Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/03338/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27 April 2015	**On 5 May 2015**

Before

UPPER TRIBUNAL JUDGE SOUTHERN
UPPER TRIBUNAL JUDGE FINCH

Between

K. R.

(Anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. P. Turner, counsel instructed by Greater London Solicitors
For the Respondent: Ms A. Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

History of Appeal

1. The Appellant, who was born on 11th May 1969, is a national of Sri Lanka and of Tamil origin. He arrived in the United Kingdom on 3rd May 2009 and applied for asylum. His application was refused on 23rd July 2009 and he appealed. His appeal

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was heard by Immigration Judge Sanderson on 1st September 2009 and dismissed in a determination sent out on 9th September 2009. Senior Immigration Judge Kekic made an order for reconsideration on 29th September 2009. But in a determination, dated 15th January 2010, Senior Immigration Judge Gleeson found that Immigration Judge Sanderson had not made any material errors of law and that his determination of the appeal should stand.

2. The Appellant subsequently made further representations to the Respondent and on 28th November 2013 she refused to treat them as a fresh claim for asylum. He made a claim for judicial review of this decision and on 10th January 2014 the Respondent again refused to grant the Appellant leave to remain but recognised that his representations of 20th December 2013 amounted to a fresh claim for asylum and attracted a further right of appeal.

3. His appeal was heard by First-tier Tribunal Judge Griffith who allowed his appeal in a decision promulgated on 11th December 2014. However, the Respondent sought permission to appeal, which was granted by First-tier Tribunal Judge Ransley on 11th February 2015.

4. In her grounds of appeal the Respondent asserted that the First-tier Tribunal Judge had failed to adequately apply the decisions in *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 00702 or *JL (medical reports-credibility) China* [2013] UKUT 145. In addition, she asserted that the Appellant did not fall within any of the risk categories identified in *GJ and others (post-civil war: returnees) Sri Lanka* [2013] UKUT 00319 and that, therefore, he would not be at risk of persecution in Sri Lanka. In the alternative, it was submitted that the Judge had not provided adequate reasons for her findings and had failed to resolve a previous conflict relating to evidence previously produced about alleged scarring to the Appellant's back.

5. Permission was given on all grounds on the basis that the Judge may have erred in law by focusing on the medical evidence to the exclusion of other material considerations and not addressing the finding by Immigration Judge Sanderson that the entirety of the Appellant's account was a fabrication. She also found that the Judge had failed to apply relevant case law concerning scarring reports.

Error of Law Hearing

6. At the hearing the Home Office Presenting Officer submitted that the Judge had made an error of law by treating both the medical evidence and the UNHCR Guidelines issued on 21st December 2012 as determinative of the appeal before her. She also asserted that Immigration Judge Sanderson's findings should have formed the starting point for the Judge's consideration of the Appellant's appeal against the refusal of his fresh claim for asylum and that in paragraph 46 of her decision she did not give adequate reasons for departing from the previous judge's findings in relation to credibility. She also noted that the Judge had erroneously stated in paragraph 55 that the core of the Appellant's claim had been consistent throughout and had not engaged with the inconsistencies in the evidence identified by the previous judge. She also noted that in paragraph 14 of her determination Senior Immigration Judge Gleeson had found that at the hearing before her there

were several significant modifications of the Appellant's account and that Immigration Judge Sanderson had been entitled to rely on the discrepancies in the Appellant's account. She also asserted that the Judge had not explained why the medical evidence had undermined the previous judge's credibility findings.

7. She also noted that it was not clear whether Dr. Halari, who is a senior clinical psychologist, had been provided with a copy of Immigration Judge Sanderson's determination. In addition, she noted that a photograph of another person's back showing scaring from the back of the neck to the waist had been submitted in 2009 and that that Judge had not addressed this conflict of evidence. She also noted that in paragraph 60 of her decision the Judge had found that the Appellant did not fall under any of the specific risk categories set out in paragraph 356(7) of *GJ and others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC) but erroneously allowed the appeal on the basis that he fell within the UNCHR's risk categories. She asserted that this was an error of law, as recognised in *MP (Sri Lanka), NT (Sri Lanka) v The Secretary of State for the Home Department* [2014] EWCA Civ 829. She accepted that the Judge had referred to this case in paragraph 58 of her decision but asserted that she had not properly engaged with its findings and noted that in paragraph 325 of *GJ and others* the Upper Tribunal had found that previous involvement with the LTTE did not now give rise to a risk of persecution. She also noted that family links were now just one factor which may need to be taken into account.

8. The Appellant's counsel then replied. He asserted that the grounds formulated by the Respondent were a mere disagreement with the Judge's findings. He noted that the Judge had found the Appellant to be credible and had accepted that people were still looking for him. He also noted that in paragraph 62 of her decision the Judge had found that the Appellant's fragile state of health would increase his risk of being ill-treated. In addition, he asserted that the grounds did not explain how the Judge had misapplied *Deveeslan* and he noted that the Judge had explicitly referred to it in paragraph 45 of her decision. He also noted that she had referred to *JL (medical reports-credibility) China* [2013] UKUT 145 (IAC) in paragraph 48 of her decision. In addition, he asserted that in paragraphs 100 – 110 of her report Dr. Halari had expressly considered whether the Appellant was malingering. He also noted that Dr. Arnold had been provided with the first judge's determination but had found that the Appellant's scarring was consistent with his account of torture. He then asserted that the Judge had considered the evidence in the light of the medical evidence and made her decision in the light of relevant case law.

