Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09334/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 August 2019	**On 03 September 2019**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

GY
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms R. Popal, Counsel instructed by Greater London Solicitors
For the Respondent: Ms S. Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, GY, is a citizen of Sri Lanka, born in September 1992. He appeals against a decision of First-tier Tribunal Judge Fox promulgated on 30 October 2018 dismissing his appeal against a decision of the respondent dated 13 July 2018, refusing his claim for asylum and humanitarian protection.

Factual background

2. The appellant claims to be at risk from the Sri Lankan authorities on account of suspected LTTE links. His case is that he was detained in January 2013, mistreated and tortured in detention, and eventually released following the payment of a bribe by his father. The next month, he obtained a student visa to come to the United Kingdom. He contends that the authorities visited his father at the family home in April 2013, presenting an arrest warrant in his name, without leaving a copy. His father was later arrested in Sri Lanka but released without charge. Subsequently, the appellant claims to have arranged for his father to instruct local legal representation in Sri Lanka to obtain a copy of the arrest warrant which was issued against him, in order to support his asylum claim. He claims that the existence of an extant arrest warrant means that the authorities continue to take an interest in him, and that if he returns to Sri Lanka he will face persecution on account of his suspected LTTE links.

3. The appellant provided the respondent with a copy of the arrest warrant, plus correspondence with his lawyer in Sri Lanka relating to its provenance. He also provided two medical reports demonstrating, first, scarring on his body "consistent with" the account he has provided of torture (Dr Arnold), and secondly, concluding that he has post-traumatic stress disorder and other mental health symptoms "typical of" the detention account he has provided (Dr Halari). "Consistent with" and "typical of" are terms taken from the Istanbul Protocol on diagnosing the symptoms of torture.

Decision of the First-tier Tribunal

4. Judge Fox dismissed the appellant's appeal on the following bases. First, the judge considered that the medical reports were unreliable as they were based primarily on the account provided by the appellant, with no "meaningful consideration" as to whether other potential causes of the appellant's symptoms could be responsible. The judge found the analysis in the medical reports to be brief, and struggled to reconcile the description the appellant had provided of part of his detention incident with the language used in the report. For example, at [52], the judge said that it was "an unusual choice of vocabulary to describe [the arrest incident] as being beaten on the cheek without further detail of sustained attack". There were details in the medical reports which did not feature elsewhere in the appellant's case, such as his account of being raped. The judge discounted the arrest warrant documents on the basis that corruption is endemic in Sri Lanka and that it is possible that they were obtained fraudulently. When considering the arrest warrants in the round with the remaining subjective evidence, they were of "limited probative value".

Permission to appeal

5. Permission was granted by Judge O'Callaghan on all three grounds of appeal:

   a. Ground 1: Judge Fox failed to apply the Joint Presidential Guidance Note No. 2 of 2010 concerning vulnerable witnesses and appellants and AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 in that he failed to take into account the appellant's vulnerability when assessing his credibility;

   b. Ground 2: The judge made material errors of fact when assessing the report of Dr Halari;

   c. Ground 3: The judge failed to make any findings concerning the documents that had been supplied in support of the probative value of the arrest warrant, in particular correspondence between the appellant's London lawyers and his attorney in Sri Lanka.

Discussion

6. There is force in the submissions of Ms Popal that the judge failed to take the appellant's vulnerability into account when assessing his evidence. The judge did refer to the appellant's vulnerability in his decision, but that was in the context of rejecting submissions made by Ms Jegarajah, who then represented the appellant, specifically inviting the judge to take account of the appellant's vulnerability when assessing his evidence. At [56], the judge said:

> "The author [of the second report, Dr Halari] claims that the appellant is a vulnerable witness; paragraph 73 onwards. However this was not raised as a preliminary issue and only relied upon in closing submissions. The appellant had no apparent difficulty engaging with the appeal hearing. His interests were protected by Ms Jegarajah at all material times who expressed no concerns throughout the hearing and conducted an extensive examination-in-chief without issue. In these circumstances the second report is of limited probative value."

