Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05792/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27 November 2014	**On 3 December 2014**

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE
DEPUTY JUDGE OF THE UPPER TRIBUNAL BIRRELL

Between

T V
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muquit, Counsel, instructed by Kanaga Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DETERMINATION AND REASONS
Ex tempore

1. This is an appeal from a determination of the First-tier Tribunal promulgated on 25 September 2014. At the onset, we correct a mistake at the end of that determination. The Tribunal said that no anonymity direction was being made, in circumstances where earlier in its decision

the Tribunal had made such a direction. We direct that the appellant should be anonymous.

2. Permission to appeal was granted by First-tier Tribunal Judge Shimmin. In his grant of permission to appeal he said that the grounds of appeal were that the judge had erred in finding that the appellant was not credible. The judge proceeded on the mistake of fact, namely that the appellant did not mention he had been burnt with iron rods. In fact the appellant when questioned in his asylum interview had claimed this. The appellant argue that there was no foundation for the adverse credibility finding.

3. First-tier Tribunal Judge Shimmin observed that the appellant had claimed to have been burnt with iron rods, and that the judge appeared to have placed considerable reliance on this apparent inconsistency. It was arguable that this disclosed an error of law. The other grounds of appeal remained open.

4. The decision of the First-tier Tribunal records that the appellant is a Sri Lankan man born on 12 November 1966 that he was married with four children and that one of them, sadly, had been killed in Sri Lanka. It went on to say that the appellant did not currently know the whereabouts of his wife and other children. He came to the United Kingdom on 18 November 2013, arriving by air. He said that he had travelled through Nairobi, Dhaka and Lisbon. He claimed asylum on arrival in the United Kingdom and underwent a screening interview on the same day. He attended for a formal asylum interview on 8 July 2014 and his claim was dismissed by the Home Office in a letter dated 28 July 2014, for the reasons set out in that letter. He then appealed.

5. The Tribunal then summarised the basis of the appellant's claim from the responses to questions put to him during his two interviews, and from a further statement prepared for the hearing. The appellant's case was that he was a Hindu Tamil Sri Lankan. He had been employed as a subsistence farmer and he left Sri Lanka because he lost his wife and family there and was subjected to harsh treatment by the authorities. He was helped in coming to the United Kingdom and used a false Maltese passport to enter the United Kingdom. He had said in his interview that the reason he came here was that he has family here. He claimed that he was arrested at the end of the civil war and detained for a period of one and a half years by the government.

6. It then set out the appellant's history. He claimed that his wife had been a member of the political wing of the LTTE. Members of the organisation used to visit his house and he was introduced to M, who was head of the logistical division. She had become a member of the LTTE before he married her. His claim was that he used to see the LTTE when they visited and accordingly he started working for them at a place called Anbu Muham Kitchen in Vattakatchi. He said that this was some 12 km away from his home. It took him 45 minutes to travel there. He worked every day from 9.30 until 6 pm. He said that he had worked for the LTTE until

2008. The war had then started. The army came, separated the civilians from those who were suspected of involvement in the LTTE, and he was placed with the latter as someone had pointed him out to the army. His wife was not arrested, as the LTTE had put her on a ship but he was taken to Omanthias camp in Vauniya. He was detained in a small room on his own for one and a half years. He was interrogated about his involvement in the LTTE and was beaten and made to sign a document in Sinhalese. He did not know what the document said because he could not understand it. He said he was threatened with death if he did not sign it. His claim was that he had been interrogated and tortured every other day and asked about the whereabouts of weapons. He was given rice and lentils to eat but not on the days when he was tortured.

7. He claimed that he had been released in December 2010 when the CID collected him from his cell, drove for about 30 minutes and then released him. He discovered that his relations had bribed the CID to release him. His uncle then put him on a lorry which took him to Puttalam. The appellant claimed that his uncle told him that "this is temporary release. After that if you keep him here and we arrest him again we will not keep him alive". The appellant said that his wife was more politically active and she used to be collected by the LTTE to address meetings regarding their political agenda. While he did not actively support the LTTE's aims he agreed that Tamils should have their own independence.

8. He told interviewing officers that his son had been killed by a government shell on 25 April 2009 in Mullivaikkal. The appellant said that after he went to stay in Puttalam with his uncle's friend he was told to stay in the house and not to leave. The person was a Muslim friend of his uncle's and was doing the uncle a favour by letting him stay. That friend took him to the agent and the agent prepared documents to bring him to the UK.

