Trinity Term
[2016] UKSC 32
On appeal from: [2014] EWCA Civ 829

JUDGMENT

MP (Sri Lanka) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Kerr
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

22 June 2016

Heard on 11 May 2016

Appellant	*Respondents*
Raza Husain QC Alasdair Mackenzie Alison Pickup (Instructed by Birnberg Peirce and Partners)	Jonathan Hall QC Will Hays (Instructed by The Government Legal Department)

LORD TOULSON: (with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Hughes agree)

1. The issue in this appeal is whether the appellant is entitled to "subsidiary protection status" under articles 2 and 15 of EU Council Directive 2004/83/EC on the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive").

2. The main objectives of the Qualification Directive, identified in recital (6), are to ensure that EU member states apply common criteria for the identification of persons in need of international protection and that a minimum level of benefits is available to them.

3. Article 2 provides:

> "For the purposes of this Directive:
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> (a) 'international protection' means the refugee and subsidiary protection status as defined in (d) and (f); ...
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> (e) 'person eligible for subsidiary protection' means a third country national or stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in article 15 … and is unable, or, owing to such risk, unwilling to avail himself or herself the protection of that country;
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> (f) 'subsidiary protection status' means the recognition by a member state of a third country national or a stateless person as a person eligible for subsidiary protection …"

4. Article 15 provides:

> "Serious harm consists of
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> (a) death penalty or execution; or
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> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country or origin; or
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> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

5. The appellant is a national of Sri Lanka. He arrived in the UK in January 2005, then aged 28, and was given leave to enter as a student. His leave to remain was extended to 30 September 2008. Shortly before its expiry he applied for a further extension. This was refused on 11 December 2008. He claimed asylum on 5 January 2009 on the grounds, in summary, that he had been a member of the Liberation Tigers of Tamil Eelam ("LTTE"), he had been detained and tortured by the Sri Lankan security forces, and, if returned to Sri Lanka, he was at risk of further ill-treatment for the same reason.

6. The appellant's application was refused by the respondent on 23 February 2009. The respondent did not dispute the core of the appellant's account, that he had been a member of the LTTE and had been detained and tortured for that reason, but she did not accept that he would be of continuing interest to the Sri Lankan authorities or at risk of further ill-treatment if he were returned.

7. The appellant appealed against the respondent's decision. It is not necessary to set out full details of the procedural history, but ultimately his appeal formed part of a decision by the Upper Tribunal, dated 5 July 2013, giving "Country Guidance" on the risk to Tamils following the end of the Sri Lankan civil war: *GJ and Others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC).

8. The Upper Tribunal had medical evidence that the appellant bore scars on his chest and upper and lower limbs which were "highly consistent" with his account of being beaten with blunt instruments, burned with cigarettes and an iron bar, and his hand cut with a knife. It also had evidence of a psychiatrist, who had examined the appellant and had access to his medical records in the UK, that he was suffering severe post-traumatic stress disorder and severe depression, he showed a high degree of suicidality and he appeared to have a serious determination to kill himself if he were returned to Sri Lanka. The appellant did not himself give evidence. The psychiatrist did not consider him fit to do so.

9. The Upper Tribunal accepted that the appellant had a genuine fear of return to Sri Lanka, and that he had difficulty in trusting or interacting with official figures, even in the UK, because of his past torture, but it rejected his appeal under the Refugee Convention and the Qualification Directive because it did not accept that he was of any continuing interest to the authorities in Sri Lanka. However, it allowed his appeal under article 3 of the European Convention on Human Rights. It explained its reasoning in the following paragraphs:

