Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/04447/2015**

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On the 2nd March 2018	**On the 14th March 2018**

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR K.D.
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Paramjorthy (Counsel)
For the Respondent: Miss Everitt (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Butler promulgated on the 21st September 2017, in which he dismissed the Appellant's protection and Human Rights appeals.

2. The Appellant is a citizen of Sri Lanka who was born on the 5th May 1983. He claimed asylum on the basis of his imputed political opinion. His case is that between June and November 2008 he helped his friend P by transporting car parts from Colombo to Jaffna on 4 or 5 occasions and that he was arrested on the 9th July 2009 and detained for 3 months, during which time he says was questioned about his links to P and whether he assisted the LTTE. He says he was released after payment of a bribe by his uncle. He says that he was then abducted on the 28th July 2012 by the Army and detained and questioned about why he had been to France in 2005 and about P and that he was tortured and taken to hospital. He again says his uncle secured his release and that he then stayed with his uncle for 3 to 4 months during which time he says the authorities visited his mother claiming to have an arrest warrant.

3. In his decision First-tier Tribunal Judge Butler found that the Appellant was not a member of the LTTE and that he had varied in the evidence he had given regarding the assistance he had given to P, and Judge Butler did not accept for the reasons given in his decision that the Appellant had been arrested by the authorities in Sri Lanka or detained or beaten as claimed. Judge Butler further went on to find that in terms of the Appellant's mental health he had not reached a high threshold discussed in the case of N v The United Kingdom, and found that little weight could be attached to the reports of Dr Persaud, who provided psychiatric evidence in respect of the Appellant's appeal.

4. The Appellant now appeals against that decision for the reasons set out within the Grounds of Appeal. That is a matter of record and is therefore not repeated in its entirety here, but in summary, it is argued by the Appellant that the First-tier Tribunal Judge erred in his assessment of the psychiatric evidence of Dr Persaud and that the Judge's finding that Dr Persaud has based his clinical findings on the conclusions of an unnamed psychotherapy service was a factual mistake and that Dr Persaud referred to treatment from the NHS that the Appellant was undergoing and that he had concurred with the NHS that the Appellant had PTSD and depression. It is argued the second report of Dr Persaud was given very limited consideration and the Judge did

not engage the clinical findings and it is argued had focused irrationally upon the findings relating to the Appellant's ability to give evidence and had not adequately engaged with the clinical findings of Dr Persaud. It was further argued that the Judge was pre-occupied with the identity of the person who carried out the interpretation of the Appellant when being assessed by Dr Persaud and had further materially erred in finding that it was imperative for Dr Persaud to consider the Respondent's refusal letter. It is further argued in the Grounds of Appeal that the Judge erred procedurally in not asking the Appellant's mother about whether she had been arrested a week after the Appellant had left for France and to make an adverse finding in that regard against the Appellant when that had not been put to her. It is argued that his assessment of the mother's oral evidence was such that the Judge was never going to attach weight to it.

5. Permission to appeal had been granted by First-tier Tribunal Judge Hodgkinson on the 25th October 2017 who found that it was arguable that the Judge had erred in his consideration of Dr Persaud's addendum report for the reason indicated in the Grounds and that that had arguably tainted the Judge's consideration of the medical evidence as a whole and that all of the grounds could be argued.

6. Within the Respondent's Rule 24 Reply dated the 30th November 2017, it is argued, inter alia, he directed himself appropriately and that Judge Hodgkinson had found it was not arguable that the Judge had failed to consider the report of Dr Persaud but it was argued the Judge had given a full account of why the appeal failed to be dismissed and in that regard the Secretary of State relied upon the case of JL (Medical Reports – Credibility) China [2013] UKUT 145. Various paragraphs from the head note are quoted, which I have fully taken account of in reaching my decision.

7. It is on that basis the case came before me in the Upper Tribunal.

8. I have also listened carefully to the oral submissions made by both Mr Paramjorthy and Miss Everitt. In his oral submissions, Mr Paramjorthy argued

that although it was unhelpful for the psychiatric report referred to by Dr Persaud not to have been included within the papers, he has still made clinical findings regarding the Appellant's mental health, which the Judge had failed to properly consider. He argued that at [54], the Judge appears to have found that the Appellant was suffering from some anxiety in relation to the appeal and that he had not satisfied the burden upon him of proving to the lower standard that his mental health problems had been caused by being tortured in Sri Lanka and that Dr Persaud had not been alerted to the credibility issues raised within the refusal letter and that therefore the report could not be regarded as having significant weight, as the author would not have been alerted to the possibility that the account of the patient had been fabricated. It was argued by Mr Paramjorthy that irrespective of causation, Dr Persaud had given a clear clinical diagnosis that the Appellant suffered from both PTSD and depression, and that the Judge had not adequately dealt with or explained as to whether or not he was simply rejecting the causation aspect of Dr Persaud's evidence, or if he was rejecting the entirety of the report, and if so what were the Judge's reasons for rejecting the clinical diagnosis.

