Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02490/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th March 2019	**On 1st April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR M T
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Georget, Counsel, instructed by ASK Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

The Appellant, a citizen of Sri Lanka, appealed to the First-tier Tribunal against a decision made by the Secretary of State on 5th February 2018 to refuse his application for protection. First-tier Tribunal Judge Gibbs dismissed the appeal in a decision promulgated on 4th June 2018. The Appellant now appeals to this

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Tribunal with permission granted by Upper Tribunal Judge Perkins on 7th February 2019.

The background to this appeal is that the Appellant claims that he was born in a rural area outside Jaffna and that in 1998 his family was displaced to Vanni, where they lived in a refugee camp until 2002 when they returned to his home area which was under Tamil control. He claims that he was trained by the LTTE in Jaffna for fifteen days in 2005. He claims that he was detained on three occasions and accused of being an LTTE member in 2006 and 2007. He claims that he left Sri Lanka, travelling via India, and arrived in the UK on 9th April 2008. He claimed asylum and his application was refused on 2nd October 2009. He appealed that decision and his appeal was dismissed by Immigration Judge Froom in a decision promulgated on 4th January 2010. The Appellant's appeal rights became exhausted on 5th March 2010.

On 22nd May 2014 the Appellant submitted a fresh application for asylum to the Home Office, including an updated medical evidence and information regarding his activities with the Transnational Government of Tamil Eelam (TGTE) in the UK. The Respondent accepted that the Appellant had made a fresh claim but refused the application on 5th February 2018, the decision the subject of this appeal.

Judge Gibbs took the decision of Immigration Judge Froom as the starting point in accordance with the decision in **Devaseelan [2002] UKIAT 00702**. The judge took into account two medical reports from Dr Goldwyn, a 2014 report in relation to scarring in 2014 and a 2017 report in relation to the Appellant's mental health. The judge decided that the Appellant had not established that his removal would be in breach of the UK's obligations under the Refugee Convention or Articles 2, 3 or 8 of the ECHR.

The Grounds of Appeal are set out in the grounds to the First-tier Tribunal and the renewed grounds to the Upper Tribunal. Before me, Mr Georget summarised those grounds with reference to the case as put in the First-tier Tribunal. The first aspect to the appeal in the First-tier Tribunal was the asylum issue in the context of the new evidence. Mr Georget maintained that there were errors in the judge's approach to the medical evidence in the context of her consideration of asylum. Mr Georget submitted that the findings made by Judge Froom had to be considered in the context of the 2017 medical report in relation to the Appellant's mental health.

I do not accept that this ground has been made out. First-tier Tribunal Judge Froom found that the Appellant's account was not credible for a number of reasons set out in the decision. I note that there was no challenge to Judge Froom's decision. Judge Froom found a number of matters damaged the Appellant's credibility, including the fact that he denied having travelled through India and had not explained his behaviour in continuing to mislead the authorities [30]. He also considered that the Appellant's evidence of his claimed training with the LTTE was vague and that the Appellant had not claimed to have any scarring despite having claimed to have been beaten with gun butts and kicked with boots [31]. Judge Froom also noted that the

Appellant had produced no medical evidence whatsoever to support the claim that he had mental health problems [32]. In my view, Judge Gibbs took the proper approach to this evidence, setting out Judge Froom's findings of fact before going on to consider how the medical evidence should be approached in accordance with **Devaseelan** [20] where she set out paragraph 40(4) of **Devaseelan**. The judge found that the caution expressed in **Devaseelan** was particularly relevant in this case when considering that Dr Goldwyn's reports had been produced five years after the Appellant's appeal rights were exhausted, at a time when the Appellant would have been wholly aware of the problems identified in his case. The judge considered Dr Goldwyn's 2014 report dealing with scarring and considered it very significant that the Appellant previously denied either sustaining injuries as a result of ill-treatment or being scarred because of this as set out in paragraph 31 of Judge Froom's decision and in his Asylum Interview [23].

