Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11669/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 July 2015	**On 31 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF
DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

AJ
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Ms S. Iqbal, Counsel instructed by Vasuki Solicitors
For the Respondent: Mr N. Bramble, Home Office Presenting Officer

Anonymity
Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

DECISION AND REASONS

The Appellant

1. In a decision promulgated on 29th April 2015, the First-tier Tribunal dismissed the appellant's appeal against the respondent's refusal to grant him asylum or humanitarian protection and the consequent decision to remove him from the United Kingdom.

2. The appellant is a national of Sri Lanka born in July 1990 who arrived in UK in April 2012 and claimed asylum in May 2012. The core of his claim is that in 2009 he was detained and tortured because of involvement with the LTTE; that he escaped in 2012 before making his way to the UK, via France; and that since coming to the UK he has been politically active and the Sri Lankan authorities have maintained a continuing adverse interest in him.

3. On 26 November 2014 the respondent refused the appellant's claim. The respondent did not believe the appellant and therefore did not accept he would, on return to Sri Lanka, be subject to any of the risks identified in GJ and Others (post-civil war returnees) Sri Lanka, CG [2013] UKUT 00319 (IAC). Further, the respondent took the view that even if the respondent's account was accepted, neither his role in the LTTE nor his *sur place* activity in the UK were not sufficient to put him at real risk of persecution or serious harm.

4. The appellant appealed and his appeal was heard by First-tier Tribunal Judge M R Oliver ("the judge") on 1 April 2015 at Hatton Cross. The judge, having identified what he described as "clear discrepancies" in the appellant's account, concluded that he did "not accept his account in its entirety" and found that the appellant would not be at risk on return to Sri Lanka.

5. In support of his appeal, the appellant submitted a report prepared by Professor S. Lingham dated 30 March 2015. In his report, Professor Lingham states that he had a three hour consultation with the appellant and that, having examined the appellant's four scars, he formed the view that the clinical features of the scars could not be from any other means than burning with heated metal. He found that the scars were inflicted at the same time by the same instrument and that they were at least two years old. He ruled out the possibility that they were self inflicted due to their location. He was unable to comment on whether they were caused deliberately to mislead but thought it very unlikely the wounds could be from any ritual, medical condition or accident. In his concluding remarks, Professor Lingham stated:

> "I found no reason to dispute the history provided by the patient and this was after I had clinically assessed the scars, their location, distribution and appearance and after I had examined the melanocytes and pigmentation of the scarring."

6. The judge, at paragraphs 27 and 28 of his decision, made the following comments about Professor Lingham's report:

> "27. The one incontrovertible fact of the appellant's case is that he has received 4 scars. These were relied upon by Mr Paramjorthy, who told me that Professor Lingam had been accepted in the case of KV (scarring – medical evidence) Sri Lanka [2014] UKUT 230 (IAC). In fact criticism was levelled at him at paragraph 310, and at paragraph 341 it was stated:
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> > "Of the medical witnesses, we prefer the evidence given by Dr Odili and Dr Aapata-Bravo as to the technical circumstances in which the scarring may have come about. Unlike Dr Arnold and Professor Katona, both examined the appellant. As noted above, Professor Lingam's finding was limited to one of mere consistency and such a finding does not entail more than a conclusion that torture was one among other possible causes. Whilst we have commented favourably on certain aspects of Professor Lingam's methodology, we find little assistance in his application of this to the appellant's case in relation to other possible causes, as he appears to have decided to eliminate some possible causes simply because they were not consistent with the appellant's narrative."
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> 28. This was very much the tenor of short report on the appellant. Causation of the appellant's scars has never been in issue but the circumstances in which they occurred has. What is really in issue is his credibility and the viability of his account. Before coming to any conclusion on the medical evidence, I must consider all of the evidence in the round (Mibanga v SSHD [2005] EWCA Civ 367; MN (Sri Lanka) v SSHD [2014] EWCA Civ 1601)."

7. In his application for permission to appeal, the appellant contended, firstly, that the judge made his findings on credibility without having proper regard to Professor Lingham's report. Secondly, it was submitted that several of the discrepancies in the appellant's evidence that were highlighted by the judge as undermining the appellant's credibility were not in fact discrepancies and could be reconciled by the evidence. Thirdly, it was contended that the judge had not properly explained why the appellant's *sur place* activity was not sufficient to result in the risks identified in GJ and Others.

8. Permission to appeal was granted on 22 May 2015 by First-tier Tribunal Judge Fisher on all grounds.

The Upper Tribunal Hearing

Submissions for the Appellant

9. For the appellant, Ms Iqbal submitted that the judge had rejected the entirety of the claim without considering the expert medical report, even though this should have been central to the assessment of credibility given the extent to which it was consistent with the appellant's account. She noted that at paragraph 28 of his decision the judge had correctly identified the Court of Appeal authority which sets out how medical evidence should be approached but had not then followed the authority. At paragraph 28 the judge appeared to be saying he would return to, and

make a conclusion with respect to, the medical evidence later in the decision but he clearly failed to do this. She also commented that the judge was incorrect to characterise Professor Lingham's report as short.

