



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

Appeal Number: AA/11048/2013

THE IMMIGRATION ACTS

**Heard at Field House, London
On 14 April 2015**

**Decision Promulgated
On 24 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

**TM
(ANONYMITY ORDER MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr V Lingajothy, Linga & Co

For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

Preliminary

1. The First-tier Tribunal made an anonymity direction in relation to the appellant because of the nature of the case. I consider it appropriate to make a similar order in the Upper Tribunal under Procedure Rule 14(1) to prohibit the disclosure or publication of any matter likely to lead members of the public to identify the appellant. To give effect to this order the

appellant is to be referred to as TM

Background

2. The appellant was born on 11 October 1990 and is a citizen of Sri Lanka. She last arrived in the UK on 15 September 2013. She entered illegally, using a false French passport. Her asylum claim is recorded as having been made on 15 October 2013 when she attended the Home Office in Croydon for a screening interview. The Home Office interviewed the appellant about the details of her asylum claim on 26 November 2013 and a negative decision was reached two days later. The reasons for refusal were set out in a detailed letter dated 28 November 2013. On the basis of that decision, on 29 November 2013, the Secretary of State issued a notice of immigration decision (which is headed: Notice to remove an Illegal Entrant ... Asylum/Human Rights Claim Refused). It is against that decision that the appeal has been brought under s.82(1) of the Nationality, Immigration and Asylum Act 2002.
3. The appellant previously held leave to enter the UK as a student in August 2011 and that leave expired on 21 January 2013. The appellant says she left the UK and returned to Sri Lanka shortly before the expiry of that leave, although she has previously stated that she returned in September 2012.

The appeal process

4. On 18 July 2014, First-tier Tribunal Judge Petherbridge dismissed the appeal. On 2 February 2015 I found that the determination of Judge Petherbridge contained an error on a point of law that required it to be set aside. A copy of that decision is annexed for convenience.
5. This decision and reasons statement relates to the issues considered at the resumed hearing that occurred on 14 April 2015.

The appellant's claim

6. Although the appellant's claim is much more detailed than the summary that follows, the salient issues in this appeal are as follows.
7. The appellant explains that at the end of the civil war she, together with other LTTE fighters, had surrendered. She had been interred and then released on a rehabilitation scheme. After a year she absconded from that scheme. She came to the UK to study. At the end of her course, early in 2013, she decided to return to Sri Lanka because she understood from her parents that it would be safe for her to do so and because they had arranged for her to marry.
8. The appellant says she is a refugee because she has a well-founded fear of persecution because of her political opinions. She claims to have been a member of the LTTE in the past and that upon her return to Sri Lanka in January 2013 she was arrested and detained. During that detention she says she was tortured, including by being raped by her custodians.
9. The appellant has provided two medical reports to substantiate her claim

to have been tortured. One is a report by Dr K Balasubramaniam, a consultant psychiatrist, who diagnosed her with moderate to severe PTSD. The other is a report from Dr Yacoub, currently a general practitioner. He found the appellant's scars to be typical of being burned by a hot metal rod and cigarette burns. He used the descriptor, typical of, as used in the Istanbul Protocol.

The respondent's case

10. The following summary highlights the key concern raised by the Home Office. The reasons for refusal letter is much more detailed and I have had full regard to it.
11. The Home Office does not believe any part of the appellant's account because of inconsistencies and discrepancies in her account.
12. In addition, the Home Office is not satisfied that the appellant's account of the rehabilitation scheme and arrest at the airport on return is consistent with the background country information and country guideline cases of the Upper Tribunal. The Home Office also rely on the fact that the appellant travelled on a false passport and did not claim asylum immediately as other factors that damage her credibility.
13. Because these factors undermine the appellant's credibility, the Home Office also disputes the medical evidence provided.

Relevant legal provisions

14. To succeed in her appeal, the appellant must show that she meets the criteria set out in the Qualification Directive (2004/83/EC). This has been transposed into UK law through part 11 of the immigration rules and various statutory instruments.
15. It is for her to prove her case but the standard of proof is reduced to take account of the difficulties refugee will have in obtaining evidence. For this reason, the standard of proof is described as being a reasonable likelihood or real risk.

