complaint to the police reporting that her father hit her a few days previously. She gave the police the medical record from the hospital. She also said that she was hit when she was a child and gave her parents' name and address. The officer, on realising which address the appellant had given, left the room to check the records. He returned ten minutes later to say that the assault was not serious enough for a potential charge, it was a family issue and she was overreacting. He said that he would not officially lodge the report. The appellant did not report the abuse to the police earlier because she was ashamed of discussing family matters with anyone from the outside. The appellant gave details of returning to the UK later that month.

29. In her first statement at paragraph 53 the appellant says she is terrified at the prospect of having to go back to Japan. She is afraid that the abuse from her father will start again and that he will track her down no matter where she goes in Japan. When she met them in July 2012 her parents said that they will do everything in their power to prevent her coming back to Japan. She was considered a failure for not getting married as was planned and they feared this would affect her sisters' chances of getting married. They said also that it would be "great" if she took her own life as it would make it easier for them.

30. The appellant stated that she has spent the majority of the last fifteen years in the UK and has no close friends in Japan. All of them are in the UK and she considers the UK to be her home. She has been a member of the church for five years; she goes to church every weekend when she is in

London and to church events such as football matches and going to tea. At the time the statement was made she was in a "committed" relationship with a British national. It is apparent, however, that since that statement was made the relationship with him broke down, and although she is lodging in a property that he owns, he is no longer supplying her with any funding and she is unable to work because of Border Agency restrictions.

31. The supplementary statement dated 25 November 2013 refers to the Family Registry in Japan recording the details of every member of every family there and is based upon the assumption that "no-one gets thrown out of their family". An Address Registry requires that every person must register where they are living. This is for employment and national insurance purposes. Anyone who is listed on the Family Registry can look up where other family members are living via that Registry. It is possible to separate yourself from a specific family on the Registry by means of an application to separate yourself, giving a valid reason for doing so. This involves going to court, but the appellant believes it is a fairly simple process. Even if you do separate yourself, however, any family member would still be able to track you down because your new details as an individual or as a member of another family would be stored with your former family's details, albeit with an indication that you have separated from your family. Thus her family will easily be able to find out her new address by doing a simple check at the Registry.

32. The statement also refers to her beginning group psychotherapy sessions with Dr Thomas in July 2013 which she attends once a week for an hour and a half. Since beginning those sessions she has started to comprehend the extent of the trauma that she has been through in her life and realises how much her behaviour and personality have been shaped by the abuse and how much work she needs to do in order to get better. She feels that she is just at the beginning of a very long pathway to recovery. Having suffered abuse for 30 years she has to take each stage of her recovery step-by-step which she thinks is going to take at least five years. Having opened up and started to face the abuse to which she was subjected she feels that she has opened up a box that cannot be closed again. It is essential for her to carry on with this psychotherapy programme in a place where she feels safe. She is settling in well with the group and would not want to have to restart psychotherapy with a different group of people whom she does not trust in Japan.

33. As to her relationship that recently broke down, this caused her great shock and a lot of pain and she was glad that she had the psychotherapy group to talk to about the relationship breakdown as they have helped her to cope. She has been helped to realise that she can constructively rebuild her life without this man, whereas before she started therapy her reaction to such a trauma would have been to revert back to "destructive mode", as she did in the past when in traumatic situations.

Professor Goodman's Report

34. This report provides information on Japanese culture and the issues of physical, psychological and sexual abuse in domestic situations. One of his conclusions is that even if there had been concerns by neighbours, teachers, police or any other authorities that the appellant was the victim of any kind of abuse in the 1980s, it is extremely unlikely that this would have been reported or, if it had been reported, that any action would have been taken in relation to it.

35. The number of reported cases of sexual abuse remains very small indeed. In many ways this (sexual abuse) seems to be one of the last taboos in Japanese society. If there were concerns about sexual abuse having taken place in the appellant's family, this is particularly unlikely to have been investigated and there is probably no more appetite for investigating sexual abuse in families today than there was twenty years ago.