The judge also found it not credible that the Appellant would not have raised any issue of scarring in his appeal before Judge Froom, considering particularly that he was represented at that time and that at that time the relevant country guidance case of **LP (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG [2007] UKAIT 00076**, in which the presence of scarring was identified by the Upper Tribunal as a risk factor for Tamils being returned to Sri Lanka. The judge took into account that the Appellant was legally represented at the previous appeal and that had the Appellant had the type of scarring described by Dr Goldwyn it would have been drawn to Judge Froom's attention [25].

The judge also considered the fact that in her report Dr Goldwyn had not addressed the issue of the possibility of the scars having been self-inflicted by proxy nor had she addressed the fact that the Appellant previously denied having any scars [26].

Following the hearing in the Upper Tribunal Mr Georget made further submissions dated 8th March 2019 arising from the decision of the Supreme Court in **KV (Sri Lanka) v SSHD [2019] UKSC 10**. He pointed out that this case had not been raised at the hearing as the decision was handed down on the morning of 6th March 2019, whilst the hearing in the Upper Tribunal was taking place. It is submitted that the decision in **KV** is plainly relevant to this appeal and that in the interests of justice that these issues are dealt with either through consideration of the written submissions or a reconvened hearing.

I considered that it was appropriate to consider the submissions and invited the Secretary of State to respond to the submissions, the substantive submissions and the response are set out below.

Mr Georget submitted that the First-tier Tribunals reasons for rejecting Dr Goldwyn's 2014 report on scarring is no longer sustainable, in particular due to her reliance on the potential alternative cause of the scarring as 'self-infliction by proxy' (SIBP). He relied on paragraphs 31-35 of the decision in **KV** where Lord Wilson said:

> "31. The third point arises out of the tribunal's final conclusion that there were only two real possibilities, namely that KV had been

tortured and that his wounding was SIBP. The point is that the likelihood of both possibilities had to be compared with each other before either of them could be discounted. And the contention is that, when it came to compile the final section of its determination entitled “Assessment of the Appellant’s Appeal”, and in particular the final subsection, entitled “Conclusion”, in which it discounted the possibility of torture, the tribunal made no reference to the likelihood, or rather on any view the unlikelihood, that the wounding was SIBP.

32. That there was extensive torture by state forces in Sri Lanka in 2009 was well established in the evidence before the tribunal. For example at para 187 of its determination it quoted an EU report dated October 2009 as follows:

> “International reports indicate continual and well-documented allegations of widespread torture and ill-treatment committed by state forces (police and military) particularly in situations of detention. The UN Special Rapporteur on Torture has expressed shock at the severity of the torture employed by the army, which includes burning with soldering irons and suspension of detainees by their thumbs.”

33. By contrast, evidence of wounding SIBP on the part of asylum-seekers was almost non-existent. The tribunal referred at para 11 to just one unreported decision in 2011 in which it had concluded that the wounding had been SIBP. Dr Zapata-Bravo said that, in the field of immigration, neither he nor any colleague to whom he had spoken had experience of wounding SIBP. He contrasted it with tribal and ritual scarring, administered with social consent, which no one had suggested to account for the scars in question. His and the other medical evidence before the tribunal indicated that the wounding of a body which that person deliberately achieved by his own hand was slightly less uncommon; but that there were parts of a body which that person could not burn without assistance and that they certainly included the burnt parts of KV’s back. Dr Zapata-Bravo said that in the literature he had found only one statement referable to a person’s burning of himself by use of a proxy. “Very rarely”, it had said, “an accomplice might be asked to cause a wound in a place the person cannot reach”.

34. There is no doubt that, particularly in the light of the serious lack of KV’s credibility in several other areas of his evidence, the tribunal was correct to address the possibility of wounding SIBP. But, in assessing the strength of the possibility, it had to weigh the following:

> (a) It is an extreme measure for a person to decide to cause himself to suffer deep injury and severe and protracted pain.
>
> (b) Moreover KV needed someone to help him to do it.
>
> (c) Wounding SIBP is, in the words of Sales LJ at para 93 of his judgment, “generally so unlikely”.
>
> (d) If KV’s wounding was SIBP, the wounds on his back could have been inflicted only under anaesthetic and so he would have needed assistance from a person with medical expertise prepared to act contrary to medical ethics.