My findings

16. I begin by examining the evidence as to whether it is reasonably likely that the appellant was tortured in Sri Lanka.
17. The medical report of Dr Yacoub confirms that the appellant has physical scars that are typical of having been burned by hot metal bars and cigarettes. He uses the descriptor, "typical of" as set out in the paragraph 187 of the Istanbul Protocol. It means that the appearance of the appellant's scars is usually associated with the trauma described although there could be other possible causes. The Istanbul Protocol only has one higher level of description, "diagnostic of", which permits of no other possible cause.
18. Dr Yacoub's qualifications and experience are not disputed and this means I should give significant weight to his assessment. The Home Office does, however, question whether Dr Yacoub was able to rely on the appellant's

account of how her injuries were inflicted. It is evident from the accounts given by the appellant at different times during the asylum process that she has not always given the same explanation of how she was injured. This was also evident during the hearing when the appellant only mentioned having been burnt by cigarettes and made no mention of being burnt by metal rods. When pressed by me, the appellant explained that she was trying to forget her torture and therefore would not always mention everything.

19. The appellant's mental state is corroborated by the other medical report. It is a psychiatric report in which Dr Balasubramaniam diagnosed the appellant as having moderate to severe PTSD. The appellant continues to receive treatment in the form of medication and has, since December 2014, received talking therapies. The fact the appellant continues to receive treatment is a strong indication that the diagnosis remains accurate and reliable.
20. Some of the well known consequences of moderate to severe PTSD are set out by Dr Balasubramaniam and include difficulties the appellant has in remembering events. I am aware that although the appellant has not given consistent accounts of how she was tortured, she has not given any accounts which are contrary to the physical evidence or to the background country information. I am aware that when the appellant's disparate accounts are pulled together they paint a coherent picture of serious ill treatment.
21. In light of the physical and psychiatric medical evidence, I am satisfied that it is reasonably likely that the appellant was tortured in Sri Lanka, such torture including being burned by a hot metal rod and by cigarettes.
22. There is one element of the appellant's account that is not corroborated by the medical evidence directly. This is the appellant's account of having been raped. She believed this to have happened because she was forced to take drugs that made her unconscious and when she awoke she saw blood stains on her legs. The appellant has been unable to give all these facts in one go, something the Home Office argues must undermine her truthfulness. However, as I have already indicated, the evidence of the appellant's mental health provides an alternative explanation for the differences, and I find that explanation to be reasonable and reliable.
23. In light of the fact that sexual violence was used against female detainees in Sri Lanka, and taking account of the fact that I am satisfied that the appellant was otherwise tortured, I find that it must also be reasonably likely that she was raped as claimed and this is further evidence of the serious harm she has suffered.
24. The next issue relates to timing. I need to consider when her torture is likely to have occurred. This is a relevant factor in assessing the level of risk the appellant might face on return to Sri Lanka.
25. I remind myself of the low standard of proof that applies in an asylum appeal. I have already found that the appellant was tortured and am concerned here with when that torture occurred. Nothing indicates that

the tortured happened before the appellant first came to the UK in 2011.

26. Although the appellant has given a relatively detailed account of how she became a member of the LTTE and what happened when she surrendered in May 2009, at no point has she ever described being ill treated (other than by the simple fact she was detained) prior to her return to Sri Lanka in 2013. This is consistent with the background country information. She describes how she entered a rehabilitation programme, again consistent with the country guidance, and remained under supervision for about a year after release from detention.
27. The appellant describes how her parents made arrangements for her to travel to the UK in 2011 because they were worried about her safety. However, despite those concerns, the appellant clearly did not think there was a real risk to her life or freedoms when she returned to Sri Lanka in January 2013. She told me during the hearing that her parents had advised her it was safe for her to return and had made arrangements for her to marry. This evidence indicates that the appellant and her parents were cautious about the situation in Sri Lanka in 2011 but by 2013 were under the impression that any real concerns no longer persisted. This again indicates that the appellant did not have a well founded fear of persecution at that time, which would imply that she had not faced torture.
28. The appellant has only ever claimed that she was tortured when she returned to Sri Lanka in January 2013. This is consistent throughout her accounts, although there is a small discrepancy as to whether she returned to Sri Lanka in September 2012 or January 2013. Given her mental health state, I do not take that discrepancy to be significant. Her immigration history indicates that she had leave to enter the UK until January 2013 and it is reasonable to find that she left the UK shortly before it expired. This is common practice.
29. Mr Kandola submitted that the appellant's account of being arrested at the airport was not consistent with the Upper Tribunal's findings in GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC).
30. The appellant's account moves away from the norm - those former soldiers who completed the rehabilitation programme - when she describes how, after a year, she absconded from the rehabilitation programme. Bearing in mind the guidance provided by the Upper Tribunal in GJ and others, it is reasonably likely that the Sri Lankan authorities would have kept a record of her failure to complete the rehabilitation programme. Although not dealt with specifically in GJ and others, it is a natural extension of the Upper Tribunal's findings that the appellant's failure to co-operate with the rehabilitation programme and her subsequent return from the UK after 17 months would be factors that attracted the attention of the authorities, which would include airport security, on her return in January 2013. Whether the appellant was formally on a watch list or stop list will never be known as that would be confidential information.
31. Taking all these considerations into account, and reminding myself that I have found that the appellant was tortured, I can only conclude that she

was tortured only after she returned to Sri Lanka in January 2013.