9. Mr Paramjorthy also further argued that the Judge had gone on at [55] to seemingly conduct his own research regarding the availability of mental health treatment in Sri Lanka from the Commonwealth Health Online, which evidence was not put by the Judge to either of the parties at the hearing, and appears to have been research undertaken by the Judge after the appeal hearing.

10. Mr Paramjorthy did not pursue the argument before me that the Judge's consideration of the Appellant's mother's evidence involved any material error of law.

11. In her submissions, Miss Everitt argued that the Judge had given cogent reasons for not accepting the evidence of Dr Persaud, but said that it was arguable that the Judge had not given adequate reasons for rejecting the depression diagnosis, but argued that that would be a peculiar finding in

isolation. She argued that Dr Persaud's reasoning linked both the causation and the diagnosis, and that therefore the Judge's reasonings for rejecting the medical evidence were sufficient. She did quite properly concede that the Judge appeared to have done his own research regarding the Commonwealth Health Online organisation and the evidence from that organisation as to the availability of mental health treatment in Sri Lanka, and quite properly conceded that the Judge had not carried out a full analysis of paragraphs 454 to 456 of GJ and Others regarding the availability of mental health treatment in Sri Lanka, although the Judge referred to those paragraphs at [51] of his Judgment, but had not gone on to consider the import of the same.

My Findings on Error of Law and Materiality

12. In his findings at [40] First-tier Tribunal Judge Butler found that the report of Dr Raj Persaud, in terms of the initial report dated the 19th February 2015 which was updated by way of an addendum report on the 26th April 2016, was woefully inadequate in that Dr Persaud had said that he had seen the Appellant and read the documents in the Home Office asylum interview, but the doctor had not said that he had referred to anything else and there was no reference to the Appellant's GP notes. It is said that Dr Persaud referred to the Appellant as being very withdrawn and that it had been difficult to elicit signs and symptoms and that the diagnosis was only elicited with help from the gentleman who had accompanied him, who appeared to be a family friend, who helped translate. But then Dr Persaud had given a diagnosis of a serious psychiatric disorder including major depression that was probably secondary to the traumas that the client claims he had undergone and that the vividness of his descriptions of past traumas in terms of his emergent reactions led to Dr Persaud to believe it was highly unlikely that core parts of his account had been fabricated or exaggerated.

13. However, Judge Butler criticised the fact that there was little history recounted by Dr Persaud regarding the Appellant's history in Sri Lanka and it was unclear whether the Appellant gave his own personal account of those events or whether Dr Persaud had read them in the asylum interview and

there was also a question regarding the identity of the man who accompanied him.

14. Judge Butler went on to consider the further report dated the 12th December 2016 contained within the supplemental bundle and said that was predicated largely upon a report from an unnamed psychotherapy service, which had not been produced and where it was not clear of the circumstances in which that report had been compiled and that Dr Persaud appears to place reliance upon that report and that Dr Persaud had relied upon that report to reinforce his own previous assessment. Judge Butler again mentioned that Dr Persaud had given no hint of having read the refusal letter, which would have been available to him, which the Judge found were contrary to the principles in JL (Medical Reports – Credibility) China [2013] UKUT 145 and therefore he found that little weight should be attached to the reports of Dr Persaud.

15. However, in all three of his reports, Dr Persaud had given clear diagnosis of the Appellant suffering from both clinical depression and PTSD and how the Appellant had been prescribed by his GP with antidepressants, initially in the form of amitriptyline, and then onto sertraline with the dose being increased over time to 100mgs and stated specifically that the length of time that he had been on antidepressants was a measure of the seriousness of his psychiatric disorder.

16. Certainly as far as Dr Persaud not having considered the refusal letter, although I note that that post-dated the initial report of Dr Persaud, no reference was made to it in subsequent reports, and in that regard the causation of any psychiatric symptoms can properly be criticised by the Judge in that regard, as Dr Persaud has not considered the reasons for rejecting the Appellant's credibility by the Secretary of State, and dismissing the asylum claim.

