**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/04989/2015

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 5th May 2016** | **On 18th May 2016** |

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**S S**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Pascoe, Counsel instructed on behalf of the Appellant
For the Respondent: Ms K Pal, Senior Presenting Officer

**DECISION AND REASONS**

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order in this case. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings or any formal publication thereof shall directly or indirectly identify the original

Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. The Appellant, a national of Sri Lanka, with permission appeals against the decision of the First-tier Tribunal who dismissed his appeal against the decision of the Secretary of State to refuse to grant asylum on humanitarian protection under the Immigration Rules HC 395 (as amended).

3. The basis of his claim to asylum was his fear of the Sri Lankan authorities based on political opinion imputed to him. This was on the basis of his support for the LTTE and assistance given to them from 2005 to 2008 and his arrest by the authorities in June 2010 in which he was detained and seriously ill-treated whilst in detention. In addition in the United Kingdom he had been actively involved in pro-LTT sur place activity.

4. The claim was refused by the Secretary of State in a decision dated 10th March 2015 which was accompanied by a detailed reasons for refusal letter which provided reasons as to why that claim was refused, namely that the Respondent was not satisfied that the Appellant had established a well-founded fear of persecution, that his claim was not credible in many respects and thus had not demonstrated that there were substantial grounds for believing that he would face a real risk of persecution or serious harm on return to Sri Lanka nor that he would qualify for humanitarian protection or that his removal would breach any of the Articles of the ECHR.

5. The Appellant appealed to the First-tier Tribunal and in support of his appeal produced expert evidence in the form of a medical report dealing with the scarring to his body and a psychiatric report. There was also a statement which dealt with the issues of credibility that had been raised by the Secretary of State in the refusal letter.

6. In a determination promulgated on 27th January 2016 the First-tier Tribunal dismissed his appeal reaching the conclusion that he had not given a credible account as to having any significant role with the LTTE or that he had been detained and tortured and would thus not be at risk of harm if returned to Sri Lanka in accordance with the country guidance decision of **GJ and Others (Post civil war: returnees) Sri Lanka CG [2013] UKUT 00319**.

7. The Appellant sought permission to appeal to the Upper Tribunal and permission was granted on 30th March 2016.

8. At the hearing before the Upper Tribunal, the Appellant was represented by Ms Pascoe and the Secretary of State by Ms Pal. Ms Pascoe relied upon the grounds that had been placed before the Tribunal in support of her submissions that overall the determination was unsafe and should be set aside. In addition she made oral submissions in that respect also. Ms Pal

on behalf of the Secretary of State also made oral submissions which I have had regard to when reaching a decision on whether the determination of the First-tier Tribunal discloses material errors of law.

9. The grounds of challenge relate to the credibility findings made by the judge and also the assessment and approach to the medical evidence. I intend to deal with the grounds in which it is asserted that the judge did not properly analyse or consider the medical evidence in the form of the report relating to his injuries and also the psychiatric evidence that had been advanced on his behalf. The first report is set out at page 10 of the Appellant's bundle. The expert concerned saw the Appellant on 12th June 2015 and there was a three hour consultation which took place with the Appellant and the expert sets out the documents that he has also seen to assist in the compilation of his report.

10. The report makes reference to the Appellant's account of ill-treatment including that of being beaten with hands and beaten with sticks and also including having been kicked following which he had sustained bruising which had left no permanent disability save intermittent pain. There was also the reference to some sexual interference. The report also made reference to scarring upon the Appellant's body and the mechanism upon which those injuries had been inflicted upon the Appellant. The opinion of the expert that in view of the position and sizes of the scars on the body that they could not be from any other means other than a burn. He also reached the conclusion that he was confident that there were two separate instruments used to inflict the burn wounds leaving the scars which he went on to consider later in the report. Having described the characteristics of the scars and their clinical features and having seen similar scars on several occasions, his conclusion was that they were caused by heated metal equipment such as an iron rod. As to the age of the scars, whilst he stated that it was difficult to clinically age scars more than two years, he considered that they were approximately five years old having considered the pigmentation, location, distribution and healing processes involved.

11. The report went on to consider four separate alternative causes for the scars that had been described in the report including self-infliction which he ruled out for the reasons given, whether they were caused by a medical condition which he also ruled out and whether they were caused by any accident or wounds from childhood injuries but found that the scars were inconsistent with any form of accident. The last alternative cause is whether or not it was caused deliberately to mislead. He clinically concluded that it was not possible to scientifically differentiate between deliberately inflicted wounds at a third party's behest from wounds inflicted from any trauma. This is not a case of their being provided by any form of ritual or religious festival thus his conclusion overall that the injuries and the scarring was consistent with the account given by the Appellant.

