Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02546/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 May 2018	**On 8 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

ELANCHELIYAN [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Gherman of Counsel instructed by Nag Law
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Gurung-Thapa promulgated on 28 November 2017 dismissing the Appellant's appeal on protection grounds against a decision of the Respondent dated 28 February 2017 to refuse asylum.

2. The Appellant is a citizen of Sri Lanka born on 29 June 1985. His immigration history is helpfully summarised at paragraphs 2-4 of the Decision of the First-tier Tribunal: it is unnecessary to repeat it again in its

entirety. However, for present purposes I note the following salient features: the Appellant first entered the UK in February 2011 further to entry clearance as a Tier 4 student; applications for further leave to remain were refused; following a refusal with no right of appeal on 18 March 2013 the Appellant claimed asylum on 6 April 2013; his application was refused and a subsequent appeal dismissed by First-tier Tribunal Judge Blundell in a decision promulgated on 5 July 2013 (ref AA/04590/2013); the Appellant was refused permission to appeal to the Upper Tribunal and became 'appeal rights exhausted' on 2 September 2013; the Appellant was detained on 14 February 2014 and on 25 February 2014 made further submissions to the Respondent in respect of his asylum claim: the further submissions were rejected with no right of appeal; the Appellant commenced judicial review proceedings on 18 October 2016 which in due course were settled on the basis that the Respondent would withdraw the decision; thereafter, on 28 February 2017 the Respondent made the decision that is the subject of these proceedings.

3. The Appellant appealed to the IAC.

4. The appeal was dismissed for reasons set out in the Decision of Judge Gurung-Thapa.

6. The Appellant sought permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Keane on 17 January 2018.

7. To understand the bases of the challenge before the Upper Tribunal it is necessary to have regard to the following contextual matters.

(i) The Appellant's narrative account of events in Sri Lanka that informed his claim for asylum included in particular the following points: since the age of 12 (1997) he resided in Colombo with his family where he was educated to degree level; his brother was a member of the LTTE; in March 2008 the Appellant was arrested and interrogated about his brother; during his interrogation he confessed to having helped to obtain ID cards for two friends of his brother which enabled them to travel to and reside in Colombo; the Appellant was fingerprinted during his detention; he was ill-treated; he was held for three weeks; after his release he continued in his university education; in 2009 his brother surrendered to the Sri Lankan authorities and entered the government 'rehabilitation' programme; on 15 September 2010 the Appellant was arrested again; the basis of his arrest was that he had previously housed his brother, had obtained identity cards for friends of his brother, and had supplied the LTTE with medicines; the Appellant was held until 10 December 2010 when he was freed after the intervention of the EPDP; his national identity card was retained by the

authorities; after his release he stayed with an aunt in Vavuniya until arrangements could be made with the assistance of the EPDP to leave Sri Lanka; to this end entry clearance was obtained as a student further to an application made on 21 January 2011.

(ii) In refusing the Appellant's appeal Judge Blundell rejected the credibility of the Appellant's narrative account: "*… I do not find the appellant to be a credible witness. I do not accept that he has rendered assistance the LTTE, that his brother was a member of that organisation, or that he has ever been detained by the authorities*" (paragraph 40). See also at paragraph 62 – "*I am left in no doubt that the appellant's account is a fabrication designed to ensure that he can remain in the United Kingdom for economic reasons*".

(iii) Before Judge Blundell the Appellant relied upon, amongst other things, items of documentary evidence that were said to corroborate his account: see decision of Judge Blundell at paragraph 9. The documents included a letter from a Sri Lankan attorney. Judge Blundell found that the Appellant's account was inconsistent with the contents of this letter, and this was a significant factor in Judge Blundell's overall evaluation of the Appellant's credibility: "*…what I considered to be serious inconsistencies between the account advanced by the appellant and that which is recounted in the letter from [G], the Sri Lankan attorney who supposedly assisted him in 2008 and 2010*" (paragraph 44). (See further at paragraphs 53–59 for Judge Blundell's evaluation of the supporting documentary materials.)