36. A comment at page 61 of the bundle is that the concerns expressed by the appellant about future abuse which she might suffer if she was to return to Japan would probably fall under the title of domestic violence rather than child abuse. In Japan this is also generally considered to be a private family matter and not of concern to the public or the state. In the light of all that is said in that paragraph and others Professor Goodman thinks it extremely unlikely that the authorities would become involved if the appellant asked them to investigate or take into account historical cases of abuse, regardless of her family background.

37. When asked how safe it would be for the appellant to live in Japan undetected by her family he commented that Japan is a large country but it is difficult to hide in it due to the compulsory family and local registration systems. While documents are in theory private it is well-known that they are easy to obtain by detective agencies who can thereby uncover where people are staying and working. At the very least he thinks that wherever the appellant went to live in Japan she would, with good reason, be living in the *anticipation (*his emphasis*)* that she could be tracked down at any point.

38. There are a very small number of refuges run by local Governments and private organisations for what used to be called "battered women". He would be surprised if the appellant was eligible to live in one of these on the basis of being abused several years ago by her family and on the basis of needing protection in the present time. He fears that she might only become eligible in the case that she was actually abused again, and even then, given the demand for places in such hostels he is not sure that she could be guaranteed a place.

Dr Thomas's Reports

39. When Dr Thomas made her initial report she had seen the appellant for some two hours. After giving her credentials and the history as told to her by the appellant she sets out her findings and conclusions from page 16 onwards (p.31 in the bundle). The appellant's psychiatric classification is

said to be "major depressive disorder, moderate, without psychotic features". The appellant feels recurrently low in mood with frequent bouts of tearfulness whenever alone. She reports that the appellant's parents have reportedly told her they wish she were dead and would cover up if she wished to commit suicide.

40. That part of the appellant that blames herself for her abuse feels that she does want to kill herself and indeed made "recent" plans to do so in a London hotel room (the report is dated 23 May 2013, amended 21 June 2013). Whilst not actively suicidal currently, she experiences regular suicidal thoughts and that risk could easily escalate to a severe and acute one again in the event of further traumatic life events, especially a negative determination.

41. There is a history of sleep and appetite disturbance. Due to the severe and sustained abuse she experienced in childhood the appellant began losing her hair which began falling out in clumps. She then began pulling it out because it was loose. She now has several significant bald patches and wears a wig. Hair loss on that scale requires extreme and prolonged stress for its causation and this symptom indicates the heightened and serious levels of that symptom over a significant time period.

42. The appellant feels scared "all the time" at the moment as she is doing something for the second time that she knows her parents will absolutely disagree with, namely seeking leave to remain in the UK. She is continually troubled with the possible outcome of her current application for leave to remain and very frightened in case she is refused and has to return to Japan to face the retaliation she believes strongly will then come from her family. She has ongoing severe pain and tension in her neck and shoulders which appears to be due to chronic stress. She also has ongoing gynaecological problems.

43. Dr Thomas at page 20 of the report for reasons given there opines that the appellant is a highly credible self-historian and her self report was matched both by other recorded documentation and by Dr Thomas's objective assessment of her clinical presentation to her in interview.

44. Dr Thomas finds that the appellant is currently moderately depressed and this would increase to a severe level if the appellant is returned to Japan where she would believe strongly that her life and emotional and physical wellbeing and integrity is at risk from her family, particularly from her parents, who have already apparently wished her dead and been severely abusive to her over many years, including extreme acts of physical and sexual violence. Even if the threat from her parents is not borne out in reality, which given the history seems very likely (sic), the very fact that she fears it to be so would anyway be sufficient to cause a marked psychiatric deterioration were she to be returned to Japan with, in Dr Thomas's view, a marked depressive breakdown. The appellant already has significant suicidal thoughts and these would, Dr Thomas believes,

increase her thoughts with an intended plan to commit suicide in the event of a negative determination being given.