12. The judge considered the medical evidence at paragraphs 30 and 31. He found there was an inconsistency in the report as to the aging of the scars, the judge found it hard to believe that the burn marks would heal as quickly as the Appellant had claimed and that when looking at the location of the scars that it seemed "odd that there were scars only on the back and nowhere else on the body".

13. As to causation the judge considered the expert's report as to whether the burn marks could have been deliberately caused and stated that "in light of that conclusion and bearing in mind the inconsistencies and general lack of credibility that he could not rule out that the scars had not been caused deliberately in order to mislead." Thus he was not satisfied that the presence of the scars on the Appellant's back meant that he had been detained, interrogated and tortured as claimed.

14. Ms Pascoe relied upon the grounds and in addition provided a copy of the decision of **KV (Scarring and medical evidence) Sri Lanka [2014] UKUT 230** which provides guidance on self-infliction by proxy of scarring. Ms Pal on behalf of the Secretary of State submitted that it had been open to the judge to make those findings as set out above and in particular the inconsistency as to the ability to age such scars and that overall the judge did not accept that the Appellant had been tortured and that it was open to him to attach little weight to the report.

15. Having heard the submission of the advocates and having read the determination and the evidence as a whole, I accept the submissions made by Ms Pascoe when considering the medical evidence.

16. Dealing firstly with the age of the scars, the reasons given for rejecting the report was that the judge had found an inconsistency concerning the expert's conclusion that he was able to date the scar to "about five years" which would be consistent with the chronology put forward by the Appellant. In his analysis of the report the judge considered that that finding was inconsistent with what he had said earlier that it was difficult to clinically age scars of more than two years. However there is no agreed consensus at which it is impossible to chronologically determine the age of scars (see decision **KV** at paragraph [229]). Whilst in **KV** reference was made to the possibility of dating scarring up to two years, in this case the expert gave reasons as to why he had reached the conclusion that he could date the scars to a later date after considering the pigmentation, location, the distribution and the healing process. Consequently there was nothing to support the view that there was any inconsistency or that it was improbable that he could not clinically age the scars in the way that he did.

17. Furthermore the judge went on to state that the Appellant did not have any treatment for those wounds and reached the conclusion "I find it hard to believe that the burn marks would heal as quickly as being claimed and that the Appellant would not seek treatment for them." However that was not based on any evidence and the report at paragraph [7] and [8] made

reference to the doctor's clinical findings in this respect and that he was not simply relying on the Appellant's account and gave specific clinical evidence as to how the wounds had healed (see page 7 and page 8).

18. Dealing with the issue of causation the expert gave four different alternative causes for the scars before reaching the conclusion that the burn wounds and scarring were consistent with the account given by the Appellant.

19. The judge made reference to this at paragraph [30] and stated

> "He considers the alternative causation for the scars and at page 8 rules out the possibility of self-inflicted injury because the burns specifically are not in an area where the patient could have easily caused them himself. … He concludes that clinically the patient could not have caused the wounds himself on the back and quite high up on the left arm and on the lower lumbar regions as shown on the body map. However it does seem odd that there are scars only on the back and nowhere else on the body. It does not make sense that if the persons who were detaining the Appellant were intent on causing harm to the Appellant that they would limit the burn marks simply to his back."

The Judge then went on to set out the expert's view as to whether they have been deliberately caused and the judge went on to state "In light of that conclusion and bearing in mind the inconsistencies and the general lack of credibility of the Appellant, I also cannot rule out that these scars have not been caused deliberately in order to mislead." The analysis of the judge is not strictly correct as the Appellant's account of ill-treatment did not only include burns on the back but also ill-treatment in the form of beating and kicking but also some sexual interference. Furthermore there is no support for the judge's view, which is speculative, that because there were scars only on the back that this was inconsistent with the Appellant's account of ill-treatment. There was no evidence upon which it could properly be said that as there were only burn marks on his back that they could not have been inflicted in the way stated.

20. Also as to causation the judge found that he could not rule out that the scars had been caused deliberately in order to mislead. This conclusion was reached, it appears because the expert had ruled out the possibility of self-inflicted injury given the location of the burns but on the judge's analysis that it was odd that there were scars only on the back. Ms Pascoe referred the Tribunal to the decision of **KV** (as cited). It is plain from reading the determination that there needs to be presenting features in the evidence and that those presenting features can either be clinical or non-clinical (but are not exhaustive in that sense). The decision also sets out an issue of procedural fairness between paragraphs [296] and [300] and that if a judge wishes to explore with the Appellant the possibility of SIBP, that requires there to be some presenting features. It does not appear from the evidence that this issue was ever explored during the hearing and there was no consideration of whether there were any presenting features to support the conclusion of the judge that this was a

possibility. Whilst the judge is not required to make a definitive finding, the way that the finding is expressed and the earlier comment that it was "odd that there were scars only on the back" gave the appearance of SIBP being considered as a real possibility. As this was not explored nor was there any reference to any evidential foundation by way of presenting features, I accept the submission made by Ms Pascoe that that conclusion was not one open to the judge and further undermined his overall analysis of the medical evidence in this respect.