> "453. Although the appeal fails under the Refugee Convention and Qualification Directive, we must consider whether the suicide risk which this appellant presents is such as to engage article 3 ECHR. Applying the *J* and *Y* principles [*J v Secretary of State for the Home Department* [2005] EWCA Civ 629 and *Y (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 362] and reminding ourselves of the gravity of the appellant's past experience of ill-treatment and his current grave mental health problems, with severe forms of both post-traumatic stress disorder and depression, we have considered whether returning the appellant to Sri Lanka will breach the United Kingdom's international obligations under article 3.
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> 454. The evidence is that there are only 25 working psychiatrists in the whole of Sri Lanka. Although there are some mental health facilities in Sri Lanka, at para 4 of the April 2012 UKBA Operational Guidance Note on Sri Lanka, it records an observation by Basic Needs that 'money that is spent on mental health only really goes to the large mental health institutions in capital cities, which are inaccessible and do not provide appropriate care for mentally ill people'.
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> …
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> 456. We note that the … appellant is considered by his experienced Consultant Psychiatrist to have clear plans to commit suicide if he is returned and that he is mentally very ill, too ill to give reliable evidence. We approach assessment of his circumstances on the basis that it would be possible for the respondent to return to return the … appellant to Sri Lanka without his coming to harm, but once there, he would be in the hands of the Sri Lankan mental health services. The resources in Sri Lanka are sparse and limited to the cities. In the light of the respondent's own evidence in her OGN that there are

> facilities only in the cities and that they 'do not provide appropriate care for mentally ill people' and of the severity of this appellant's mental illness, we are not satisfied on the particular facts of this appeal, that returning him to Sri Lanka today complies with the United Kingdom's international obligations under article 3 ECHR."

10. The Upper Tribunal's decision was upheld by the Court of Appeal: [2014] EWCA Civ 829. Maurice Kay LJ, with whom the other members of the court agreed, said that in his judgment "the Qualification Directive was not intended to catch article 3 cases where the risk is to health or of suicide rather than of persecution" (para 48). He referred to the decision of the European Court of Human Rights in *N v United Kingdom* (2008) 47 EHRR 39 (a case of an AIDS sufferer who claimed that her removal to Uganda would contravene article 3) as showing that cases where the risk to an applicant arose from his health were a special category to which article 3 applied only in very exceptional circumstances, because "in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-state bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country" (para 43). Counsel for the appellant submitted that it made a critical difference to the applicability of the Qualification Directive that the Sri Lankan state was responsible for his mental illness by its past ill treatment, but Maurice Kay LJ considered that this argument stretched the concept of subsidiary protection too far.

11. It is argued on the appellant's behalf that the Upper Tribunal and the Court of Appeal took too narrow a view of the scope of the Qualification Directive. It is his case that his mental illness should not be regarded as a "naturally occurring illness", because it was caused by torture at the hands of the Sri Lankan authorities. Instead, it is submitted that, just as the Upper Tribunal accepted that on the facts of this case the appellant's return would cause him severe mental harm which, taking into account his history of ill treatment by the state and the inadequacy of facilities to treat its consequences, would amount to a violation of ECHR article 3, so for similar reasons it should have accepted that he was entitled to subsidiary protection status under the Qualification Directive. According to this argument, it makes no difference to his entitlement to such protection that there is no longer a risk of repetition of the ill treatment which is the cause of his current state of health.

12. The respondent submits that the Upper Tribunal and Court of Appeal were right. It is her case that it is a necessary component of subsidiary protection that there exists a risk of serious harm, as defined in article 15 of the Qualification Directive, in the country of origin for which the home state will be responsible, in that it will either inflict that harm or it will be inflicted by a non-state actor against which the state is unable or unwilling to provide protection. Put shortly, according to her argument, the Directive is aimed at providing international protection against

the risk of serious harm from *future* ill treatment, either by the state or by a third party against which the state cannot or will not provide protection, and not at potential future consequences of *past* ill treatment of which there is no risk of repetition.

13. This court was referred to a number of authorities of the Court of Justice of the European Union, including *M'Bodj v Kingdom of Belgium* (Case C-542/13) [2015] 1 WLR 3059, and of the European Court of Human Rights, but none is precisely in point. The question of principle which the appeal raises is debatable and should therefore be referred to the Court of Justice. The question to be referred is: Does article 2(e), read with article 15(b), of the Qualification Directive cover a real risk of serious harm to the physical or psychological health of the applicant if returned to the country of origin, resulting from previous torture or inhuman or degrading treatment for which the country of origin was responsible?