45. It is her opinion that in the event of such a determination and return to Japan the appellant would be flooded with traumatic affect and by feelings of despair and hopelessness. She would think it a very strong probability that the appellant would give up hope at that point and commit suicide in the UK in preference to a life of probable further abuse in Japan. Even if suitable and high quality psychotherapeutic and psychiatric care is available in Japan, she does not believe that the appellant would be in any state mentally to access it as she would feel too unsafe and be too frightened and traumatised by a return to her country, and by reconnection with the traumatic memories of being abused there to render such treatments in any way effective.

46. Dr Thomas then goes on to say that the appellant is in urgent need of psychotherapeutic help for her current psychiatric disorder and it would be Dr Thomas's assessment that the appellant would require a minimum of a one year treatment once weekly with a trusting therapeutic relationship before any noticeable change to her current depressed state. She may need considerably longer than this given the severity and chronicity of her abusive early experiences. The appellant is only just beginning to face, in her opinion, the full extent of her family's abusive behaviour towards her and to see it as such.

47. That the appellant has received such psychotherapeutic help is revealed by the second report from Dr Thomas dated 17 November 2013 which is the most recent report available but is now some six months old. The report reveals that Dr Thomas met with the appellant for an initial individual six sessions at her consulting rooms which the appellant attended and made good use of. Although Dr Thomas would not usually take on an individual for psychotherapy treatment when that person had been assessed for court proceedings, the urgency of the clinical situation, the fact that a suitable treatment vacancy was available, and the fact that the appellant already knew her with some element of trust, all caused Dr Thomas to feel that this might be a good and feasible treatment option for her.

48. Following the six initial sessions the appellant joined Dr Thomas's women's psychotherapy group in September 2013 and the appellant has attended reliably every week and has never missed a group. During the three months to the date of report the appellant has been increasingly able to give more detail about the nature of her past abuse and to trust other group members with personal and painful information. The break-up with her partner has been extremely distressing, and in addition to being emotionally devastating and humiliating, has left her with considerable financial and other worries about her future as her partner was supporting the cost of her therapy treatment, and paying her solicitor's fees and living expenses.

49. During the three month period the appellant has already been able to move from her position of rather blindly adopting her parents' doctrine that the abuse was "necessary for my own good" to a position of feeling her underlying anger and distress about the way in which she was manipulated and maltreated. That is said to be an impressive development for someone in the early stages of psychotherapy treatment and it is Dr Thomas's view that the appellant's own capacity to use psychotherapeutic help, together with the "goodness of fit for her" (sic) with the psychotherapy group of which she is now a part, have both contributed significantly to this initial positive development. With the security of a base in the UK that will enable her to know she can continue without fear of return to Japan and that she can work to support herself and her treatment without dependence on others who may let her down, her therapeutic progress will certainly continue with this rate. Indeed, her progress will almost inevitably improve further given that she will then be in a situation of much greater safety and stability to enable her to reap full benefit from this therapeutic work. Her current disabling psychological symptoms such as her chronic hair pulling (with resultant severe consequences for her self-esteem), food restriction and phobia of bathrooms are also likely to continue to improve and, in time, may even fully resolve.

50. Dr Thomas then comments that although the appellant has made promising initial progress it remains very early days in her psychological treatment. The extent of the childhood abuse she suffered at the hands of her parents is extremely severe and cumulative and at the hands of immediate care givers which adds to the degree of trauma experienced with no safe adult to whom to have recourse. If she is forced to return to Japan she anticipates that the appellant would rapidly become re-traumatised by being forced to return to a country in which her original abuses took place and in which, due to the status and wealth of her family in her home country, she feels that she would not be safe from their finding her and re-abusing her as has happened previously. She would rapidly become more profoundly psychiatrically ill. Given that she is already symptomatic for both major depressive disorder and post-traumatic stress disorder following her traumatic earlier experiences, this will present a major psychiatric risk and, under such circumstances, she will be even less able to protect herself in the event of parental tracing or other abusive contact. She is likely to become rapidly too psychiatrically unwell to access relevant psychiatric and mental health services in Japan, and indeed is likely to be too frightened to do so in any case due to a difficulty trusting Japanese doctors due to both her parents influence in the country and the fact that her father is in the medical profession. She would lose the beneficial current support network and therapeutic benefit that she is clearly deriving from her psychotherapy group here in London.