(e) If his wounding was SIBP, an explanation had to be found for the difference in both the location and in particular the presentation of the scarring as between the back and the arm.

(f) If his wounding was SIBP, an explanation had to be found for the number of the wounds, namely the three wounds on the back, albeit now represented by five scars, and the two wounds on the arm. As Elias LJ observed in para 99, "one or two strategically placed scars would equally well have supported a claim of torture".

35. Elias LJ offered a summary in para 101:

"In my view very considerable weight should be given to the fact that injuries which are SIBP are likely to be extremely rare. An individual is highly unlikely to want to suffer the continuing pain and discomfort resulting from self-inflicted harm, even if he is anaesthetised when the harm is inflicted. Moreover, the possibility that the injuries may have been sustained in this way is even less likely in circumstances where the applicant would have needed to be anaesthetised. This would in all probability have required the clandestine co-operation of a qualified doctor who would have had to be willing to act in breach of the most fundamental and ethical standards, and who had access to the relevant medical equipment."

That was his view. It should also, I suggest, be ours."

Mr Georget submitted that the First-tier Tribunal erred in failing to weigh the factors referred to in paragraph 34 above in its assessment as to whether SIBP was a realistic alternative explanation for the scarring described by Dr Goldwyn. The expert went into detail as to the nature of the scarring and her opinion of the likely causes and considered and ruled out self-infliction as acknowledged by the judge a paragraph 26. However it is submitted, just as in **KV**, that this effectively left two possibilities: given the nature of the scarring and the findings of Dr Goldwyn, either the scars were caused in the way claimed by the Appellant or they were caused by SIBP. Accordingly, it is submitted that the possibility of SIBP was clearly in the mind of the judge. It is submitted that the judge erred in failing to explore the possibility along the lines set out by the Supreme Court and in the context of the Supreme Court's opinion that the possibility of SIBP is "generally so unlikely" that it requires the issue to be explored in detail if it is to be relied upon in a determination of a claim for international protection. It is submitted that the First-tier Tribunal Judge's treatment of the medical evidence as to scarring is no longer sustainable. Mr Georget submitted that the decision should be set aside in its entirety and remitted to the First-tier Tribunal for a fresh hearing for this reason alone. It is accepted that in any *de novo* hearing the Appellant would have to deal with the previous negative credibility findings in the 2009 appeal in the context of **Devaseelan** and in particular in circumstances where the Appellant apparently did not draw the attention of the Tribunal to any injuries at that time. However it is contended that any future Tribunal would have to treat the issue of SIBP carefully and in accordance with the guidance in **KV**.

Mr Avery responded to the submissions on behalf of the Secretary of State on 12th March 2019. He submitted that it is clear from reading the Supreme Court's decision in **KV** that the primary issue with the Upper Tribunal's decision was the interpretation of the medical evidence but that the context of this case is fundamentally different in that this Appellant initially claimed not to have any scars. In his submission, in this instance the determination of the judge did not stand in isolation but followed a previous, unchallenged, decision of the Tribunal dismissing the Appellant's case and finding him not credible. He contended that Judge Gibbs properly applied the **Devaseelan** principles when considering the fresh evidence. He submitted that at paragraph 26 Judge Gibbs gave sound reasons for expressing doubts about the medical evidence, not least was the complete failure of the expert to address the Appellant's previous denial that he had any injuries resulting from his treatment. This, in and of itself, seriously undermines the reliability of the report. On behalf of the Secretary of State he invited the Tribunal to uphold the decision of Judge Gibbs.

I agree with Mr Avery's submissions in relation to this matter. Judge Gibbs properly took the decision of Judge Froom as her starting point. Significantly she took into consideration that Dr Goldwyn did not address the fact that the Appellant had previously denied having any scars [26]. She attached considerable weight to the fact that the Appellant did not raise the issue of scarring in his appeal before Judge Froom taking into account the fact that he was represented then [25]. I accept that this in itself was capable of raising doubts as to the reliability of the medical evidence as to scarring. The judge highlighted that Dr Goldwyn had not addressed the issue of self-infliction by proxy. In the case of **KV** this was something specifically addressed in the medical evidence. It is clear from the Supreme Court's decision that the tribunal in that case had significant evidence as to the nature of the scars and to the possibility of them being SIBP. No such evidence was before Judge Gibbs. Judge Gibbs drew attention to the fact that this issue was not dealt with by Dr Goldwyn but did not reach a conclusion that this is what happened to the Appellant. This is a significant distinction between this case and the case of **KV**.