7. The judge appears to have conflated the distinct issue of accommodating any vulnerability the appellant may have exhibited during the hearing itself, and the consequential need to make reasonable adjustments, with the quite separate requirement to ensure that the evidence of an appellant is assessed by reference to any particular vulnerabilities he or she may have. In relation to accommodating the needs of the appellant during the hearing, the judge rightly pointed out that the appellant was represented by experienced counsel, and had had no apparent difficulties in engaging with the proceedings before him. No complaint can be made about the fairness of the hearing on these grounds.

8. However, in relation to the operative analysis the judge conducted of the appellant's evidence, it was necessary for the judge to consider whether the mental health conditions experienced by the appellant could have given rise to the credibility concerns the judge had with the appellant's evidence. At [55], the judge noted that the appellant specifically had

claimed to suffer from a poor memory, and that he struggled to recall dates. As the judge noted, at [73] and following of Dr Halari's report, the appellant had been described as being likely to get anxious and confused when giving evidence, and that he suffered from moderate of cognitive impairment which could hamper his fitness to instruct a legal representative due to his poor (mild) memory.

9. Paragraphs 13 and 14 of the Joint Presidential Guidance Note No. 2 of 2010 state the following, in the context of assessing a witness's evidence after a hearing:

> "13. The weight to be placed upon factors of vulnerability may differ depending on the matter under appeal, the burden and standard of proof and whether the individual is a witness or an appellant.
>
> 14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity."

10. At [22] of AM (Afghanistan), the Senior President of Tribunals endorsed the submissions he recorded at [21.d] concerning the need to consider the impact of an appellant or witness's medical conditions on the quality of their evidence. He said:

> "expert medical evidence can be critical in providing explanation for difficulties in giving a coherent and consistent account of past events and for identifying any relevant safeguards required to meet vulnerabilities that can lead to disadvantage in the determination process, for example, in the ability to give oral testimony and under what conditions…"

11. At no point in his decision did the judge consider the above points. He was specifically invited to do so by Ms Jegarajah. As set out below, the concerns the judge had with the medical reports relied upon by the appellant are without merit. The judge was seized of expert medical evidence which suggested that the appellant struggled with his ability to recall certain facts, especially those relating to traumatic events. Yet the judge did not consider whether those symptoms could have been responsible for the appellant's difficulty in recalling certain matters at different stages of the asylum process, for example when giving an initial account to the respondent during his screening interview, the substantive interview, to the two doctors, and later before him. For example, at [67], the judge is critical of the appellant for not mentioning LTTE connections during his screening interview, making only a "belated" reference to them during his substantive interview. The judge also expressed concerns that the appellant had not mentioned his detention during his screening interview. Although at [69], the judge considers the possibility that the appellant may have misunderstood the questions put to him during his

screening and substantive interviews, he asserts that it is "reasonable to expect him to recall the core of the claim as expressed in later representations". The judge does not consider his "reasonable" expectation in light of the medical evidence which expressly states that the appellant has difficulty remembering matters.

12. Ms Cunha accepted that the judge erred in expecting the appellant to raise vulnerability, but contended that the error was not material. I disagree.

13. The analysis above is not to suggest that the mere suggestion of memory difficulties is enough to iron over any creases or fill in the gaps in an otherwise unmeritorious claim for asylum. It may well have been the case that, had the judge expressly considered such matters and taken proper account of the appellant's vulnerability, he would have reached the same conclusion. However, that analysis has not taken place. As the Senior President noted in AM (Afghanistan) at [21.f], the highest standards of procedural fairness are required in asylum cases. The judge's decision expressly to reject Ms Jegarajah's invitation to factor in the appellant's vulnerability into his assessment, and his failure to inform his assessment of the appellant's credibility on this basis of his own motion, amounts to an error of law which calls into question the entirety of the judge's credibility assessment.