21. The psychiatric evidence was also rejected (see paragraph [31]) on the basis that the findings of both the medical expert and the psychiatrist that their evidence was inconsistent with the ability of the Appellant to obtain a student visa and continue his studies.

22. In reaching the decision, the judge did not consider the witness statement of the Appellant (paragraph [30]) in which he made reference to his inability to study. Furthermore he did not analyse the report and its contents in the light of the other additional material relevant to the Appellant's mental health. The doctor made reference to the slight improvement to his mental health when he came to the UK and that the memories of torture and nightmares had gradually reduced in frequency and intensity and thus he was able to cope with his studies. The report made reference to deterioration in 2012 (due to his father being in detention) and to the extent that the Appellant stopped attending college. There was an assessment of his presentation and also there were medical records referring to albeit later GP's assessments, but also the reference to counselling which the Appellant had undertaken of eleven sessions. It would have been open to the judge to reject the psychiatric report or attach little weight to it if there had been an analysis of the content of the report in the light of the evidence as to his mental health as a whole, however to reject it solely on the basis that he had been able to study did not take into account the other evidence available in this respect.

23. The importance of the medical evidence to the Appellant's claim is central given the nature of the claim to have been detained and tortured and the interest of the authorities shown to him on return thus it is not possible to say but for the other matters set out in the determination it is sustainable.

24. The grounds make reference to a number of further issues including the adverse credibility findings in which it is asserted that the judge in essence accepted the credibility matters set out in the refusal letter and did so without considering in any real respect the statement provided by the Appellant after the service of the refusal letter in which he provided an explanation and further evidence in relation to those credibility points. There are also issues raised about failure to claim asylum and sur place.

25. In relation to the sur place issue the judge had before him evidence of his sur place activities including having attended various demonstrations and events and that he was a volunteer for the TGTE (and he had provided an ID card and a letter). The judge at [31] made reference to him being

"highly suspicious" due to the timing making reference to the Appellant having joined after he had claimed asylum.

26. Whilst the decision of **GJ** made reference to attendance at demonstrations by itself not being sufficient to create a real risk of adverse attention, in this case the judge did not consider the issue of the status of the TGTE which is a proscribed organisation and has since been proscribed since the decision of **GJ** and what questions would be asked on arrival of the Appellant which may include a membership of this party a point specifically raised in the submissions made.

27. The judge dealt with alternative findings that even if he had been detained he would not be at risk because he would be of no adverse interest to them but even on the alternative version if he had been detained and tortured in the way he claimed, it is likely that he would be identified upon arrival and thus questions relating to sur place activities may have given rise to a risk. Those matters were not considered in an assessment of risk.

28. As I have set out other grounds made reference to the credibility findings. Not all of those grounds I consider are made out, for example, the ground upon which he said that the judge's findings on his delay in claiming asylum were not credible. However it is plain from reading the determination that in relation to that specific issue the judge gave adequate and sustainable reasons as to why he rejected his explanation for the delay and it could not be said that he had not considered that in the light of the Appellant's evidence given in interview but also in his oral evidence and that of his statement.

29. One of the other grounds relied upon related to the finding that the Appellant was able to leave on his own passport (paragraph [34]) however that by itself is not indicative of a finding of there being no adverse interest and that finding did not consider the Appellant's evidence that there were contacts at the airport as set out in **GJ** (paragraph [170] and [394]) and the reference to the corruption at the airport. However it is not necessary for me to consider the grounds any further in the light of the analysis of the medical evidence (including the psychiatric evidence set out above as I consider that that was central to the credibility findings as a whole and as such I accept the submission made by Ms Pascoe that the determination should be set aside.

30. Both parties submitted that in the event of an error of law being found and the decision being set aside, that it should be remade in the First-tier Tribunal.

## Notice of Decision

The decision of the First-tier Tribunal contains errors of law such that it must be set aside. The appeal is to be remitted to the First-tier Tribunal for a hearing in accordance with Section 12(2)(b) of the Tribunal's Courts and Enforcement Act

and paragraph 7.2 of the Practice Statement of 10th February 2010 (as amended).

**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

Upper Tribunal Judge Reeds