(iv) Before Judge Blundell the Appellant also sought to place reliance upon a scar on his left foot which he claimed was corroborative of his account of having been ill-treated whilst detained: see paragraphs 22 and 34. Judge Blundell rejected the Appellant's evidence in this regard in the following terms:

> "*I turn finally to consider the appellant's left foot. I have been provided with some photos which are said to show a scar which was sutured following the appellant's torture in 2008. I can attach no weight to these photographs. The scar is not even clearly a scar as opposed to a naturally occurring crease in the underside of the appellant's foot. In any event, [the Home Office Presenting Officer] was entirely correct to submit that it would be inappropriate to conclude that such a scar provided material support for the appellant's account without a medical report confirming (at least) that it is a scar and, preferably, performing an Istanbul Protocol compliant assessment of the mark itself. Considering it in the round, I find it of no assistance.*" (paragraph 61).

(v) When the Appellant presented his further submissions in support of a purported fresh claim he relied upon the same narrative account as had

been rejected by Judge Blundell, but sought to support it by way of 'new' evidence being a corrected translation of a letter from his mother dated 5 June 2013 (which had been previously before the Tribunal with a different translation): see letter from Nag Law dated 25 February 2014. The pertinent correction in the translation appears to have been the addition of the word 'again' to denote that the lawyer had been involved in respect of the detention in March 2008 as well as 2010 – cf. paragraph 56 of Judge Blundell's decision. It was also pleaded that the Appellant had been involved in 'diaspora activity' whilst in the UK respect of "*the humanitarian crisis and human rights conditions Sri Lankan Tamils in Sri Lanka*". The further submissions otherwise sought to rely upon changes in the country guidance decisions in respect of Sri Lanka, and other matters in respect of the background country situation rather than advancing anything new or different in respect of the Appellant's personal circumstances and history.

(vi) Before Judge Gurung-Thapa the Appellant resubmitted his appeal bundle that had been before Judge Blundell, together with a supplementary bundle. The supplementary bundle included photographs of the Aappellant attending demonstrations in the UK, a further statement from his mother, a further letter from the Sri Lankan attorney (dated 15 November 2016), and a medical report dated 30 April 2017 from a specialist in accident and emergency medicine. (See decision of Judge Gurung-Thapa at paragraphs 51-52.)

(vii) The medical report referred to the scar on the Appellant's foot, but also additionally referred to scars on his forearm.

8. Judge Gurung-Thapa concluded that there was no basis to differ from the findings of Judge Blundell (paragraph 60). As regards the correction to the translation of the Appellant's mother's letter, the Judge observed that there were nonetheless other discrepancies between the mother's account and the Appellant's narrative (paragraph 65). In respect of the further evidence from the attorney, the Judge did not accept that the attorney had previously made a mistake (paragraphs 66-69). The Judge considered the medical evidence now provided, and the Appellant's account in respect of how he had sustained scarring; however the Judge concluded "*I reject his claim that the scars on which he relies were caused in the manner claimed*" (paragraph 86) - noting, amongst other things, that the Appellant had not related the cause of the scarring during his previous appeal in the manner now claimed: see paragraphs 72-86. The Judge noted the Appellant's diaspora activities - accepting that he "*has attended various demonstrations/protests*", but that "*his role appears at its highest to be a very low level activity*" (paragraph 97), and ultimately concluded that such activity would not put him at risk upon return to Sri Lanka (paragraphs 91 – 100).

9. In my judgement the First-tier Tribunal Judge's findings and conclusions have been made pursuant to a full and careful analysis of the evidence and arguments in the appeal, such analysis being set out with sustainable and adequately clear reasoning in the body of the decision. Ultimately I find no substance in the Appellant's challenge.

10. The Appellant seeks to challenge the Judge's approach to the medical evidence provided in support of his claim to be a victim of torture. Necessarily this evidence was relied upon in support of the Appellant's account to have been detained by the Sri Lankan authorities – a matter previously rejected by Judge Blundell.

11. The grounds of appeal plead that the Judge did not give "*proper weight*" to the medical evidence (grounds at paragraph 19a). The substance of this challenge is set out at paragraphs 21-26 of the Grounds. In large part these paragraphs read as a disagreement with the weight accorded by the Judge to the medical report, rather than specifically identifying any error of law in the Judge's approach: they present more as a dispute with the outcome, and conclude with the pleading that "*the report should have been given substantially more weight in rebutting the adverse credibility findings from Judge Blundell…*".