In the particular circumstances of this case and in light of the evidence before Judge Gibbs and the way she dealt with that evidence I am satisfied that the decision and guidance in **KV** does not undermine the conclusions reached by Judge Gibbs. Accordingly in my view the judge reached conclusions open to her on the evidence and made no material error in her approach to the issue of the medial evidence of scarring.

In his submissions, Mr Georget submitted that the second element of the appeal before the First-tier Tribunal was the Appellant's *sur place* activities in light of the updated country guidance. He highlighted that in the Appellant's witness statement from paragraph 6 onwards he described his activities with the TGTE and provided evidence of his attendance at demonstrations, providing links to websites where his photographs had been released. He submitted that the TGTE is a proscribed organisation, that the Appellant was involved in that organisation and that the judge erred in her approach to this evidence.

The judge dealt with this at paragraph 32, where she said:

> "With regards to the Appellant's sur place activities I accept, as does the Respondent in the Reasons for Refusal Letter, that he is a member of TGTE and has attended rallies and demonstrations in the UK. I am not however persuaded that his participation goes beyond this. Although Mr Yogalingam's letter states that the Appellant takes an active role in organising events and public demonstrations I am not satisfied that he has a particular profile, which I would in any event find inconsistent with his claimed level of mental health problems (which require his brother to take a day off work to take him to the demonstrations and meetings)."

Mr Georget contended that this was an inadequate consideration of the Appellant's claimed *sur place* activities. In his contention, the judge failed to explain why she found the Appellant has no particular profile and should have dealt with this issue in more detail.

However, the judge did take into account the fact that the Appellant is a member of TGTE and that he has attended rallies and demonstrations in the UK. The Appellant submitted a letter from the TGTE, which the judge referred to in paragraph 32. However that letter was not specific about the Appellant's claimed roles in relation to organising events and public demonstrations. In his witness statement, the Appellant set out a number of demonstrations he had attended but did not specifically refer to any active role in organising events or volunteering in organising events as claimed in the letter from TGTE. The judge considered the guidance in the case of **GJ and others (post-civil war: returnees) [2013] UKUT 00319 (IAC)** at paragraph 33 but did not consider that the Appellant had established a profile whilst in the UK in accordance with risk category 7(a) of **GJ**. In my view the judge was entitled to reach this conclusion on the basis of the evidence before her.

The third matter put forward by Mr Georget at the hearing relates to how the judge dealt with the evidence as to the Appellant's mental health. The judge had before her a report from Dr Goldwyn, following a consultation on 27th November 2017. That report details an examination of the Appellant's mental state and a report on a PTSD assessment. Dr Goldwyn concluded that the Appellant has severe Post Traumatic Stress Disorder and major depression. Dr Goldwyn also considered that the Appellant presents a high risk of committing suicide if he is returned to Sri Lanka (paragraph 43).

Mr Georget submitted that there is a distinction between the diagnosis of PTSD and the causes of PTSD. He submitted that the judge took an erroneous approach to the medical evidence in that at paragraph 15 the judge accepted that there was prima facie evidence that the Appellant had been identified as suffering from PTSD, depression and anxiety and treated the Appellant as a vulnerable witness but at paragraph 29 the judge said that she was not persuaded in relation to the diagnosis of PTSD. In his submission, the judge did not separate the cause of the PTSD from the diagnosis. In his submission, the judge had to give compelling reasons for going against the diagnosis of PTSD but did not do so here. He submitted that this is material because the judge

went on to question the cause for any diagnosis for PTSD at paragraph 29. He submitted that it is clear from paragraphs 31 and 35 that the judge did not accept the doctor's diagnosis of PTSD.

