



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

Appeal Number: PA/03010/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 31 October 2018**

**Decision & Reasons
Promulgated
On 29 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

**SS
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Waheed, counsel.

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

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 9 February 2018 refusing his claim for international protection.

Background

2. The appellant is a citizen of Sri Lanka born on 19 January 1992. He first came to the UK in March 2010 with leave to enter as a student. He then returned to Sri Lanka in early August 2011 to visit his mother and returned to the UK on 17 August 2011 when he was detained on arrival. He was released from detention the following day and claimed asylum on 21 September 2011. He claimed that he had been detained on a number of occasions in 2007 and 2008 and detained again when he returned to visit his mother in August 2011. His application was refused on 7 November 2011 and his appeal to the First-tier Tribunal was dismissed on 3 January 2012. The judge did not find the appellant to be credible about being detained and ill-treated in Sri Lanka or that he would be at real risk of serious harm on return. He was granted permission to appeal the Upper Tribunal, but his appeal was dismissed and an application for permission to appeal to the Court of Appeal was refused.
3. The appellant made further submissions to the respondent about his asylum claim on 3 August 2015 supported with further documentary evidence including a police report about his arrest, detention and grant of bail, a medical report, photographs of his scars, a letter from a lawyer in Sri Lanka and police documents relating to the arrest of his mother and aunt when they were attempting to obtain certified copies of documents relating to the appellant. His claim was refused for the reasons set out in annex A of the decision letter of 9 February 2018.

The Hearing before the First-tier Tribunal.

4. The judge heard oral evidence from the appellant who adopted his witness statements. He gave oral evidence about attending a demonstration outside the Commonwealth Heads of Government meeting in London and produced photographs showing him there. He also referred to the photographs of the scars on his body. He claimed that he would be at risk of persecution at the hands of the Sri Lankan authorities because of his actual or imputed political opinion evidenced by the fact that he had been tortured in the past when previously detained. When he returned to Sri Lanka in 2011, he had been detained and after being released he was required to report to the police, but he had returned to the UK before his reporting date. He would also be at risk as someone who had taken part in demonstrations in London.
5. The judge took the previous tribunal decision as the starting point for her consideration of the appeal in accordance with Devaseelan v Secretary of State [2002] UKIAT 282. She noted that the appellant's current claim was based on the same factual matrix considered by the previous Tribunal but there was key additional evidence not previously considered, in particular, a medical report about his scarring and a psychiatric report. When considering the medical report, the judge commented that the doctor had not directly referred to the fact that the appellant's claim had been

refused, although he was aware of this fact as he had been provided with a copy of the refusal letter. He had assessed the appellant on 4 March 2012 but there was nothing in the report to suggest that he was aware that the appellant's appeal had been dismissed or that he had been provided with a copy of the decision.

6. The judge said that this was a significant omission given the appellant's credibility with respect to his claimed detention and ill-treatment which was clearly an issue. The appellant had said that during his detention in 2007 and 2008 he was beaten with wooden sticks and by hand, that he was kicked with heavy army boots and kept in unhygienic conditions and that in 2011, he was beaten with hands, cut on his upper left inner thigh with a bayonet while sitting, beaten with a wooden stick and kicked with heavy boots.
7. The doctor had found that the scar on the appellant's upper left thigh was consistent with trauma from a sharp object. In the refusal letter there was a reference to the appellant's evidence in his asylum interview where he said that he was hit on his private parts with a gun, a bit of flesh came off and he was in great pain. The judge commented that it was not entirely clear if this was the same injury to which the doctor referred but if so, his evidence about how the injury was sustained was inconsistent as there was no mention in the interview record of an injury caused by a bayonet. The judge noted that the other scars on the appellant's legs and left arm were stated to be typical of trauma from blunt objects which meant they had an appearance usually found with this kind of trauma but there were other possible causes.
8. The doctor had said that the age of the scars was compatible with the appellant's account but gave no reasons for this statement, he did not consider alternative causes for the scars and there was no evidence in his report that he explored the appellant's background to determine whether, for example, he had been beaten in the past or suffered any other injuries which might have been the cause of the scars.
9. The judge then considered the report of the consultant psychiatrist. He had observed the appellant's scars and found they were evidence of torture and consistent with his history and mental state examination. However, the psychiatrist had not assessed scars with reference to the Istanbul Protocol and there was no evidence that he had considered them individually or given them any detailed consideration. He appeared simply to have adopted the doctor's report. It was the psychiatrist's conclusion that the appellant suffered from PTSD. The diagnostic criteria were appended to that report, but he had made no reference to them or how they were satisfied in the body of his report. There was no indication that the psychiatrist was provided with copies of the refusal letter, the immigration judge's decision or the decision under challenge.