9. He claimed that before he joined the LTTE he was a farmer on his uncle's land, had been unable to continue farming because he injured his back and could not turn over. He had said that the LTTE did not make him do any training because his wife was in the political wing, and because he had to look after the children.

10. The Tribunal set out the relevant legal provisions in paragraphs 8 to 12 of the determination, directed itself correctly in paragraph 13 about the burden and standard of proof and then summarised the evidence from both sides in paragraphs 14 to 16 and 19 to 26.

11. In paragraph 21 of the determination the Tribunal summarised the questioning of the appellant about his scars as follows:

> "With reference to the photographs of the scars, he was asked why he had not mentioned the scars to anyone prior to the expert report, but that he had mentioned being kicked, slapped and beaten with several bland [sic] objects. His response to this was that he had not been asked. Mr Brooks noted that he had not mentioned it in his witness

> statement either; initially he said that he did not understand what he was being asked, but when he was shown a copy of his statement he said that he now understood what he was being asked, and the fact was that as he had already mentioned it to the doctors he did not see the need to put in into his witness statement."

12. The Tribunal made findings of fact and in relation to credibility at paragraphs 29 to 34 of the determination and the Tribunal's conclusion was that it not satisfied that the appellant was a reliable witness or that his account of his problems in Sri Lanka was true.

13. In paragraph 29 of the determination the Tribunal referred to a claim by the appellant that he had scars as a result of ill-treatment that he had received at the hands of the Sri Lankan authorities and to what the Tribunal considered was a discrepancy between his account and an account given by Dr Martin that he had been burnt with a hot iron rod during his detention. What the Tribunal said was that

> "It appears from the interview record that he had been legally represented at the interview. This is significant because nowhere during the course of his interview does he mention that he has scars on his body as result of the ill-treatment that he received at the hands of the Sri Lankan authorities. The appellant has provided photographs of quite extensive [sic] when he was examined. He told Dr Martin that the scarring was caused by 'being burnt with a hot iron rod during his detention in 2009'. Dr Martin concludes that the appellant's explanation is a likely cause of his injuries, as he says that the scars are 'mature' which means that they are likely to be over two years old."

14. The Tribunal went on to say in paragraph 30:

> "However it is incredible that the appellant should mention being slapped, held under water, beaten but should omit to mention torture by burning with a hot iron rot [sic], which is likely to be been the most painful of all the other forms of torture. I also note that he told the interviewing officers that he used to work as a farmer but stopped because of problems with his back. It is strange that he could remember that but not the burn injuries inflicted on his back by torture during his interview. It is even more so when one takes into account the fact that the appellant was legally represented at the time of his interview and at the time that he prepared his statement in response to the refusal letter and it is highly likely that a reasonably competent immigration advisor will have asked him if he has scars."

15. The Tribunal then referred to difficulties in dating the scars and said,

> "……I must make the decision as to whether I accept the appellant's scarring was caused in the way that he claims. There is no detailed

> account of how the injuries were caused as there was in **KV**. The sponsor was not sympathetic to the LTTE although he claims that his wife was political member. ... It is a matter for me in the context of the whole of the appellant's evidence to assess whether the scars were caused as a result of torture. In assessing that evidence I have to pay due regard to the medical evidence and to bear in mind that doctors are independent and that appropriate weight must be given to their evidence."

16. The Tribunal then referred to the decision in the case of **KV** and concluded that it was not satisfied the appellant's scarring was caused in the manner described. The Tribunal referred to Dr Martin's report and said

> "I note that Dr Martin does not rule out the possibility that these could be SIBP [that is "self-inflicted by proxy injuries"], but prefers the appellant's explanation as he finds no evidence to support the former. I disagree with Dr Martin because I have had the benefit of hearing from the appellant and his account is no more detailed than it was when the respondent first considered it."

17. Mr Tufan, representing the Secretary of State today, accepts that in these passages of the determination the Tribunal misdirected itself. In short it is clear from the appellant's asylum interview that at question 2, he was asked "Can you tell me what these documents are and how they support your asylum claim". Among other things he said "And this is photos regarding my torture". At paragraph 4 he was asked "Have you been diagnosed with any medical conditions?" and he replied "All I was beaten by the army so I have problems in walking. Because they have beaten me on the back and they also burnt me behind. Because they have beaten me behind and burnt me behind with iron rods."