Ground 2 – medical reports

14. In relation to ground two, the judge does express some legitimate concerns in relation to the contents of Dr Halari's report. For example, see his observation at [48] that her single sentence dismissal of other causes of the possible trauma at [68] was not properly reasoned. It was also open to the judge to have some concerns that Dr Arnold's report had been compiled on the basis of a draft witness statement in the name of the appellant, in addition to a consultation with the appellant, in circumstances when the draft witness statement in question had not been provided to the judge (see [57]). Ms Cunha submits that the judge conducted a thorough assessment of the medical evidence and reached legitimate findings. Certainly, many aspects of the judge's assessment of the medical evidence did not feature an error of law. However, I accept Ms Popal's submissions that the judge's overall analysis of the medical evidence was flawed, for the reasons set out below.

15. At [49], the judge was critical of the omission in Dr Halari's report at [29] of any details concerning the appellant's claimed beating to his cheek, or the nature of the mistreatment he endured. It is hardly surprising that Dr Halari, a Consultant Psychologist, did not engage in a scarring analysis in her psychological report. Dr Arnold provided the scarring report. The judge thus highlighted as an error the absence of *scarring* analysis in the *psychological* report.

16. The judge does not explain at [52] why the description of being beaten on the cheek provided by the appellant "was an unusual choice of vocabulary". It is not immediately apparent why such an "unusual choice" renders this aspect of the report unreliable. It is not clear why repeated punches to the side of the appellant's face, for example, should not be described as a beating on the cheek. The judge appears to be bringing his own subjective expectations of how the police in Sri Lanka would operate and how a person mistreated by them would describe it.

17. At [55], the judge contends that the appellant's ability to recall certain details during his consultation with Dr H – for example at [31] to [33] – undermines the report's conclusion that the appellant suffers from difficulties with memory recall. In making that observation, the judge does not appear to have engaged with [24] of the report which states that, "in eliciting a torture account, I used the 'T funnel' approach of starting with open questions and narrowing down the field of enquiry with closed questions."

18. The judge also ascribed less weight to the medical report of Dr Halari as it, "relies exclusively on the appellant's account of events". Although the judge cited – without operative analysis – JL (medical reports-credibility) China [2013] UKUT 00145 (IAC), his approach was essentially to treat the report as having no probative value. At Headnote (4), the Upper Tribunal in JL said:

> "Even where medical experts rely heavily on the account given by the person concerned, that does not mean their reports lack or lose their status as independent evidence, although it may reduce very considerably the weight that can be attached to them."

While the judge was legitimately entitled to take into account the experts' reliance on the appellant's account of events as a factor leading to the reports attracting less weight, an examination of his operative analysis reveals that he placed no weight on the reports. The judge treated the reports as lacking the status of independent evidence that they enjoyed. In addition, the judge did not take into account [10] of Dr Halari's report, which states that, although psychology relies on the patient's account, there remain certain clinical signs which are revealed during psychiatric or psychological examinations that do not rely on the content of the patient's account. In dismissing the probative value of the expert reports on account of them being based on the narrative provided by the appellant, the judge did not take into account the clinical nature of the presentation of the appellant, as outlined in the reports.

19. The judge's criticism of the medical evidence relies primarily on the differing nature of the accounts provided by the appellant to each of the doctors. For the reasons outlined above, many of the criticisms of the evidence are not sustainable. I consider the differences in the accounts provided by the appellant at different stages of the process to be negligible; they are not so much inconsistencies as differences in emphasis. The judge erred in law by failing providing insufficient reasons

for ascribing minimal weight to the medical evidence, including by giving reasons which featured material errors of fact. As this went to the heart of the judge's credibility assessment, the entirety of his assessment of the medical evidence was infected by a material error of law.

Ground 3 – arrest warrants

20. At [71], the judge considered "the supporting documents" provided by the appellant to support his case. This must have been a reference to the arrest warrant he included in his evidence (see [39]). The judge found that the "supporting documents" were of limited probative value in these terms:

> "[71]... emphasis was placed upon the supporting documents to assist the appellant's credibility. It is possible that the supporting documents have been issued by the authorities. However it is information in the public domain that genuine documents can be obtained fraudulently due to endemic corruption in Sri Lankan society; GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) ("GJ") considered.
>
> [72] When the subject of evidence is considered in conjunction with the documentary evidence the supporting documents are of limited probative value; Tanveer Ahmed applied."