17. However, it is perfectly feasible for people to suffer from psychiatric conditions, especially such as depression, which are not based upon any particular history being accepted either by the Judge or either the

psychologist. In my judgement First-tier Tribunal Judge Butler has not properly explained whether or not he accepts that the Appellant does suffer from PTSD or depression, or whether he is simply suffering from anxiety. If he is rejecting the evidence of Dr Persaud in respect of the diagnosis, as opposed to causation of the psychiatric symptoms, he has not adequately explained the reason for rejecting the diagnosis of an extremely renowned psychiatrist in that regard.

18. The reasoning given regarding the fact that Dr Persaud had not seen the refusal letter and that in respect of his second report, he had not seen the report from the unnamed psychological service had not been produced, do in themselves not explain why Dr Persaud's opinion, even in the very first medical report that the Appellant was suffering from depression and PTSD was rejected. There may have been other traumatic events, which would explain the PTSD, even if it was not the account given by the Appellant, and certainly insofar as depression was concerned, that did not necessarily depend upon the account given by the Appellant being accepted.

19. Indeed, in his latest report, Dr Persaud indicated that the Appellant's depression was such that the Appellant was said by Dr Persaud to be having depressed mood for most of the day nearly every day for longer than 2 weeks, and feelings of worthlessness, insomnia every day, diminished ability to think or concentrate, and, particularly noteworthy, recurrent thoughts of death including recurrent suicidal ideation.

20. The reasoning given by First-tier Tribunal Judge Butler is therefore inadequate regarding whether or not he is just rejecting the causation arguments in Dr Persaud's evidence or in addition, the clinical diagnosis, and if he is rejecting also the clinical diagnosis, the reasoning is inadequate in order to explain to the losing party why he has rejected that diagnosis, rather than simply rejecting the causation for the diagnosis of depression. If the Appellant does in fact suffer from PTSD and/or depression that may well possibly affect his ability to be returned, which the Judge has not seemingly adequately dealt with. I do find that this is a material error of law, in that I cannot say that the

Judge would necessarily have come to the same conclusion, had that error not been made.

21. Indeed, in fact if the Appellant does suffer from post-traumatic stress disorder and depression as indicated by Dr Persaud, then there is a further error committed by the Judge in terms of doing his own research post-hearing in respect of the availability of treatment in Sri Lanka from the Commonwealth Health Online, in circumstances where the parties were not given any opportunity to comment upon the same, and which the Judge did take account of as being significant evidence regarding the availability of treatment for psychiatric conditions in Sri Lanka. The Judge has not actually considered the evidence given within the Country Guidance case of GJ and Others regarding the availability of psychiatric treatment in Sri Lanka at paragraphs [454 to 456] of the Judgment. Those paragraphs clearly referred at paragraph [454] to there being only 25 working psychiatrists in the whole of Sri Lanka, at [455] to the UKBA country of origin report regarding there being no psychologists working in the public sector and there being only 55 psychiatrists attached to the Ministry of Health and working across the country. Further at paragraph [456] the Upper Tribunal in the Country Guidance found that in respect of someone who was a suicide risk that the resources in Sri Lanka are sparse and limited to the cities and in that case found that in light of the Appellant's own evidence that on her OGN that medical facilities were only in the cities and they do not provide adequate care for mentally ill people and in that case given the severity of that Appellant's mental illness, the Upper Tribunal were not satisfied that on the particular facts of the appeal that returning him to Sri Lanka complied with the United Kingdom's obligations under Article 3. Judge Butler's reference therefore that he did not understand that those paragraphs related to returning mental health patients as opposed to those in opposition to a single state, was clearly in error.

22. I find that the Judge conducting his own research without giving the parties the opportunity to comment upon the same, not referring to the evidence given in the Country Guidance case to the availability of mental health

treatment and the number of psychiatrists in Sri Lanka, does also amount to a material error of law, in the fact that the availability of such treatment has to be considered, in a case where the Appellant says that he is suffering from PTSD, depression and the depression is of such severity that he is said to be having suicidal ideation.

23. In such circumstances I do find that the decision of First-tier Tribunal Judge Butler does contain material errors of law and should be set aside. I therefore remit the case back to the First-tier Tribunal for re-hearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Butler.

Notice of Decision

The decision of First-tier Tribunal Judge Butler does contain a material error of law and is set aside.

I remit the case back to the First-tier Tribunal for re-hearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Butler.

Anonymity

In light of the circumstances of this case, it is appropriate for there to be an anonymity direction. Unless and until the 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

Deputy Upper Tribunal Judge McGinty Dated 2nd March 2018