



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/01657/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 24th January 2018

Promulgated

On 29th January 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

SB

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N. Paramjorthy, instructed on behalf of the Appellant
For the Respondent: Ms A. Fijiwala, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sri Lanka.
2. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who, in a determination promulgated on the 13th September 2017, dismissed his claim for protection. The Appellant's immigration history is set out within the determination at paragraphs 3-4, and in the papers before the Tribunal, namely, that the Appellant had applied for

entry clearance as Tier 4 (general) student on 16 June 2010. He arrived in the United Kingdom in October 2010 with a Visa valid until October 2012. However records indicated that he was no longer studying by January 2012 and therefore his leave was curtailed in April 2012 to expire in June of that year. On 16 December 2013 he applied for a residence card as an extended family member of an EEA national and that application was refused on 31 March 2014. He exercised his right of appeal before the First-tier Tribunal but his appeal was dismissed in a determination promulgated on 24 November 2014. Further permission to appeal was refused by both the First-tier Tribunal and the Upper Tribunal.

3. On 7 July 2015 he made a fresh application for residence card relying on new documentation. He was later detained on reporting and made a claim for asylum on 6 September 2015. He attended a substantive interview on 7 January 2016. A decision was made refusing that application on the 3rd February 2016 and the Appellant appealed to the First-tier Tribunal. In a determination promulgated on the 30th of August 2016 the appeal was dismissed. An appeal to the Upper Tribunal was lodged. The Upper Tribunal found the First-tier Tribunal had made an error of law and remitted the appeal.
4. He appeal came before the FTT on the 30th August 2017 and in a decision promulgated on the 13th September 2017 his appeal was dismissed. The Appellant sought permission to appeal that decision and permission was granted by the First-tier Tribunal (Judge Pooler) on the 14th November 2017 as follows:

“The application for permission was made in time and submits that the judge erred in law in his assessment of credibility and of the risk on return to Sri Lanka. It is arguable that the judge misdirected himself in law by rejecting the Appellant’s claim to have been detained and tortured without taking account of the rule 35 medical report and expert scarring and psychiatric reports; see for example the final sentence of [50]. It is also arguable that the judge aired in his assessment of risk arising from sur place activity in the UK. All grounds may be argued.”

5. At the hearing before the Tribunal, Mr Paramjorthy relied upon the grounds as he had drafted and supplemented them with his oral submissions. Whilst the Respondent had provided a Rule 24 reply on the 7th December 2017, Ms Fijiwala placed no reliance upon that as it referred to a previous decision and not the one under challenge. She therefore made oral submissions.
6. I have taken into account the respective submissions by the parties in reaching a decision as to whether the decision of the First-tier Tribunal involved the making of an error on a point of law. I shall deal with the parties respective submissions when considering this question.
7. The first paragraphs of the grounds relate to the challenge made on the basis that the judge had made findings of fact in isolation from the

consideration of the expert medical reports (the scarring report and psychiatric evidence). It is submitted on behalf of the Appellant that a careful reading of the determination revealed that the adverse findings of credibility were made before the consideration of the medical evidence and thus was a classic “Mibanga” error. Mr Paramjorthy made reference to the determination and the findings of fact by reference to the material that was before the First-tier Tribunal and that the adverse findings were clearly made before making any proper assessment of the medical evidence.

8. Ms Fijiwala submitted that the judge had considered all the evidence before reaching his findings of fact. She referred to the determination at paragraphs 23 - 25 where he made reference to the medical report (scarring) and the psychiatric report (at 25). She submitted that the determination should be read as a whole and should not simply be considered on the basis of the findings at paragraph 41 onwards. Furthermore she submitted at paragraphs 50 - 51 the judge gave reasons for rejecting the scarring report. As to the submission made relying on the case of Mibanga, she submitted that the judge was required to start somewhere in his assessment of credibility and did so by considering the issue of delay and the rule 35 report. She made reference to the decision in HH (medical evidence: effect of Mibanga) [2005] UKIAT 00164 where the Tribunal considered that there was a danger of Mibanga being misunderstood. The Tribunal held that the judgements in that case were not intended to place judicial fact finders in a form of forensic straitjacket. In particular, the Court of Appeal was not to be regarded as laying down any rule of law as to the order in which judicial fact finders were to approach the evidential material before them.
9. The judge’s findings begin at [41 - 52]. I would not disagree with Miss Fijiwala’s general submission that the determination is to be read as a whole but I do not accept that in the context in which that submission is made that the judge made his findings on credibility by considering all the evidence “in the round” or holistically as required. The judge rejected the Appellant’s credibility in isolation from the medical evidence presented on the Appellant’s behalf. At paragraph 47 the judge made the following finding; “The Tribunal places very little weight upon the events which the Appellant describes in Sri Lanka. It certainly does not accept that the Appellant was detained and tortured in the manner which is described. It will be remembered that he was effectively sent to the UK from Sri Lanka in 2010 with a valid student Visa. Given the background which he describes, it is neither possible nor conceivable that he would simply wait for five years and just before his removal, lodge a claim for asylum in the UK.”. The judge went on to state at paragraph 48; “The Tribunal does not therefore accept that there was a warrant for arrest in Sri Lanka or indeed that he was detained and tortured on account of his alleged support of the LTTE. Despite the alleged arrest warrant, it is of note that the Appellant was able to obtain a student Visa and depart from the airport in Sri Lanka. There is only one airport there and his departure proceeded the end of the previous hostilities in that country.”