51. The report continues that the appellant is currently quite socially isolated, especially since the ending of her partner relationship. The group members represent to her a clear form of social support and she is already much attached to all of them, takes their advice and allows them to help

her both practically and emotionally. The group has been essential to her mental stability over the past weeks and without that support she is likely to have harmed herself to a serious extent following the breakdown of the relationship with her partner and may have made a suicide attempt. Even with the group's help she has greatly struggled and has needed some additional holding contact with Dr Thomas between group sessions and direct help with negotiating with her ex-partner some form of financial support package from him going forward.

Article 3 ECHR

52. As Lord Bingham put it in **Ullah v Secretary of State for the Home Department [2004] UKHL 26** at paragraph 24:

> "In relation to Article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment".

53. The Court of Appeal in **J v Home Secretary [2005] EWCA Civ 629** draws a clear distinction between "foreign cases" and "domestic cases". Those are the labels which Lord Bingham used in **Ullah**. By "foreign cases" he meant those cases where it is not claimed that the state complained of has violated the applicant's ECHR rights within its own territory, but where it is said that the conduct of the state in removing a person from its territory to another territory will lead to a violation of the person's ECHR rights in that other territory. By "domestic cases" he meant cases concerning claims based on the ECHR where a state is said to have acted within its own territory in a way which infringes the enjoyment of an ECHR right within that territory. At paragraph 17 of **J** this has been recognised as an important distinction, both in Strasbourg and in our own jurisprudence. **J** was concerned with an appellant who was a citizen of Sri Lanka and an ethnic Tamil who alleged that he would commit suicide if he were returned to Sri Lanka. In **J** the risk of a violation of Article 3 or 8 must be considered in relation to three stages. By reference to the claim made in that case these were:

(i) when the appellant is informed that a final decision had been made to remove him to Sri Lanka;

(ii) when he is physically removed by aeroplane to Sri Lanka; and

(iii) after he has arrived in Sri Lanka.

In relation to stage (i) the case is plainly a domestic case. In relation to stage (iii) it is equally clearly a foreign case, but the classification of the case in relation to stage (ii) is less easy. It is then said that since in practice arrangements are made by the Secretary of State in suicide cases for an escort it was found safer to treat that as a domestic case.

54. Dyson LJ, giving the judgment of the court in **J**, said in relation to the possibility that enforced return might bring about the appellant's suicide:

> "25. ... It should be stated at the outset that the phrase 'real risk' imposes a more stringent test than merely that the risk must be more than 'not fanciful'. The cases show that it is possible to amplify the test at least to the following extent.
>
> 26. First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of severity. The court has said on a number of occasions that the assessment of its severity depends on all the circumstances of the case. But the ill-treatment must 'necessarily be serious' such that it is 'an affront to fundamental humanitarian principles to remove an individual to a country where he is at risk of serious ill-treatment': see **Ullah** paragraphs [38-39].
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> 27. Secondly, a causal link must be shown to exist between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's Article 3 rights. Thus in **Soering** at paragraph [91], the court said:
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> > 'In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which *has as a direct consequence the exposure of an individual to proscribed ill-treatment.*'"(emphasis added).
>
> See also para [108] of **Vilvarajah** where the court said that the examination of the Article 3 issue 'must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka…'
>
> 28. Thirdly, in the context of a foreign case, the Article 3 threshold is particularly high simply because it is a foreign case. And it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental. This is made clear in para [49] of **D** and para [40] of **Bensaid**.
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> 29. Fourthly, an Article 3 claim can in principle succeed in a suicide case (para [37] of **Bensaid**).
>
> 30. Fifthly, 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 the removal will be in breach of Article 3.