9. Having heard these submissions, we find that the Judge did not properly apply the principles in *Devaseelan.* We accept that in paragraph 45 of her decision, she reminded herself of the need to take Immigration Judge Sanderson's determination as her starting point. She was also aware that she could reach a different decision if there was fresh evidence that entitled her to do so. However, she then treated the fresh medical evidence as determinative of her consideration of whether or not the Appellant had been previously tortured as asserted. When doing so she did not address her mind to the inconsistencies in the Appellant's overall evidence, which had led Immigration Judge Sanderson to conclude that the Appellant's entire account was a fabrication. Neither did she consider whether the medical evidence provided an explanation for any discrepancies which previously arose.

10. We are satisfied that the approach taken by the Judge discloses a legal error in that she failed correctly to apply the *Devaseelan* principles*.* This was particularly the case as Dr. Arnold's report on the Appellant's scars went no further than finding that all but one of his scars was consistent with his account of torture. He found that the other scar was typical of a stab wound but also found that a fall onto a sharp object could not be totally excluded. Therefore, the medical evidence did not exclude the fact that the Appellant had fabricated his account and this required the Judge to consider the reasons given by Immigration Judge Sanderson for doubting his credibility in paragraphs 33 – 36 of his determination. In our judgment this did amount to an error of law and was not just a mere disagreement with the Judge's findings of fact.

11. Paragraph 37 of this earlier determination also refers to a photograph said to be of the Appellant's back which had been submitted at that hearing. The later determination of Upper Tribunal Gleeson reveals that this was not a photograph of the Appellant's back and that he did not have a scar which extended from the back of his neck to near to the left-hand side of his waist. In our judgment the Judge should have also considered this conflict of evidence and the totality of the evidence before Immigration Judge Sanderson before finding at paragraph 55 of her decision that the core of the Appellant's claim had been consistent throughout.

12. In addition, we find that given this previous apparent attempted deception, the Judge should have considered the possibility that some of the scars that were on the Appellant's body were self-inflicted or self-inflicted by proxy as required by *KV (scarring-medical evidence) Sri Lanka* [2014] UKUT 00230. This was not considered by Dr. Arnold or the Judge.

13. In her grounds of appeal the Respondent had also relied on the case of *JL China.* It is clear from paragraph 48 of her decision that the Judge was aware of this case and the fact that those writing reports are to ensure that where possible that before forming their opinions they study any assessments that have already been made about the appellant's credibility. But later in the same paragraph she notes that it was unclear whether Dr. Halari had been provided with the two previous determinations, which did doubt the credibility of the Appellant's account. At the hearing before us Counsel was not able to clarify whether she had been provided with these determinations but in her report she simply states that the background information to her report had been set out in her letter of instruction from the Appellant's solicitors. There is nothing to suggest that she had seen these determinations and her statement at paragraph 100 of her report suggests that she did rely on the Appellant's own account before concluding that the alleged torture was the precipitating cause for his post traumatic stress disorder and his major depressive symptoms. We find that this amounted to an error of law as in *JL China* the Upper Tribunal found that the more a diagnosis is dependent on assuming that the account given by the appellant was to be believed, the less likely it is that significant weight will be attached to it.

14. The Respondent also asserted that the Judge erred in her approach to the Appellant's entitlement to protection. We accept that she did remind herself of the decisions in *GJ & Others* and also *MP Sri Lanka.* However, after finding in paragraph 60 of her decision that the Appellant did not fall within the risk categories

identified in sub-paragraph 356(7) of the former case, she sought to rely on sub-paragraph 356(4) of the case. This states that if a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection. However, this country guidance read holistically makes it clear that a real risk only occurs if a person falls into one of the categories referred to in sub-paragraph 356(7). The Judge also relied on the fact that the Appellant fell within one of the categories contained in UNHCR's 2012 Guidelines. However, in paragraph 16 of *MP Sri Lanka*, the Court of Appeal found that the country guidance in *GJ and Others* was legally sound even though it did not include categories included in the UNHCR guidelines.

15. For all of these reasons we are satisfied that there were material errors of law in the First-tier Tribunal Judge's decision and findings and that it should be set aside in its entirety. We are also satisfied that, as there will need to be a complete re-hearing, that this is a proper case for remission to the First-tier Tribunal.

Conclusions:

1. The First-tier Tribunal Judge's decision and findings did include material errors of law.

2. The decision should be set aside in its entirety.

3. The appeal to the Upper Tribunal is allowed to the extent that the appeal is remitted to the First-tier Tribunal to be determined by a different judge of that Tribunal.

Upper Tribunal Judge Finch Date: 27 April 2015