10. In the preceding paragraphs at paragraphs 43 – 46, the judge set out his findings of fact relating to his immigration history and applications made whilst in the United Kingdom which he found to be adverse and also the delay in making his asylum claim. It is then at paragraph 47 that the judge expressly rejects the Appellant’s account of events in Sri Lanka and reaches the finding that he had not been detained or tortured in the manner in which he has described.
11. At paragraph 48 he rejected that there was a warrant for his arrest based on the same findings. The judge therefore rejected the Appellant’s account of detention and torture in Sri Lanka based on his adverse history and delay in claiming asylum. I am satisfied that the finding as to adverse credibility is made before the judge considered the medical evidence in the form of the scarring report (at paragraph 50) and the psychiatric report at (51 and 55). I would accept also as Miss Fijiwala submitted that a judge has to start somewhere in analysing the evidence however I am satisfied that that the adverse assessment of credibility was made before properly considering the medical evidence and that this is an error of law (see Mibanga v SSHD[2005] EWCA Civ 367).
12. This is further exemplified by the finding at [51] and his consideration of the medical evidence. In relation to the scarring report his findings are set out at paragraphs [50] – [51]. The expert found scarring to be consistent with the account given to the expert taking into account the shape, type of scarring presented. He summarises his conclusions in line with the Istanbul protocol that there was “no doubt” that the injuries were caused intentionally and the most likely explanation was that he was severely tortured. The judge set out at [50] that “this report cannot exclude the possibility that his scars were caused by means other than his alleged torture. The wounds described are stated to be typical or supportive of history given. However, as a history given has been rejected by the Tribunal it follows that it is not accepted that the scars were caused by the alleged torture”.
13. Therefore the judge rejected the medical evidence on the basis that he had already rejected the Appellant’s history in Sri Lanka primarily based on his adverse immigration history and delay in making a claim. Also reliance was placed on his ability to leave Sri Lanka but it is accepted by Miss Fijiwala that that finding set out in paragraph 48 was in error as it was inconsistent with the decision of GJ and the objective material.
14. Furthermore the paragraph also displays a factual error in that the report did in fact consider alternative causation, as to whether it was likely due to a skin disease, accidental injury or whether it was self-inflicted. It is not clear whether the judge was referring to self-affliction by proxy when he stated that “the report cannot exclude the possibility that his scars were caused by other means” but as Counsel submits that issue was not put to the Appellant (See KV v SSHD [2017] EWCA Civ 119), although it was suggested that it was caused by farming, which is different. Therefore there was no basis in such a finding if it was indeed based on SIBP.

15. Similarly the judge reached adverse findings on credibility without considering the psychiatric report. The consideration at [51] whereby it was stated “The Tribunal is neither equipped nor needs to find a cause for the medical condition”, did not engage with the medical evidence as a whole.
16. The grounds raise other credibility issues. As set out above it is accepted on behalf of the Respondent that the finding at [48] was not open to the judge in the light of paragraph 367 of GJ (Sri Lanka) and the background evidence. Furthermore, the finding at paragraph 49 relating to the Appellant’s mother was rejected solely on the basis of it being “self-serving” and should have been considered in the light of the background material (see 13.1.2 of the CIG).
17. The second issue relates to the Appellant’s sur place activities and in particular his status as a member/volunteer for the TGTE and his attendance at demonstrations.
18. The skeleton argument made reference to the decision of UB (Sri Lanka) [2017] EWCA Civ 85. The Court of Appeal in that decision considered the implications of neither the First-tier Tribunal nor the Upper Tribunal being referred to the Home Office policy guidance of August 2015 entitled “Tamil Separatism”. The Court considered that there had been an obligation on the Secretary of State to serve that material on the parties and to produce it before the Tribunal.
19. However as set out in the decision, the Appellant’s Counsel had made reference to the country information and guidance (CIG) on Sri Lanka entitled “Tamil Separatism” dated August 2016 (see paragraph (xv) of his skeleton argument. The judge considered the issue at paragraphs [58-64]. Miss Fijiwala on behalf of the Secretary of State submitted that the findings of fact were open to him on the evidence and that the judge had properly made a distinction as to the Appellant’s position at [62].
20. However as Counsel submits, there is no reference to the Respondent’s guidance and in particular the objective material that makes reference to the possibility of the Appellant being interviewed on return and no reference to the material in the CIG (see UB (Sri Lanka) to the letters from the BHC dated 25th of July 2014 which makes reference to returnees and that they “may be questioned on arrival by CID, SIS and TID.”
21. The decision of GJ and others makes reference to the Sri Lankan authorities approach being based on sophisticated intelligence as to the activities in the Diaspora (see paragraph 356(8)) and did not consider that attendance at demonstrations alone would be sufficient to create a real risk or a reasonable degree of likelihood that such a person would attract adverse attention (see paragraph 336 of GJ and others). Furthermore at paragraph 351, whilst the attendance at demonstrations is not of itself evidence to person is a committed Tamil activist seeking to promote Tamil separatism within Sri Lanka, it will be a question of fact in each case dependent on the Diaspora activities carried out by such an individual.