- 10 The judge accepted that it was not the role of the psychiatrist to comment on the credibility of an account, but it was within his expertise to comment on or make findings in relation to possible psychiatric causes for issues with the appellant's evidence such as his failure to disclose aspects of his ill-treatment at an earlier date and his difficulties in remembering detail and providing a coherent account. She commented that numerous inconsistencies in the appellant's evidence were identified in the previous immigration judge's decision and in the refusal letter but there had been no attempt to address any of them. The judge said that she had identified a number of deficiencies in both the scarring report and psychiatric report and for those reasons placed limited weight on them.
11. She took into account the appellant's young age at the time the events occurred which initially led him to leave Sri Lanka and the impact that may have had on his evidence. She commented that he had not dealt with his failure to claim asylum at the earliest opportunity adequately. Having arrived as a student, he may not have considered it necessary to claim asylum, but he had not dealt with the fact that, having allegedly been detained in August 2011 when he visited his mother and then realizing the danger he was in, he did not claim asylum on arrival back in the UK. She said that, having been detained on arrival while checks were made, he must have understood that there was a risk he would be returned to Sri Lanka but notwithstanding this, he did not claim asylum and provided no explanation for his failure to do so. She did not accept to the lower standard that he had been detained as claimed or that he was ill-treated in the manner he described. She accepted that he suffered from some symptoms of PTSD but not as a result of being detained in Sri Lanka. She did not find the appellant to be a credible witness.
12. The judge went on to consider whether, nonetheless, the appellant might still be at risk on return because of the authorities' interest in his mother, the presence of scars on his body or as result of his activities in the UK. She did not accept the documents relating to the claimed police case against the appellant's mother were genuine or that there would be any risk to the appellant by reason of attending a number of demonstrations in the UK. She concluded that he was not and would not be perceived as a threat to the integrity of Sri Lanka as a single state on return and she did not accept that he had or would be perceived to have a significant role in post-conflict Tamil separatism and it was not likely that he would be on the stop list or watchlist. He been able to leave Sri Lanka unchallenged particularly the second time in 2011 and that was evidence that the authorities would have no interest in him. His scars were typical of or consistent with injuries caused by blunt trauma, but they could have been sustained a result of being beaten or in a variety of other ways. She did not accept that his scars were reasonably likely to lead to him being identified as a person who was or was suspected of being involved with the LTTE on return to Sri Lanka. Accordingly, she dismissed his appeal

The Grounds of Appeal and Submissions.

13. There are five grounds of appeal, all alleging perversity, in the substance of ground 1 and in the sub-headings of grounds 2-5. In ground 1 it is argued that the judge erred by making an unlawful assessment of the scarring evidence. It was not open, so it is argued, to require an expert medical witness to reference prior assessments of the appellant's credibility and then to treat this omission as significant. The role of the expert medical witness was to say whether the appellant's injuries were consistent with the history he gave. The ground argues that the judge misdirected herself on the role of an expert witness as including going behind the appellant's history and embarking on a fishing exercise for evidence to contradict the attribution of the injuries examined. Ground 2 argues that the judge's assessment of the scarring evidence was perverse in that was not open to her to conclude that the appellant was being inconsistent when describing an injury caused by being hit by a gun as opposed to being hit by a bayonet, which is an integral part of some modern guns as evidenced by publications such as Jane's Infantry Weapons. Accordingly, there was nothing inconsistent with being hit by a gun and sustaining a wound caused by a bayonet.
14. Ground 3 argues that the judge's assessment of the psychiatric evidence was perverse because she was wrong to state that the psychiatrist did not comment on possible psychiatric causes when the psychiatrist had commented that the appellant was trying to push away his painful memories and felt shame when he remembered sexual violence. It was also not open to the judge to conclude that the report did not show how the appellant satisfied the criteria for PTSD when this was clear from the report as identified in ground 3(ii).
15. Ground 4 asserts that the credibility assessment was perverse and that it was wrong to say that the appellant had failed to deal with many of the significant challenges to his credibility when he had in fact done so in his statement of 28 June 2018. The judge failed to explain why those responses did not deal with these challenges. She had accepted that the appellant may not have considered it necessary to claim asylum previously when he had a student visa and she should not have found that that explanation would not still suffice when successfully re-entering the country lawfully notwithstanding that checks were made. Ground 5 argues that the judge's assessment of risk on return was perverse arguing that there was cogent evidence that Sri Lankan High Commission officials filmed protesters and would be likely to have done so in respect of the appellant and there was evidence of hostility by way of a "throat slitting" gesture from a member of the High Commission staff to protesters. This demonstrated, so it is argued, a reasonable likelihood of adverse interest in the appellant as a protester.
16. Mr Wahid adopted his grounds in his submissions. He emphasised that the judge appeared to have erred by requiring the medical experts to assess credibility, submitting that whether the appellant had told the truth or not