10. Ms Iqbal also argued that the judge's overall credibility finding could not be sustained as it was in large part based on events that he was mistaken in treating as not being supported by consistent and credible accounts. Ms Iqbal identified several of the judge's findings in paragraph 29 of the decision where she argued the judge was mistaken in describing the appellant's account as having discrepancies, being vague or not being plausible. Specifically, she took issue with the judge finding discrepancies in the appellant's account of whether his brother worked at the medical centre; that the appellant was unable to say how many doctors and helpers worked at the medical centre; that he was unable to say how long he had known the man who helped him escape; and the failure to explain the men on motorbikes outside his family home. She also argued that the judge had not had proper regard to the extent to which the appellant's *sur place* activity put him at risk given the sophisticated intelligence gathering by the Sri Lankan authorities in the UK and that he had not had proper regard to relevant parts of GJ and Others.

Submissions for the Respondent

11. For the respondent, Mr Bramble acknowledged that after referring to the medical evidence in paragraphs 27 and 28 the judge did not return to it. However, this did not necessarily mean the judge had not had due regard to the medical evidence or that it had been overlooked. The fact that there were scars was not disputed and Professor Lingham was unable to differentiate between deliberately inflicted wounds and those inflicted by the authorities. The judge made a wide range of findings that were damaging to the appellant's credibility which lead him to conclude that the appellant was not tortured notwithstanding the medical report.

12. With regard to the credibility findings, Mr Bramble's position was that even if the judge was mistaken in relation to the discrepancies identified by Ms Iqbal, these were peripheral to the core findings on credibility which had not been challenged and were sufficient to substantiate the judge's overall conclusion on credibility. Mr Bramble further argued that the judge's findings on the significance of the appellant's *sur plus* activities were clearly open to him given the limited evidence the appellant had provided in support of his activities and that his account of his experience in Sri Lanka was not accepted. Accordingly, it was Mr Bramble's position that the judge's decision should stand as there had not been a material error of law.

Findings and Consideration

13. We gave our decision at the hearing and gave a brief summary of our reasons.

14. For the reasons set out below, we find that the decision of the First-tier Tribunal contains a material error of law such that it must be set aside in its entirety and remitted to the First-tier Tribunal for re-hearing.

15. It is well established that medical evidence should not be artificially separated from the rest of the evidence in an appeal in order to reach a conclusion about credibility without reference to it. This was considered by the Court of Appeal in Mibanga [2005] EWCA Civ 367 where Wilson J made the following observation: "what the fact-finder does at his peril is to reach a conclusion by reference only to the appellant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence." He then quoted with approval paragraph 22 of the Tribunal decision HE (DRC-Credibility and Psychiatric Reports) [2004] UKIAT 00321:

> "Where the report is specifically relied on as a factor relevant to credibility, the Adjudicator should deal with it as an integral part of the findings on credibility rather than just as an add-on, which does not undermine the conclusions to which he would otherwise come"

16. The First-tier Tribunal must also consider medical evidence with appropriate care. As noted by the Court of Appeal in SS (Sri Lanka) [2012] EWCA Civ 155:

> "… a judge's decision not to accept expert evidence does not involve an error of law on his part, provided he approaches that evidence with appropriate care and gives good reasons for his decision"

17. This is an appeal in which the judge had before him expert evidence on the appellant's scars based on a thorough in person examination of the appellant in which the expert set out in clear terms his conclusions about the scarring, finding them to be clinically diagnostic of burns and that they could not be from any other means than burning with heated hot metal. The expert, Professor Lingam, is an experienced practitioner who explicitly recognised in his report his duty to the Court and confirmed he had followed the United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, known as the Istanbul Protocol.

18. Professor Lingam's report is important evidence which is relevant to the core of the appellant's claim. As such, it was incumbent on the judge to approach it with appropriate care and give properly articulated and understandable reasons to explain the weight he attached to it. Consideration of the report also needed to be an integral part of his assessment of the appellant's credibility, particularly as there is such a striking difference between the judge's credibility findings based on his identification of discrepancies in the appellant's account and the medical evidence where the expert concluded that he found no reason to dispute the history provided by the appellant having clinically assessed the scars, their location, distribution and appearance.

19. Professor Lingam's report does not appear to play any part – and certainly not an integral part – in the judge's assessment of the appellant's

credibility. The judge has treated the appellant's credibility – and the viability of his account – as something distinct and separate from the evidence in the report. The judge has not set out any analysis of the report or explained how the report plays a part in his overall assessment. Nor has he given any reasons to explain why he has given the report such cursory treatment other than to quote criticism of the report's author in another case without properly explaining how this criticism is relevant or explaining the context of the criticism.

20. These matters are sufficient to amount to a material error of law such that the First-tier Tribunal's decision must be set aside. As the medical evidence needs to be considered in the round as an integral part of any assessment of the appellant's credibility, there will need to be a complete rehearing and accordingly the appeal should be remitted to the First-tier Tribunal to be heard afresh.

NOTICE OF DECISION

The decision of the First-tier Tribunal contains a material error of law such that it should be set aside in its entirety and the appeal heard afresh.

The appeal is remitted to the First-tier Tribunal for hearing afresh before a judge other than Judge M R Oliver.

Anonymity order made.

Signed Date

Deputy Upper Tribunal Judge Sheridan