12. However, in granting permission to appeal, Judge Keane's attention was caught by an apparent error at paragraph 83 of the decision.

13. In this context the grounds of appeal argue that the Judge fell into error in stating that the medical report concluded that it was 'extremely likely' that the Appellant's injuries had been caused from self-infliction: "*He also asserts that it is in his opinion extremely likely that the scars described above result from wounds that were self-inflicted or inflicted on the appellant with his consent*" (paragraph 83). The opinion expressed in the report was that this was 'extremely <u>un</u>likely'.

14. I agree with the contention advanced in the Respondent's Rule 24 response dated 13 February 2018 to the effect that in context it is clear that the Judge understood that the medical report opined that it was unlikely that the scars were caused by self-infliction. The Judge immediately goes on at paragraph 83 to note that the doctor recognised that "*these possibilities cannot be entirely eliminated*", before adding that "*the doctor does not explain why he discounted that the wounds were self-inflicted or inflicted on the appellant with his consent*": these observations make no sense unless the Judge understood the doctor to be opining that it was 'unlikely' (rather than 'likely').

15. Moreover the Judge accurately records the doctor's opinion in this regard at paragraph 79.

16. As such in context it seems to me that the word 'likely' appears at paragraph 83 as a mere slip or typographical error. Indeed when this was suggested as a possibility to Ms Gherman she did not seriously seek to dispute it, but rather suggested that it was an example of one of many slips or irregularities such as perhaps to render the decision unsafe. I do not accept this more general criticism of the Judge's decision; in any event as regards the particular allegation, I do not accept the use of 'likely' instead of 'unlikely' at paragraph 83 is demonstrative of a general misreading or misunderstanding of the medical report.

17. As indicated above, it seems to me that the grounds of appeal in this regard are otherwise essentially an expression of disagreement with the Judge's evaluation of this aspect of the Appellant's case.

18. Even if it might be said that the Judge was wrong to identify a discrepancy between the doctor's opinion that the scar on the Appellant's left foot would result from skin being split by a blow with a stick, and his earlier opinion that such a scar would result from a wound caused by contact with a hard or thin edged object such as a whip, knife, shard of glass, or stone - this does not in any way significantly increase the probative value of the scar in circumstances where the doctor recognised that scars on the soles of feet were not uncommon and frequently resulted from accidental lacerations caused by walking barefoot over rough ground. Nor does any of this address the real difficulty in respect of the Appellant's account of having been injured during torture: specifically that he made no mention in the earlier proceedings that, as he now claimed, he had been deliberately burnt by cigarettes during his detention. In the circumstances it seems to me that it can have been of little or no surprise to the Appellant and his advisers that this aspect of his claim met with a finding of incredulity – and certainly not something in respect of which it is possible to identify any error of approach in the overall evaluation of the Judge. In this context it must have been obvious to the Appellant and his advisers that he would need to address the apparent earlier omission to refer to such specific ill-treatment and the presence of supposedly corroborative scarring: accordingly I do not accept that the Judge could be considered to be at fault, as is suggested at paragraph 24 of the grounds, for not directly inviting the Appellant's explanation in this regard. (Even now, as Ms Gherman acknowledged, the Appellant has not filed anything by way of explanation as to his omission of such matters in the previous proceedings.)

19. I consider the Judge to have fully explored the relevant issues in the round, in particular at paragraph 84. Therein it is noted that the Appellant relied in the previous proceedings only on the scar on his left foot and made no mention of supposed cigarette burns on his left forearm resulting from torture. This was notwithstanding that he "*provided a detailed account of how he was treated during his first detention*", and thereafter made no reference to having been ill-treated during his second detention. Ms Gherman accepted that the doctor's opinion did not appear to have been expressed with any knowledge that the Appellant had not at any point hitherto alleged that he had sustained injuries during detention by being burnt with cigarettes.

20. I find no merit in the line of challenge premised on the Judge's supposed failure to give adequate weight to the medical evidence.

21. Challenge was also made to the Judge's approach to the documentary evidence from the Appellant's mother and the Sri Lankan attorney.