I have considered the judge's treatment of the evidence of the Appellant's mental health. In my view, there is no inconsistency between the approach at paragraph 15 and the approach elsewhere in the decision. At paragraph 15 the judge was simply saying that she treated the Appellant as a vulnerable witness on the basis of the prima facie evidence that the Appellant suffered from PTSD. This is the correct approach to the conduct of the hearing and no error is disclosed in relation to the judge's approach.

In terms of the diagnosis of PTSD, the judge considered at paragraphs 26 and 27 that the concerns she expressed about Dr Goldwyn's assessment as to scarring in the 2014 report affected the weight that she could attach to Dr Goldwyn's evidence as a whole. The judge found at paragraph 27 that if the Appellant was able to dupe Dr Goldwyn regarding his scars it is a real possibility that he has done so regarding his mental health problems. In this context, the judge noted, and I consider that this is significant, that she did not have any other medical evidence before her regarding the Appellant's mental health problems or treatment in the UK. In my view, this finding was open to the judge on the evidence before her. The judge gave cogent reasons for not accepting Dr Goldwyn's report in relation to scarring. These went to the Appellant's previous appeal and the delay in seeking medical evidence on the issue of scarring. In circumstances where the scarring report and mental health report were carried out by the same doctor three years apart, the judge was entitled to consider how the conclusions in the first report affected those in the second.

Further, there was limited evidence in relation to the Appellant's mental health problems or treatment in the UK, accordingly it was open to the judge to take this into account when assessing the weight to be attached to Dr Goldwyn's 2017 report [27]. Indeed, there was no evidence that the Appellant has been receiving any treatment in the UK in relation to any mental health problems. This was a relevant consideration for the judge in this context and indeed, in the context of Article 3 and Article 8.

The judge reached conclusions at paragraph 28 as follows:

> "I also find that in Dr Goldwyn's 2017 report she concludes that the Appellant suffers from severe PTSD, major depression, memory difficulties and cognitive impairment. Although she attributes this decline to the Appellant's ongoing worries regarding his asylum claim I do not see, in the absence of evidence on this issue, how the Appellant has developed cognitive impairment (which is not mentioned in the 2014 report) or why Dr Goldwyn has diagnosed (in 2017) memory problems independent of the PTSD when previously (in 2014) she recorded these as a symptom."

The judge went on at paragraph 29 to say that, given these concerns, she did not attach any weight on Dr Goldwyn's conclusions regarding the Appellant's

memory problems or cognitive impairment in her assessment of the evidence. The judge said that equally, she was not persuaded with regards to the diagnosis of PTSD but, even if she was wrong in this, given her overall credibility findings, she was not satisfied that the existence of PTSD is evidence that the Appellant's account of events in Sri Lanka is true. The judge did find it credible that the Appellant is depressed and anxious but found that this is most likely to be because of his immigration situation and desire to remain in the UK although not for the reasons he has advanced.

In the medical report Dr Goldwyn referred to the Appellant having very real worries because he does not know whether his asylum case will be accepted and expressed anxiety in relation to the prospect of return to Sri Lanka (paragraph 36) and that the Appellant reported feeling very hopeless about his situation (paragraph 43). On the basis of this evidence it was open to the judge to reach the conclusions reached at paragraph 29. In these circumstances, in my view, the judge did not err in her approach to the 2017 report.

This feeds into the judge's assessment of Article 3 and Article 8. There was no evidence before the judge as to ongoing treatment for the Appellant in the UK that would be relevant to issues around Article 3 and the judge attached limited weight to Dr Goldwyn's report in relation to PTSD and depression. Accordingly, I conclude that the judge made no error in the approach to Article 3. The judge dealt with Article 8 at paragraph 36. I find no error in the judge's approach here either. The judge considered the evidence about the relationship between the Appellant and his brother and his family. There is no evidence about ongoing medical treatment in the UK in relation to the Appellant's depression. The conclusions in relation to Article 8 were open to the judge on the evidence.

For the reasons set out above the Grounds of Appeal have not been made out.

Notice of Decision

The decision of the First-tier Tribunal Judge does not contain a material error of law.

The decision of the First-tier Tribunal shall stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a 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 Date: 28th March 2019

A Grimes
Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed. Therefore, there is no fee award.

Signed Date: 28th March 2019

A Grimes
Deputy Upper Tribunal Judge Grimes