32. The penultimate question is what evidence is there to indicate that the appellant was tortured because of her political opinions. In light of the findings I have just made, and bearing in mind the comments the Upper Tribunal made in GJ and others to the effect that all Tamils from the north of Sri Lanka (a group that includes the appellant) would be considered to have had some link to the LTTE at some time, I am satisfied it is reasonably likely that the appellant was tortured either because it was known that she had been a soldier for the LTTE or because she was suspected of having such a role. The fact that the appellant has always stated that she served in the LTTE up until she surrendered in 2009 supports this finding.
33. The final question is whether the appellant continues to have a well founded fear of persecution in Sri Lanka. Mr Kandola rightly acknowledged that were I to find that the appellant had been tortured on return to Sri Lanka in January 2013, then, because the country situation in Sri Lanka has not materially changed since that time, by application of paragraph 339K of the immigration rules (transposing Article 4(4) of the Qualification Directive (2004/83/EC)), the appellant is a refugee.
34. Before concluding, I add a few final comments. I have taken into consideration the arguments presented in the reasons for refusal letter and during the hearing by Mr Kandola as to why the appellant should not be believed. However, those submissions are wholly based on the fact that the appellant is not a good historian. As I have indicated, the appellant's failure to give a fully coherent account is explained by her mental health condition. In addition, I take account of the fact that the disparate accounts when combined hang together and give a good picture of what the appellant experienced. This is not a case where the accounts do not point in the same direction.
35. I have also taken into account the appellant's failure to claim asylum whilst here between 2011 and 2013. I am satisfied that the appellant fled Sri Lanka at that time to escape potential difficulties but that at that time she did not have a well founded fear of persecution. That level of fear was only reached because of the events she endured on her return in 2013.
36. Having found that the appellant is a refugee, I must find that she is not entitled to humanitarian protection (as it is mutually exclusive from refugee protection). By analogy, the appellant succeeds under Article 3 ECHR.

Decision

The appellant is a refugee and her appeal is allowed on that basis.

Signed

Date **23 April 2015**

John McCarthy

Deputy Judge of the Upper Tribunal

ANNEX: My decision of 2 February 2014

DECISION ON ERROR ON A POINT OF LAW

1. As I announced at the end of the hearing, I am satisfied that the determination of First-tier Tribunal Judge Petherbridge that was promulgated on 18 July 2014 contains an error on a point of law and has to be set aside. My reasons are as follow.
2. I am satisfied, having heard from both representatives and having regard to the determination that Judge Petherbridge failed to give adequate consideration to the medical evidence relied on by the appellant. The appellant had provided two medical reports, one providing a psychiatric assessment and the other an assessment of her physical condition, including scarring.
3. With regard to the psychiatric report, it is evident that at no point in his determination does Judge Petherbridge consider whether the appellant's mental state might explain either in full, in part or not at all, her failure to disclose all at once the details of the incident of sexual violence that is at the heart of her asylum claim. There is substantial authority to indicate that a person who has been raped might have genuine difficulty in disclosing the details on the first opportunity and that further details might be given at later dates. In such circumstances the giving of a disjointed account might not carry as much weight as it would otherwise when assessing credibility and this fact undermines the adverse credibility findings made by Judge Petherbridge as he did not consider all of the evidence.
4. With regard to the other medical report, it is clear that the medical examiner was familiar with and applied the Istanbul Protocol and found that the scarring on the appellant was "typical of" the incidents as described by the appellant. This is the second highest of the Istanbul Protocol classification. Judge Petherbridge did not give sufficient reasons for going behind this assessment of a medical professional because in paragraph 76 of his determination he suggests that the medical professional had not explained the possibility of the scars having been inflicted by other causes when the application of the Istanbul Protocol means that is precisely what the doctor has in fact done.
5. The failure to properly understand and consider the medical evidence undermines the reliability of Judge Petherbridge's adverse credibility findings. As that is the basis on which he dismissed the appellant's appeal, his determination must be set aside. I agreed with the representatives that this is a case where it will be appropriate for me to retain the appeal because it is unclear whether the appellant will be called to give further evidence and I have consented to that approach.

Decision

The appellant's appeal is allowed because the determination of Judge Petherbridge contains an error on a point of law.

His determination is set aside and will be remade in the Upper Tribunal.