



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04263/2015**

THE IMMIGRATION ACTS

**Heard at Field House
On 18 December 2015**

**Decision & Reasons Promulgated
On 6 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

**T V
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Soloman (counsel) instructed by Aschfords law
For the Respondent: Ms Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, because the case involves discussion of the appellant's mental health.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge M A Khan promulgated on 28 August 2015, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 30 August 1987 and is a national of Sri Lanka.
4. On 23 February 2015 the Secretary of State refused the Appellant's application for asylum.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge M A Khan ("the Judge") dismissed the appeal against the Respondent's decision.
6. Grounds of appeal were lodged and on 23 September 2015 Judge Roberston gave permission to appeal stating *inter alia*

"2. Although there is little arguable merit in the claimant Professor Lingham's report cannot carry significant weight because it is incomplete, there is some merit in the submission that the appellant's sister's witness statement supported Dr Persaud's reference to brain damage suffered by the appellant at birth. It is unclear what tests, if any, were conducted by Dr Persaud to assess the current effects of this on the appellant. It is also arguable that the judge did not consider the risk on return on article 3 grounds in view of his mental health, which was referred to in the skeleton argument before him. Permission is granted on all grounds because much of the substance of the grounds relates to the findings made by the judge on the basis of the appellant's evidence which may (or may not) have been affected by his mental health."

The Hearing

7. (a) Mr Solomon, counsel for the appellant, adopted the grounds of appeal and argued that the judge's approach to the medical evidence was flawed. He told me that the scarring report was superficially considered by the Judge at [55] and [56] of the decision, and that no adequate reasons for finding that the expert report is incomplete had been given by the judge. He argued that the Judge failed to follow the guidance given in KV (scarring - medical evidence) [2014] UKUT 230 (IAC), and that the Judge had not given sufficient consideration to the appellants diagnosis of mental disorders. He argued that the Judge failed to take account of the evidence provided by the appellant's sister.

(b) Mr Solomon told me the Judge had materially erred in law because the Judge found the appellant not to be a credible witness before turning to consideration of the medical evidence produced. The Judge then rejects the medical evidence and expert report because he finds the appellant is not credible. Mr Solomon argued that that was not the correct approach

(c) Mr Solomon argued that the Judge gave inadequate consideration to the appellant article 3 ECHR rights, and that the Judge took no account of the appellant's diagnosis of mental disorder in his Article 3 ECHR assessment. He argued that the determination as a whole was inadequately reasoned, and that the Judge was incorrect to find that there was inconsistency in the various

strands of the appellant's evidence. He urged me to set the decision aside and to remit this case to the First-tier Tribunal to be determined afresh.

8. (a) Ms Fijiwala, for the respondent, told me that the decision does not contain any errors and that the Judge carefully considered each strand of evidence placed before him, before reaching conclusions which were reasonably open to him. She argued that the decision contains a careful analysis of medical and expert evidence and that the Judge had followed the guidance in both KV (scarring - medical evidence) [2014] UKUT 230 (IAC) and GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). She relied on the cases of HH and Mibanga and told me there was nothing wrong with the Judge's approach to either credibility or the medical evidence, arguing that "*fact finders should not be put in a forensic straitjacket*".

(b) Ms Fijiwala argued that it was open to the judge to find the appellant was both vague and evasive in his evidence. She told me that the Judge carefully recorded cross examination of the appellant between [26] and [35], before setting out the appellant's re-examination at [36]. She told me that those passages of evidence were inconsistent with the appellant's witness statement and invited me to find that the Judge had properly assessed the medical evidence and reached the conclusion after correctly taking guidance from the relevant case law. She urged me to dismiss the appeal.

Analysis

9. In KV (scarring - medical evidence) Sri Lanka [2014] UKUT 00230 (IAC) it was held that (i) When preparing medico-legal reports doctors should not - and should not feel obliged to - reach conclusions about causation of scarring which go beyond their own clinical expertise; (ii) Doctors preparing medico-legal reports for asylum seekers must consider all possible causes of scarring; (iii) Where there is a presenting feature of the case that raises self-infliction by proxy (SIBP) as a more than fanciful possibility of the explanation for scarring:- (a) a medical report adduced on behalf of a claimant will be expected to engage with that issue; it cannot eliminate a priori or routinely the possibility of SIBP; and (b) a judicial fact-finder will be expected to address the matter, compatibly with procedural fairness, in deciding whether, on all the evidence, the claimant has discharged the burden of proving that he or she was reasonably likely to have been scarred by torturers against his or her will; (iv) a lack of correlation between a claimant's account and what is revealed by a medical examination of the scarring may enable a medico-legal report to shed some clinical light on the issue of whether SIBP is a real possibility; (v) Whilst the medical literature continues to consider that scarring cannot be dated beyond 6 months from when it was inflicted, there is some medical basis for considering in relation to certain types of cases that its age can be determined up to 2 years; (vi) Whilst if best practice is followed medico-legal reports will make a critical evaluation of a claimant's account of scarring said to have been caused by torture, such reports cannot be equated with an assessment to be undertaken by decision-makers in a legal context in which the burden of proof rests on the claimant and when one of the purposes of questioning is to test a

claimant's evidence so as to decide whether (to the lower standard) it is credible.