21. Ms Cunha submits that, even if the judge's analysis of these documents was flawed, it was immaterial. He reached legitimate conclusions on the entirety of the evidence which were not infected by his approach to the analysis of the documents, submits Ms Cunha. I accept that, superficially at least, the judge said he considered the supporting documents in the round, with the other evidence. Whether his analysis was lawful requires a more forensic examination of the approach he took.

22. I find that there are two errors with the judge's approach to the arrest warrants.

23. First, in his generic reference to the "supporting documents", the judge has made no references to the correspondence from the appellant's Sri Lankan Attorney-at-Law in Colombo, Mr R. Raveendiran. In a letter dated 29 September 2018 at S61 of the appellant's bundle, Mr R writes that he attended the Magistrate's Court of Colombo, and paid in cash to obtain a copy of the arrest warrant that had been issued in relation to the appellant. At S62, there is a copy of the receipt provided by the court to the attorney. At S63 is a copy of Mr R's entry in the Lawyers' Directory of the Bar Association of Sri Lanka.

24. The judge did not appear to have analysed these documents, nor assessed their probative value in assisting to demonstrate the reliability – or otherwise – of the arrest warrant provided by the appellant. In his unspecific reference to "the supporting documents", the judge did not explain whether he had conducted this analysis. It is not, therefore, possible to have the requisite confidence that the judge analysed all

relevant evidence when reaching his conclusion that the arrest warrant was of limited probative value.

25. That is not to say that the judge would have been bound to accept the documents as reliable had he set out his analysis in further depth; it is simply the case that it is not possible to ascertain whether the judge had analysed these documents, and if so what his reasons were for dismissing their reliability. For example, it is not clear whether the judge had found that the Attorney had acted dishonestly, or that a court official, unbeknown to the Attorney, had acted corruptly at the appellant's behest. Simply referring, in broad terms, to the prevalence of fraudulent documents does not provide the reader of the decision with reasons for why the judge found these specific documents to lack merit.

26. Secondly, in order to merit a finding that documents are fraudulent, it is necessary for there to be significant supporting evidence. The burden lies on the respondent to establish that document is fraudulent, pursuant to the approach set out in Tanveer Ahmed (Documents unreliable and forged) Pakistan * [2002] UKIAT 00439. At [38], the Immigration Appeal Tribunal said, with emphasis added:

> "1. In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on.
>
> 2. The decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round.
>
> 3. Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. **The allegation should not be made without such evidence**. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that a document is reliable. The decision maker still needs to apply principles 1 and 2."

27. It is axiomatic that if the respondent cannot make an allegation of fraud without "strong enough evidence to support it", then a judge should not make a finding of forgery or fraud without such evidence. If the allegation should not be made without such evidence (see the emphasis added, above), then a finding should not be made without such evidence. The evidence relied upon by the judge was the generic risk of fraudulent documents being obtained from the authorities in Sri Lanka as outlined in GJ, without referring to any specific evidence relating to the appellant.

28. For these reasons, the judge's analysis of the arrest warrant and the unspecified "supported documents" was flawed. The appeal succeeds in relation to ground 3.

Conclusion

29. The culmination of each of the grounds of appeal being established means that the decision of Judge Fox cannot stand. The entirety of the credibility assessment conducted in relation to the appellant was flawed.

The only remedy available to this tribunal in those circumstances is to remit the matter back to the First-tier Tribunal to be heard by a judge other than Judge Fox.

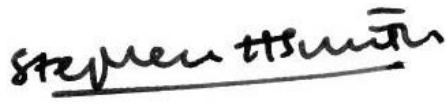
Notice of Decision

This appeal is allowed. The decision of Judge Fox is set aside.

The matter is remitted to the First-tier Tribunal to be heard by a judge other than Judge Fox.

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 their 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 27 August 2019

Upper Tribunal Judge Stephen Smith