31. Sixthly, a further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her Article 3 rights."

55. As appears at paragraph [14] of **Y and Z (Sri Lanka) v SSHD [2009] EWCA Civ 362** and following, as to the fifth principle,

> 14. "…..If a fear of ill-treatment on return is well-founded, this will ordinarily mean that refoulement (if it is a Refugee Convention case) or return (if it is a human rights case) cannot take place in any event. In such cases the question whether return will precipitate suicide is academic. But the principle leaves an unfilled space for cases like the present one where fear of ill-treatment on return, albeit held to be objectively without foundation, is subjectively not only real, but overwhelming.
>
> 15. There is no necessary tension between the two things. The corollary of the final sentence of para [30] of **J** is that in the absence of an objective foundation for the fear some independent basis for it must be established if weight is to be given to it. Such an independent basis may lie in trauma inflicted in the past on the appellant in (or, as here, by) the receiving state: someone who has been tortured and raped by his or her captors may be terrified of returning to the place where it happened, especially if the same authorities are in charge, notwithstanding that the objective risk of recurrence has gone.
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> 16. One can accordingly add to the fifth principle in **J** that what may nevertheless be of equal importance is whether any genuine fear which the appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return."

Our Conclusions on the Issue

56. We turn first to whether the appellant's fear of ill-treatment in Japan is objectively well-founded. The circumstances of this appellant are wholly different to those of the appellants in **J** and **Y and Z**. In those appeals the appellants had been tortured by the Sri Lankan security forces as suspected LTTE members and their fear was that upon return to Sri Lanka they would be likely to suffer similar treatment again or worse.

57. In the current appeal the appellant has not suffered directly at the hands of the State, but at the hands of family members, her parents in particular. There is some evidence that the State, for reasons given by Professor

Goodman, has a reluctance to investigate sexual abuse in families. The authorities would not get involved in the case of the appellant asking them to investigate or take into account historical cases of abuse. That much we comprehend. However, we find that the lack of investigation that may entail falls far short in our view of complicity by the state in the execution of such abuse or overt or even tacit approval of such behaviour. There is simply not enough good evidence to allow us to find otherwise.

58. We bear in mind and give weight to the fact also that the worst abuse was that which the appellant had to suffer when she was a child, which as recounted by the appellant was truly appalling. It is of no surprise to us that she has been adversely affected and is a highly traumatised young woman as described by Dr Thomas.

59. More latterly the abuse that she has experienced has been verbal and, on two occasions in 2012, physical. The appellant was grabbed by her father in London in 2012 and she received a bruise but she was able to walk away with her friend who accompanied her. Later that year when her father attacked her in public in Japan the appellant appears to have shown some measure of asserting herself. She requested a medical report of the injury and later reported the matter to the police. We take into account her concern that the officer at the local police station in essence refused to investigate the complaint. However, we are far from persuaded that this amounts to a systemic failure on the part of the authorities to protect her. We are left wondering what the result may have been if she had lodged the complaint immediately (rather than leaving it for several days before doing so) and thereafter pursued the matter to a higher level in the event that the local police station officer refused to help. The police were not involved when the attack took place. It is difficult to imagine that if they had arrived on the scene the assault would have been allowed to continue or that some action would not have ensued. This was not domestic violence in the sense that the assault took place in public with others present, rather than in private behind closed doors.

60. It is clear to us that the appellant has felt for many years completely under the influence of her parents. Culturally, and for reasons set out in the reports, she felt that she had to do their bidding. However, as she has grown older we assess from her actions that she has taken the first steps to achieve, or attempt to achieve, independence from her parents. It seems to have been her decision that she returned to live in Nara in 2004, away from her family. Although this attempt was unsuccessful because her parents found her and her father assaulted her, her failure to involve the authorities at that stage is explicable by her then deference to her parents. More recently when her father assaulted her she did not let matters lie but obtained a report from the hospital and, albeit belatedly, reported the matter to the police. It is noteworthy that the appellant felt able to make a complaint even though at that stage she had not yet embarked upon her therapy with Dr Thomas.