10. At [56] the Judge finds that Professor Lingham's report is incomplete because it does not address self-infliction by proxy (SIBP). At page 5 of his report, Professor Lingham refers to KV, and reminds himself that when considering the possibility of SIBP he "... *first of all will have to assess whether there are any presenting features in the patient's scarring that cause me to enter this forum and make this assessment.*" Professor Lingham does not thereafter return to consideration of SIBP. His opinion is at page 7 of the report, where he records inter alia

"There are a few non-specific scars but the one linear scar could assist me to collaborate the history of trauma"

What Professor Lingham means is far from clear. He frames his opinion in the conditional mood, and probably uses the word "*collaborate*" incorrectly. ("Collaborate" usually means to work jointly with another on an activity or project.)

11. Professor Lingham's conclusion is at page 13 of his report, where he states

"I have not investigated any mental health issues. He still has problem sitting for a prolonged period. He stated that he is much stressed and has reported his sleeping problems. His memory is poor and he is having problem in concentrating and this is likely be due to the mental health issues. The perceived pain is also likely be due to mental scars"

12. The judge could only work with the material before him. His conclusion that Professor Lingham's report is "*incomplete*" is clearly a finding of fact which the Judge was in a position to make. Professor Lingham does not engage with SIBP despite reminding himself of the *dicta* in KV. Professor Lingham offers an ambiguous opinion, before reaching a conclusion which dwells on concerns about the appellant's mental health rather than offering a conclusion about the likely cause of scarring. Before reaching his own conclusion, the Judge correctly sought guidance and direction from the case of KV.

13. It is argued that the judge should not have assessed the appellant's credibility before separately turning to the medical evidence produced. In HE [2004] UKIAT 00321 the Tribunal said that "*where the report is specifically relied on as a factor relevant to credibility, the adjudicator should deal with it as an integral part of the findings on credibility, rather than just as an add on, which does not undermine the conclusions to which he would otherwise come*". However, the Tribunal also said that where the report simply recounts a history which the Adjudicator is minded to reject and contains nothing which does not depend on the truthfulness of the appellant, the part which it can play in the assessment of credibility is negligible. In S v SSHD [2006] EWCA Civ 1153 the Court of Appeal said that an error of law only arose in this type of situation where there was artificial separation amounting to a structural failing, and not where there was a mere error of appreciation of the medical evidence. Mibanga [2005] EWCA Civ 367 was distinguished. In that case the medical evidence had been so powerful and extraordinary that it took the case into an

exceptional area. The Court of Appeal said that HE [2004] UKIAT 00321 was relevant to the case in so far as, where medical evidence merely confirmed that a person's physical condition was consistent with his claim, the effect of the evidence was only not to negate the claim. It did not offer significant separate support for the claim. The Court of Appeal said that Mibanga was not to be regarded as laying down a rule of law as to the order in which judicial fact finders were to approach evidential material before them. In this case an explanation as to why the medical evidence did not carry weight had been given by the Judge.

14. There is nothing wrong with the Judge's approach. He carefully sets out the evidence of the appellant and his witnesses, before analysing that evidence and drawing his own conclusions on credibility and reliability. He separately considers the medical evidence. He does not reject the medical and expert evidence solely because he did not find the appellant to be credible or reliable. At [57] and [58] he rejects Dr Persaud's report because he finds that it is inconsistent with other strands of evidence before him and because it contains internal inconsistencies.

15. The remaining grounds of appeal amount to little more than a complaint about the Judge's findings of fact and his inability to accept the appellant or his sister as credible or reliable witnesses. Credibility is a matter for the Judge at first instance. At [42] the Judge correctly takes guidance from GJ (post civil war returnees) Sri Lanka [2013] and reminds himself of the risk categories. He manifestly had the correct guidance on risk categories at the forefront of his mind when considering this case.

