



IAC-AH-DP-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/05447/2015

THE IMMIGRATION ACTS

**Heard at Centre City Tower Decision & Reasons Promulgated
Birmingham
On 20th October 2015** **On 27th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

**KRISHNAKURUPARAN GANESAN
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Spurling instructed by A & P Solicitors

For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, who is from Sri Lanka, appeals with permission against the decision of Judge of the First-tier Tribunal Broe, in a determination promulgated on 14th July 2015, to dismiss on asylum, humanitarian protection and human rights grounds, his appeal against removal to Sri Lanka. Judge Broe considered the Appellant's account not to be credible.
2. In the Grounds of Appeal it is contended that the Judge relied too heavily upon the Appellant's delay in claiming asylum, relying upon Section 8 of

the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, that he did not engage properly with the Appellant's account, that he considered a medical report by Mr A I Martin, a consultant in emergency medicine, only after having reached conclusions as to credibility and that he misconstrued that report as to the likelihood of causes of injuries. It was also said that he had failed to evaluate the evidence of a witness, had given inadequate consideration of documentary evidence and had not given reasons for discounting the significance of the Appellant's participation in Tamil activities in the United Kingdom.

3. The Respondent served a response under Upper Tribunal Procedure Rule 24 contending that the determination was adequately reasoned and that any activities of the Appellant as part of the Tamil diaspora would not have entitled him to succeed in his appeal. In granting permission to appeal Judge of the First-tier Tribunal Lambert considered there was limited merit to the point under Section 8 of the 2004 Act but there was potential merit in the other points raised. The grant was not however restricted in its scope.
4. At the commencement of the hearing Mr Smart indicated that he relied upon the Rule 24 response. He handed in a copy of the judgment of the Court of Appeal in **SS (Sri Lanka) v SSHD [2012] EWCA Civ 155** as to the weight to be attributed to medical reports. Mr Smart noted that the grant of permission had alluded to the fact that the Judge had not relied solely upon Section 8 in reaching his adverse credibility findings. He had to accept that there were no specific findings upon the evidence of the second witness but he submitted at that stage that the witness's evidence was not potentially material to the outcome. He accepted that the determination was not without some difficulties but argued that there was insufficient reason to set it aside.
5. Mr Spurling for his part referred to the treatment of the medical report. He relied upon the judgments of the Court of Appeal in **Mibanga v SSHD [2005] EWCA Civ 367** and **SA (Somalia) v SSHD [2006] EWCA Civ 1302**. He acknowledged that the Tribunal was entitled to consider evidence in the order it saw fit and had to start somewhere but he said the Judge had made findings on the core issues at paragraph 36 of his decision before he had assessed the medical report. The Judge then went on to the medical report but reached conclusions on it in the light of his earlier findings. He failed to consider the evidence in the round; he decided that the Appellant's case was without foundation and had then looked at the medical report. That mattered because the medical report was part of the evidence. The report showed that there were marks on the Appellant's body consistent with his account and the report was therefore highly relevant. He was not seeking to say that the Judge had to accept the medical report and weight was a matter for him but he had to consider it in the proper manner and the way that he had approached it was undercut by his earlier findings. That infected his consideration of the evidence and his approach to the weight to be applied to that report was therefore flawed. It was clear from **SS** that weight was a matter for the Judge but

the report had to be approached properly. He also submitted that the way that the Judge dealt with the report did not make sense. It appeared from the report that a finding of self-infliction of the wounds by proxy (SIBP) was a remote possibility. It was unclear what the Judge made of that. He accepted that what the report said was grammatically odd but it was incumbent on the Judge to say in sufficiently precise terms what he made of the report. Even if he found it confusing he ought to have said so.