61. It is fortunate indeed that the appellant was not more badly injured in the 2012 assault. She has supposed that it is because of her father's influence and position that the police did nothing about investigating the assault. There is some support for the view that the authorities would be unlikely to investigate the matter as they would consider it to be a form of domestic violence but we are far from persuaded that there is not a system in place in Japan that offers protection to its citizens who suffer crimes of violence perpetrated outside the home by one family member on another. There is no objective evidence about it to which we have been referred and Professor Goodman does not go so far as to say this, only that it is not mandatory for the police to intervene in cases of domestic violence where they suspect abuse is taking place.

62. The appellant is 32 years old, and would be living independently from her parents if she returns to Japan. Therefore she would not be subject to domestic violence within the natural meaning of the words, suggesting as they appear to us to do that the violence is within the home. Although Prof Goodman‘s opinion is that it is extremely unlikely that the authorities would get involved in the case if the appellant asked them to investigate or take into account historical cases of abuse, regardless of her family background, that is not to say that current (as opposed to historical) abuse in the form of assaults by one member of the family against another who live independently of each other would not be investigated.

63. The situation now is that the appellant has an insight into her past such that she is able to face the full reality of her abusive past experiences, and this is no doubt largely due to the work of Dr Thomas and the appellant’s participation in group therapy. We find that in the event that the appellant returns to Japan she would once again seek to live independently from her parents. If they found her she would not open the door to them and would not go with them anywhere because if she did so she realises that she would risk further assault. If in some way her parents, for instance, broke down the door that would be a matter that would not be ignored by the police.

Suicide Risk

64. As to the real risk of suicide, we do not find that the appellant’s subjective fear of return is so severe that there is a real risk of serious self-harm or suicide which engages Article 3 if she were returned. The summary and conclusions of Dr Thomas in her second report are predicated upon the basis that the appellant would be unable to access relevant psychiatric and mental health services in Japan and because of this she would rapidly become more profoundly psychiatrically ill.

65. We well understand that the appellant is making good progress in group therapy currently and there may well be difficulties for her in removing her from that situation. However, as far as we are aware it is not seriously suggested that there are no psychiatric and mental health services in Japan of which she could avail herself. She has made what must have

been a gigantic step to reveal more about herself to arrive at a fuller understanding of what has happened to her and this has facilitated the first steps to her recovery. Having done so once is not unreasonable to suppose that she would be able to do so again. Through no fault of the appellant or those representing her, a further six months has passed, during which we assume that the appellant will have received continuing treatment with Dr Thomas. It is difficult to know whether the prospect of the hearing in the Upper Tribunal has made worse the mental trauma for the appellant, or that the continuing sessions with Dr Thomas will have benefitted her further. We are aware that the appellant has "opened up" and has started to face the abuse and it is probably an understatement to say that it is less than ideal that the treatment should be interrupted. However, we remind ourselves that we are dealing with Article 3 risk.

66. We find it difficult to comprehend and thus reject the notion that the appellant would, in effect, be left to fend for herself if returned to Japan. We find that efforts would be made by the appellant, who is an intelligent and educated woman, or those acting with her best interests at heart, such as Dr Thomas, to make enquiries to enable her on return to enable her to have further treatment. We find that Dr Thomas, with the greatest respect, may have put it too highly to state that without any of the social, medical and therapeutic supports that the appellant has developed here in the UK, this could be psychiatrically devastating to her and that the chances of her experiencing a significant psychiatric breakdown and probably attempting suicide are very high. As the appellant says in paragraph 18 of her second statement she is settling in well with her group and she would not want to have to restart the psychotherapy with a different group of people whom she does not trust in Japan. That is well-understood, but is far from being a statement that she would not do so, or that she would take her own life because of fear of the return to Japan and her family there. For the reasons set out above whereas we understand that it *could* (our emphasis) indeed be psychiatrically devastating to the appellant if left without help on return to Japan we reject the notion that further treatment, albeit in an entirely different situation and with a different group of people involved, would be unavailable to her.