16. In SS (Sri Lanka) v Secretary of State for the Home Department [2012] EWCA Civ 155 the Claimant submitted psychiatric medical evidence at a reconsideration opining that she suffered from complex post-traumatic stress disorder, major depressive illness and suicidal ideation. In the psychiatrist's opinion, the Claimant would have difficulty in giving evidence and understanding questions at any hearing. The Court of Appeal upheld the Judge's decision to reject the medical evidence, as the weight to be given to it was for the Judge so long as it was considered carefully and reasons were given (and there were reasons given) - there were material differences between the history given by the Claimant to the psychiatrist and the facts as found by the Judge; there had been no mention in the Judge's determination of any difficulty which the Claimant had in giving evidence; there was no evidence that the Claimant had consulted her general practitioner in response to a suggested treatment/medication plan.

17. The Judge's Article 3 assessment is brief and contained at [61]. It is argued that "*the Judge failed to adequately assess the real risk to the appellant under article 3 of the ECHR in consequence of poor mental health risk of suicide.*" The flaw with that argument is that the Judge can only make findings of fact based on the evidence placed before him. It is true that in his report Dr Persaud provides the opinion that the appellant suffers from depression & PTSD and is at elevated risk of suicide, but neither the appellant nor his sister's witness

statement give any specific mention of mental disorders nor of the effect that return would have on the appellant's mental health.

18. In N v UK Application 26565/05 the Grand Chamber upheld the decision of the House of Lords and said that in medical cases Article 3 only applied in very exceptional circumstances particularly as the suffering was not the result of an intentional act or omission of a State or non-State body. The European court of Human Rights said that Article 3 could not be relied on to address the disparity in medical care between Contracting States and the applicant's state of origin. The fact that the person's circumstances, including his or her life expectancy, would be significantly reduced was not sufficient in itself to give rise to a breach of Article 3. Those same principles had to apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which might cause suffering pain or reduced life expectancy and required specialist medical treatment that might not be readily available or which might only be available at considerable cost. Notably the court held that no separate issues arose under Article 8(2) in that case and so it was not even necessary to consider the Claimant's submission that would removal would engage her right to respect for private life.

19. I take full account of the case of GS and EO and GS (India), but in reality, the argument is about the quality of life for the appellant and the services which are available to him. The argument, in reality, is a comparison of the psychiatric, psychological and support services available in Sri Lanka. The background materials make it quite clear that the quality of such services in the UK is better than the services in Sri Lanka, but that is not the test for an Article 3 consideration.

20. In Nacic and Others v Sweden (Application no. 16567/10) ECtHR (Fifth Section) 2012 it was held that aliens who were subject to expulsion could not, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that an applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State was not sufficient in itself to give rise to a breach of Article 3. The decision to remove an alien who was suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness were inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal were compelling. (As I have already indicated, in N v UK Application 26565/05 the European court of Human Rights said that Article 3 could not be relied on to address the disparity in medical care between Contracting States and the applicant's state of origin).

21. In KN (Iran) v SSHD [2008] EWCA Civ 1430 the Appellant claimed the Tribunal had failed to consider the risk that the claimant might commit suicide on return to Iran. The Court of Appeal said that the threshold for an Article 3 claim based on the risk of suicide was not reached by reliance on the single line of a doctor's report. In GS (India) and Others [2015] EWCA Civ 40 Lord Justice

Laws said at paragraph 46 that "*the case of a person whose life will be drastically shortened by the progress of natural disease if he is removed to his home state does not fall within the paradigm of Article 3. Cases such as those before the court can therefore only succeed under that Article to the extent that it falls to be enlarged beyond the paradigms*" Lord Justice Laws went on to refer to D v UK [1997] 24 EHRR 423, which he said at paragraph 66 was confined to deathbed cases, as one such example, and to another line of cases such as MSS v Belgium and Greece [2011] 54 EHRR 2 where States had taken on certain obligations to asylum seekers under EU Directives. At paragraph 67 Lord Justice Laws endorsed the views in N v UK that "*aliens who are subject to expulsion order cannot in principle claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State*".

22. Case-law indicates that the appellant's mental disorders do not approach the elevated threshold to engage article 3. In any event, I cannot see that these were arguments advanced before the Judge. He should not be faulted for failing to consider matters which were not placed before him.

23. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (*inter alia*) the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

24. In this case the Judge has reached a decision which the appellant does not like, but the decision does not contain a material error of law. The appellant's criticisms of the fact-finding process are not made out. Careful analysis of the evidence is contained within the decision, the correct burden and standard of proof have been applied and that the Judge directed himself correctly in law. The Judge quite clearly weighed all factors in carrying out a full and careful assessment. Overall the fact-finding exercise cannot be criticised, the decision does not contain a misdirection in law.

25. I find that the Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

26. No errors of law have been established. The Judge's decision stands.

DECISION

27. The appeal is dismissed.

Signed

Date 2 January 2016