6. Mr Spurling continued that it was also a serious error not to have made findings upon the evidence of the second witness. At that point Mr Smart accepted that the evidence of the second witness had in fact related to evidence other than hearsay from the Appellant. Mr Spurling said that the witness had spoken about the Appellant's activities at Jaffna University, which was potentially significant. That was a freestanding error. Finally he criticised the findings relying upon Section 8 of the 2004 Act. He said there was difficulty in the way that these findings were made and there had been insufficient consideration of the substantive facts of the case. The Judge had failed to engage with the detail of the Appellant's account. He had made no finding upon the evidence that there had been a visit by the authorities to the Appellant's parents after the Appellant had left Sri Lanka. The Judge had commented on the fact that the Appellant had left using his own passport but had made no reference to the fact that the evidence was that an agent had been used to get through the airport security arrangements.
7. Finally in reply Mr Smart said he took issue as to the submissions about the treatment of the medical report. There was unusual wording in that report and in the determination the Judge appeared to have corrected the doctor's grammatical error. The Judge had applied his mind to that evidence and had given reasons for its rejection. He had to accept that he was in some difficulties concerning the failure to address the evidence of the second witness.
8. Having heard those submissions I came to the view that there were material errors of law in the findings of the judge at first instance and his decision was required to be set aside. In my judgment there was substantial force in the submissions made on behalf of the Appellant as to the treatment of the medical report. It is clear from **Mibanga** and **SA (Somalia)** that expert medical evidence must be considered in the context of the evidence as a whole. It is stated at paragraph 24 of **Mibanga** by Lord Justice Wilson

"It seems to me to be axiomatic that a fact finder must not reach his or her conclusion before surveying all the evidence relevant thereto ... 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 ...".
9. At paragraph 36 of his determination Judge Broe stated "I find that these are not the actions of a person in genuine fear of persecution and I reject

the Appellant's account as lacking in credibility". He went on to state at paragraph 38 as follows:

"I note that Mr Martin found that it was likely that the Appellant's injuries were caused by a third party. He found that self-infliction by proxy could not be discarded as a possible cause as there was no presenting fact making it more than a remote possibility. In the light of my conclusions above I cannot be satisfied that the Appellant's injuries were caused in the way he claims. I have also considered the documentary evidence provided by the Appellant in the round and in the light of my conclusions above I am able to attach little weight to it."

10. At paragraph 38 the Judge does appear to have fallen into the error identified in **Mibanga** and **SA (Somalia)** in reaching conclusions on the medical report only after having made adverse findings as to the Appellant's credibility on other elements of the evidence. That factor alone justifies setting aside the decision.
11. I consider there was arguably potentially less weight in the submission made with regard to Section 8 of the 2004 Act but that is of no significance in the light of my decision to set the conclusion aside. There was also I found force in the submissions made with regard to the treatment of the evidence of the second witness, as Mr Smart quite properly accepted. That evidence related not only to the Appellant's activities in this country but also to testimony as to a visit said to be made to the Appellant's parents' home after his departure from Sri Lanka. It was for the Judge to make findings as to that evidence and he did not do so. That evidence might, if found credible, have had a bearing upon the conclusion. That also warrants the decision being set aside.
12. For those reasons I came to the view that a further full hearing of this appeal is required with none of the findings of the previous Judge being preserved. Having regard to Practice Statement 7.2(b) the appeal is remitted to the First-tier Tribunal under Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

Decision

There were material errors of law in the decision made by the First-tier Tribunal and that decision is set aside. The appeal is remitted for rehearing by the First-tier Tribunal in accordance with the directions given below.

There was no request for an anonymity order and no such order is made.

Signed

Date 26 October 2015

Deputy Upper Tribunal Judge French

Directions for Re-Hearing in the First-tier Tribunal pursuant to Sections 12(3)(a) and 12(3)(b) of the Tribunals, Courts and Enforcement Act 2007:

- (1) The decision of the First-tier Tribunal promulgated on 14th July 2015 is set aside with no findings preserved. The members of the First-tier Tribunal who are to reconsider the appeal should not include Judges of the First-tier Tribunal Broe or Lambert.
- (2) The appropriate hearing centre is Birmingham. A Tamil interpreter will be required and the time estimate is 3 hours.
- (3) Each party shall serve upon the other and upon the Tribunal at least seven days before the hearing copies of all witness statements and of any other documents which are sought to be relied upon.

Signed

Date 26 October 2015

Deputy Upper Tribunal Judge French