67. As we reject the notion that there would not be social, medical and therapeutic supports for the appellant in Japan, which is the reason given as to why Dr Thomas feels that the appellant would probably attempt suicide, we do not find that there is a real risk that the appellant would be likely to take her own life in the UK or in Japan such as would entail a breach of Article 3 ECHR. We note that she has not talked about suicide in her statement of May 2013, and yet in the same month appears to have talked about it to Dr Thomas because her report is dated that month and refers to the suicide risk. We are left wondering why the appellant did not set this out in her own statement if indeed she intended to take her own life at that time and we do not know the answer. On the evidence before us we are unable to reach the conclusion that the appellant's fear of ill-treatment in the receiving state upon which the risk of suicide is based is subjectively not only real, but overwhelming.

68. For these reasons we do not find that the appellant is at real risk of ill-treatment in Japan contrary to Article 3.

Article 8

69. The appellant has established a private life in the United Kingdom. She has spent the majority of the last sixteen years or so here. That private life is worthy of respect. It is said that she has developed close friendships here although Dr Thomas refers to her being quite socially isolated, especially since the ending of her partner relationship in October 2013. She has links to her church and church community.

70. No-one has suggested that the appellant can bring herself within any of the categories set out in paragraph 276ADE of the Immigration Rules that concern private life. However, although the Immigration Rules are now framed in a way that takes into account matters of relevance to an Article 8 evaluation, they are not comprehensive. Thus consideration should be given to whether the refusal of leave or the removal of the appellant from the jurisdiction would be a disproportionate interference with her right to a private life notwithstanding that she failed to qualify under paragraph 276ADE: **Gulshan (Article 8 – New Rules – correct approach) [2013] UKUT 00640 (IAC).**

71. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. A large part of the appellant's current life is engaged with Dr Thomas and the group therapy in which the appellant partakes.

72. When considering what we refer to as the "**Razgar** approach" (**Razgar [2004] UKHL 27**) we have no doubt that the appellant has an established private life and her return to Japan would cause an interference with it. The interference is, however, potentially lawful and in pursuit of a legitimate aim. Immigration control is not a legitimate end in itself, although it is a well-established means of protecting the economic wellbeing of the country.

73. We note that the appellant may well have qualified for indefinite leave under the Immigration Rules, either on the basis of long residence or by completing five years' continuous residence on the Highly Skilled Migrant Programme but for the fact that she has returned frequently to Japan, albeit she would say that this was only because of her parents' abusive demands for her to return. Nevertheless, having done so she does not qualify for such indefinite leave and although she may have wished it to be otherwise, there should not have been the expectation that temporary leave, albeit over many years, would eventually lead to the right to remain here absent meeting the Rules or there being exceptional or compelling circumstances which require that she should be allowed to do so. Since she does not meet the Rules, the key question is whether there are such exceptional or compelling circumstances in the present case as to render

the decision to remove her disproportionate interference with her established private life.

Conclusions

74. It is for the Secretary of State to show that interference with the exercise of the appellant's right to respect for her private life is proportionate to the legitimate public end sought to be achieved, which in this case would appear to be the economic well-being of the country, or perhaps the protection of the rights and freedoms of others.

75. We have considered all the evidence in the round. We have taken into account all the matters to which we have referred or to which we have been referred. We have made findings and set against them the public interest considerations justifying removal. We conclude that this is one of those exceptional cases in which there are compelling circumstances that are not sufficiently recognised under the Immigration Rules such that having considered the proportionality issue the appellant succeeds under Article 8.