22. I can see no substance in the submission set out in the grounds of appeal pursuant to **PJ [2014] EWCA Civ 1011**. The fact that the Respondent did not conduct an evaluation of the Appellant's documents by way of making enquiries in Sri Lanka does not mean that the Tribunal was bound to accept the documents as reliable evidence of the truth of their contents, and/or was not otherwise required to make its own evaluation in all of the circumstances of the appeal.

23. Nor can I see that the Appellant's case is advanced in any meaningful way by seeking to make a distinction between the attorney's letters and other documents said to relate to his arrest - an 'arrest receipt', a cash receipt, and an extract from a police book. These latter documents were included in the Appellant's bundle before Judge Blundell and as such were not new documents. I fail to see how they could have assumed any more significance in the Appellant's appeal in light of the second letter from the attorney in circumstances where the Judge did not accept the claim that the attorney had made an error in his earlier letter. To this extent the absence of any more detailed analysis of these documents in the decision of Judge Gurung-Thapa does not amount to a material omission, and does not constitute an error of law.

24. The Appellant seeks to challenge the Judge's characterisation of the most recent letter from his mother as "*a self-serving document in order to support the Appellant's claim*" (paragraph 70), with reference to the case of **SS ('self-serving' statements) [2017] UKUT 164 (IAC)**.

25. I acknowledge that considerable caution requires to be exercised before characterising a document or statement as 'self-serving' - and that it will be rare, if ever, appropriate merely to characterise a supporting statement as 'self-serving' without more. However, in my judgement that was plainly not the case here. The Judge's observation at paragraph 70 must be seen in context: it comes after careful analysis of the other documents relied upon by the Appellant, including from his mother. In such circumstances it is, in my judgement, a sustainable observation. I detect no error of law in this regard.

26. I note that in granting permission to appeal Judge Keane considered that it was arguable that the Judge had misdirected herself when considering the weight to be attached to the decision of Judge Blundell by reason of having "*advanced as a reason for concluding that the Appellant had not given a credible account that he had not made an attempt to deal with the findings made by [Judge Blundell]*". This appears to be a reference to paragraph 18 of the grounds of challenge which, in context, appears to criticise the Judge's observation at paragraph 59. However, what Judge Gurung-Thapa said at paragraph 59 was, in part, this: "*The appellant has made no attempt whatsoever to deal with the findings made by Judge Blundell and the assertions set out in the reasons for refusal letter by the respondent, in his supplementary witness statement. The statement merely deals with the demonstrations/protest he is attended in the UK*". That is an accurate statement. It cannot possibly be implied from such a statement, or otherwise from the decision, that the Judge did not have regard to all of the materials and arguments advanced by the Appellant in which he sought to address the adverse assessment previously made in his earlier appeal. Indeed such matters were at the core of the case as presented before Judge Gurung-Thapa. It is manifestly the case that the Judge dealt with all such matters in detail and at length.

27. Nothing of substance was advanced by way of challenge to the Judge's conclusions in respect of the Appellant's 'diaspora activity' and the possibility of any consequent risk upon return to Sri Lanka. The highest the matter was put in the Grounds of Appeal was a reference at paragraph 20 to the fact that Judge Blundell made no findings in relation to diaspora activity, and that in such circumstances Judge Gurung-Thapa should have commenced a consideration of the Appellant's case in this regard on the basis that there had been no prior adverse evaluation. I am unable to understand the relevance of this point: as noted above Judge Gurung-Thapa made independent findings on the evidence before her as to the Appellant's activities in the UK – indeed accepting that he had taken part in demonstrations/protests – and otherwise made an evaluation pursuant to country guidance as to the possibility of any consequent risk. Nothing in the grounds of appeal articulates a challenge by way of error of law to this evaluation. Nor did the grant of permission to appeal suggest that there

was merit in any such challenge. Ms Gherman did not seek to develop any submissions in this regard.

28. In all of the circumstances I find that there was no error of law and reject the Appellant's challenge.

Notice of Decision

29. The decision of the First-tier Tribunal contained no error of law and stands.

30. The Appellant's appeal remains dismissed.

23. No anonymity direction is sought or made.

Signed: Date: **5 January 2019**

Deputy Upper Tribunal Judge I A Lewis