18. At question 97 of the interview he was asked "How did you manage to leave detention"? He answered "1 and a half years it was severe torture for me. You want me to tell you about my torture"? The questioner replied "No". It is also clear from Dr Martin's report, to which we were referred by Mr Muquit in his submissions this morning, that the First-tier Tribunal Judge erred when summarising the effect of Dr Martin's evidence against the guidance given in the case of **KV**. Dr Martin had said "There were no presenting facts making it more than a possibility that the injuries were self-inflicted injuries by proxy". He meant that there were no clinical signs to show that these were SIBP injuries.

19. It seems to us that Mr Tufan was right to concede that the Tribunal erred in its assessment in these two paragraphs. The Tribunal appears to have ignored the fact that the appellant had referred to being burnt with iron rods during his detention very early on in his asylum interview, had volunteered further information about the torture, and been told that that would not be necessary. It is also clear from paragraph 14 of the Secretary of State's refusal letter, as it is from question 2 of the asylum interview, that the appellant had submitted at an early stage photographs of scarring

in support of his claim. So our view is that Mr Tufan was right to accept that the Tribunal misdirected itself in its assessment of the appellant's credibility.

20. The real question is not whether there is an error of law here, as it seems to us that there is, but whether this error of law is material, or not. Mr Tufan submits, basing his submission on the recent country guidance decision of this Tribunal in **GJ and Others (Post-civil war returnees) Sri Lanka CG [2013] UKUT 319** which has been approved by the Court of Appeal recently in **NP (Sri Lanka) v Secretary of State for the Home Department [2014] EWCA Civ 829** that the risk profile which will entail a conclusion that a person is at real risk of persecution or Article 3 ill treatment on return to Sri Lanka has changed significantly as a result of changes in the political climate in Sri Lanka and changes in the priorities of the authorities there.

21. We have been referred to, and have read, the recent decision of the Court of Appeal and it is apparent to us that that is so. We have considered whether it would be right to dismiss this appeal on the basis that there is no possibility under the current country guidance case, as considered by the Court of Appeal, that this appellant could satisfy a Tribunal that he was at risk of Article 3 ill treatment or persecution on Refugee Convention grounds. We have not found this an easy question to decide but it does seem to us that taking the appellant's case at its highest there is enough in his past profile to mean that he could be perceived by the Sri Lankan authorities currently to be a person of interest to them and thus to be a person who was at such risk.

22. Mr Muquit submits that the following factors are relevant. On the appellant's case he had been identified by somebody and interned as a result of that. He was detained for one and a half years. On his case he suffered serious abuse. On his case his wife had high level involvement with the LTTE and had been removed from Sri Lanka on a ship. He had been questioned while in detention about his knowledge of the LTTE and their activities and his knowledge about ammunition. He had not been released because he was perceived to have no profile but because of a payment of a bribe and a warning had been issued when he was released.

23. He had given evidence that further enquiries had been made about him in Sri Lanka after his release and he had engaged in sur place activities.

24. It is true that the Tribunal in paragraphs 32, 33 and 38 of its determination made adverse findings about the credibility of other aspects of the appellant's account apart from the source of his scarring, and in particular adverse findings about his claim to have engaged in demonstrations organised by Tamil diaspora activists. We have considered anxiously those findings, standing on their own, and coupled with the new approach to risk which is evident in the country guidance case and the decision of the Court of Appeal. Can we be confident that the First-tier Tribunal’s conclusion that there was no real risk can stand?

25. On balance we have concluded that that conclusion cannot stand. It seems to us in particular that the assessment of the sur place activities was infected by the Tribunal's approach to the appellant's credibility which was largely founded on its mistaken assessment of his claims about the cause of his scars. In particular the Tribunal said the photographs were self-serving and intended to embellish a weak claim. We also consider that the assessment of the credibility of the remainder of his claims in paragraphs 32 and 33 of the determination is likewise infected by the error which really was at the foundation of the Tribunal's assessment of credibility.

26. The appellant was entitled to have his claim considered with anxious scrutiny at first instance. We do not consider that it received the anxious scrutiny which it should have received at first instance. For that reason we cannot be confident that the error of law was an immaterial error of law. It follows that this appeal succeeds we remit the case to the First-tier Tribunal for a rehearing.

Decision

Appeal allowed – Appeal remitted to the First-tier Tribunal for re-hearing.

Signed Date 1/12/2014

Mrs Justice Elisabeth Laing DBE