22. I accept the submission made by Mr Paramjorthy that there had been evidence from a number of sources that was relevant to the sur place claim which included a number of photographs (with LTTE flags prominent in the background) and oral evidence from Mr X. There was also a membership card for the NLP. In reaching his findings the judge made reference to the photographs of the Appellant and that he had attended demonstrations (see paragraph 61). At paragraph [62] he reached the conclusion that he was a “low level volunteer”. However that arguably is not consistent with the written evidence of the witness Mr X (see page 144-145) and whom it is said gave detailed evidence before the Tribunal. Beyond the reference at paragraph 61, there was no analysis of that supporting evidence and why, if he did reject it, that was the case.
23. There was also no reference to the material in the CIG which made reference to the ITJP report and that in several cases witnesses mentioned that they or their family members had been questioned about their participation in anti-government protest or war commemoration events abroad. It goes on to state “some reported the Sri Lankan security forces had showed them, or their families, photographs of themselves at these protests. This indicates the Sri Lankan security forces are monitoring these gatherings outside the country.” (see 13.1.2) This was also relevant to the evidence sent from the Appellant’s family members which was rejected as “self-serving” but not viewed in the light of the guidance.
24. The letters referred to in UB (Sri Lanka) and which were annexed to the CIG dated 25 July 2014 (see paragraph 30), states that returnees may be questioned on arrival by immigration, CID, SIS and TID and that this was normal practice for returnees to be asked about their activities in the country they were returning from, including whether it involved activity in any Tamil Diaspora groups. The material also refers to their being no known arrests based on membership of one of the proscribed groups.
25. The more recent CIG makes reference to the government having de-proscribed a number of Tamil groups which may indicate that involvement with such organisations is not of itself likely to be seen as a threat to the integrity of the state of Sri Lanka although it is right to observe that the TGTE still remains a proscribed organisation and as Counsel noted in his skeleton argument at [6] it is still a criminal offence to be involved with a proscribed organisation.
26. There was no consideration of the risk at the airport or beyond that, in the light of the material whereby it was stated that the Appellant may be interviewed on return about their activities in the UK and the Annex to GJ (and others). Even if he found at [63] his activities in the UK were “opportunistic” there was no assessment made as to the perception of the authorities of his conduct and in the light of his activities and membership in the UK.
27. It was also submitted in the grounds (at paragraph 12) that having given a sworn statement to the International Centre for Prevention and Prosecution of Genocide about the past activities of the Sri Lankan

authorities the Appellant would be at risk on return. He submitted that the First-tier Tribunal Judge then failed to consider this aspect of the Appellant's case in the context of *GJ and others (post - Civil War: returnees) Sri Lanka CG[2013] UKUT 319* where the Upper Tribunal held that current categories of persons at risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise includes: "individuals who are given evidence to the Lessons Learnt and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during conflict, particularly in the No-Fire zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are a real risk of adverse attention or persecution on returns potential or actual war crimes witnesses."

28. Part of the assessment of risk was that the Appellant would be at risk on return having given a statement to the ICPPG. Whilst the country guidance decision of *GJ and others* sets out categories of those at a real risk of persecution or serious harm which includes individuals who had given evidence to the Lessons Learnt and Reconciliation Commission the LLRC, this is a wholly different organisation from the ICPPG and the Appellant's representatives have provided no evidence that there is any connection between them.
29. Whilst I would accept that the judge did not expressly deal with any risk based on having given such a statement to the ICPPG as a discrete issue, there was no evidence before the judge that concerned that particular organisation and whilst the bundle refers to page 87 as a "document to follow" it has not been produced. Furthermore there is no evidence that the Sri Lankan authorities have been provided with information from this organisation nor has it been shown that there is any obvious way for the Sri Lankan authorities to connect any statement made to this Appellant. Therefore I find no error in this respect.
30. However I have set out above the errors that I have found and consequently I am satisfied that Mr Paramjorthy's submissions are made out and that the judge's decision is vitiated by an error of law and his decision shall be set aside. As to the remaking of the decision, both advocates were in agreement that despite its history, the matter should be remitted to the First-tier Tribunal to be reheard. It will be necessary to reach findings of credibility and the evidence as a whole and in that respect further medical evidence may be submitted. In the light of the current diagnosis set out in the report, consideration should be given to the guidance given in *AM (Afghanistan) v SSHD [2017] EWCA Civ 1123*.

Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law and the appeal is remitted to the First-tier Tribunal.

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. 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

Handwritten signature of SM Reeds in black ink.

Upper Tribunal Judge Reeds

Date: 25th January 2018