76. Our decision turns on this appeal's own particular facts. We have found that the appellant has been the victim of circumstances that have been largely outside her control. The appellant has spent almost half her life, some 16 years, in this country, and has at all times been here legally. During that time she has built private life ties and friendships, albeit that her partner brought their relationship to an end towards the end of last year whilst her appeal was outstanding. She has returned to Japan to make applications on occasions that she has been unable to renew her visa in country. We find it likely that if she had not returned to Japan to make such applications or because of what she saw as her parents' abusive demands to return there, she may well have met the requirements of the Rules otherwise. We wish to make it clear that we are not seeking to suggest that a person who narrowly misses meeting the requirements of the Rules can rely on that as a ground for claiming that there are compelling circumstances for granting them leave outside the Rules. We mention this merely as part of the overall picture of the strength of the ties that this particular appellant has developed with the UK, which to all intents and purposes is now her home, and the environment in which she feels safe. Her return to Japan, at least in recent years, cannot truly be described as voluntary.

77. The appellant has not been a drain on public funds until recently. She is highly qualified and able to make a positive contribution to the economy. Although much of her time here was spent as a student, she also worked after obtaining her higher degree. She had the use of a credit card, and intermittent income from employment, and even when she was no longer permitted to work she was supported by her partner until the relationship failed in October 2013. We imagine that any current barrier to her obtaining gainful employment would be lifted following the success of her appeal.

78. Although the appellant would be able to build up her private life in Japan by interacting with others in a different environment, that will be difficult for her given her current state of mental health. She should be able to receive treatment for her mental health problems in Japan. However, there is a distinction between the availability of such treatment, which takes the matter outside Article 3, and the ability of a vulnerable person to adopt a sufficiently positive mental attitude to be able to take advantage of such treatment as is available. We are concerned that there will be adverse consequences for this appellant, bearing in mind the traumas that she has suffered and the medical evidence of her condition, if she is taken out of her current environment and forced to return to Japan.

79. The appellant has commenced treatment for her mental health issues here and has learned to place her trust in Dr Thomas. She has integrated with a supportive network of other traumatised patients. However this has taken much time and patience. Her mental health is improving but she clearly remains vulnerable and still needs a great deal of support, including on a one to one basis. To commence treatment again in completely different circumstances is likely to be detrimental to her health, particularly in the short term, albeit that we have found she cannot meet the high bar required to found a successful Article 3 claim on grounds of the risk of self-harm. There has to be a serious risk that all the good work achieved thus far by Dr Thomas and her group will be undermined if her treatment is interrupted at this stage. Even if she does summon up the courage to start similar treatment in Japan, she will be building up new relationships from scratch.

80. Furthermore, we have little doubt that the appellant's subjective fear of her parents and her belief that she will be assaulted again by her father will increase her anxiety substantially. It is necessary to enter one's address in the Address Registry in Japan. This would allow her father to discover her whereabouts as he did previously. Objectively we find that there is a real risk that in those circumstances the appellant would once more be the victim of assault. The fact that he attacked her in a public place without any apparent fear of reprisals is likely to fuel her anxiety about encountering him even in public, and the presence of her mother has proved no deterrent. Thus the appellant is unlikely to be able to settle easily in a new location in Japan. She will constantly be on her guard in case she is found and attacked again. All those matters are bound to reflect badly on her mental health as described by Dr Thomas.

81. If one poses the question: does the legitimate aim we have identified really justify requiring this vulnerable young woman, who has spent almost half her life in this country, to discontinue her currently beneficial treatment for genuine mental health issues, and return to a country where she will be constantly living in legitimate fear that the abuse from her own family that caused her mental health issues in the first place will resume? The answer is plainly no. The Secretary of State, upon whom the burden of proof rests, was unable to come up with any sufficient or satisfactory

explanation of why that level of interference with her established private life was proportionate.

Decision

82. It is for these reasons that we find that the proposed interference by the respondent with the exercise of the appellant's right to respect for private life is not proportionate to the legitimate public end(s) sought to be achieved. This appeal succeeds.

83. The decision of the First-tier tribunal judge is set aside and we substitute the decisions that:

    (a) The appeal is **dismissed** under the Immigration Rules;

    (b) The appeal is **dismissed** under Article 3 ECHR;

    (c) The appeal is **allowed** under Article 8 ECHR.

84. We have made an anonymity direction for the reason set out in paragraph 2 above.

Signed Date:

Upper Tribunal Judge Pinkerton