on a previous occasion was not a matter for the expert. It would be wrong for the experts to give an opinion on credibility when that was a matter for the judge. In respect of ground 2, he referred to the evidence about modern rifles having an integral bayonet which was folded back. There was no inconsistency in someone receiving an injury from the bayonet when they were hit by a gun. On ground 3 he submitted that the judge's criticism of the psychiatric evidence was not made out as the expert had addressed and indicated how the criteria for PTSD applied in the appellant's case.

17. On ground 4 he submitted that the judge had failed to deal with the fact that the appellant had specifically addressed issues relating to his credibility in his witness statement. So far the risk on return was concerned (ground 5), the judge had not taken proper account of the evidence and, in particular, the fact that there was evidence that those attending demonstrations outside the Sri Lankan High Commission were videoed and the hostility of the Sri Lankan officials was also made clear by the "throat slitting" gesture.
18. Mr Kandola dealt with grounds 1 and 3 together submitting that the judge was entitled to comment on the fact that expert witnesses had not had regard to the previous history of the appeal. It was not suggested that the doctor was entitled to form his own views on credibility but that he should take all relevant matters into account as part of the background to the report. He argued that the judge had been entitled to assess the report as she had and had not erred in law. In respect of ground 2 relating to the bayonet as part of a gun, he submitted that it was difficult to sustain an argument that the judge had erred in law. There was no reason to believe the judge was under any misapprehension about whether modern guns would also have a bayonet but in any event, alternative causes of how a scar may have been obtained should have been considered. The judge had identified at [51] the points which had not been adequately dealt with by the appellant (ground 4). On ground 5, the judge's findings on the risk of return had been properly open to her and she had properly considered these issues and reached findings open to her.

Consideration of whether the Judge Erred in Law.

19. I am not satisfied that the grounds disclose any errors of law requiring the decision to be set aside. In respect of ground 1, I am satisfied that the judge was entitled to comment on the fact that there was an omission in the report to the extent that the judge did not take into account all the evidence about the appellant's background. This is not a case where the judge was asking or expecting the expert to give an opinion about credibility still less embark on a fishing exercise, but to take into account credibility assessments which had been made when considering his opinion in relation to the scarring: see JL (medical reports-credibility) China [2013] UKUT 145 at [30].

20. The judge rightly commented that injuries which were typical of or consistent with trauma from a sharp object were non-specific and there may be other causes which were not highlighted in the medical report. The scars on the appellant's legs and left arm were said to be typical of trauma from blunt objects but again there were other causes. She was entitled to comment that there was no evidence in the report that the doctor had explored the appellant's background to see whether he had been beaten in the past or suffered any other injuries and, also when considering the evidence in the round, to take account of whether there were other potential causes of the scars. I am not satisfied that the judge erred in law in her assessment of the medical report
21. So far as the ground 2 is concerned, I am not satisfied that there is any reason to believe the judge was unaware of the fact that some modern guns have an integral bayonet. She was entitled to make the point that the medical expert found that there was an injury consistent with trauma from a sharp object and then to look at the appellant's evidence about how he had described the wound. She was entitled to comment that there was no record of an injury caused by a bayonet and to make the point that this injury was described as consistent with trauma from a sharp object and that there were many other possible causes. This ground is seeking in substance to re-argue an issue of fact where the judge has reached a decision properly open to her.
22. So far as the psychological evidence is concerned (ground 3) the judge was entitled to comment that if the psychiatrist was not aware of background information from documents such as the refusal letter and previous decision, it would impede his ability to comment on the cause of a psychiatric condition. He could also reasonably be expected to take into account any inconsistencies in the evidence when reaching his opinion. The judge's comment at [46] that there is no attempt to address any of these issues was properly open to her. It was also for the judge to assess whether and to what extent the psychiatrist had identified how the diagnostic criteria applied to the appellant but, in any event, even if this comment was not justified, it does not detract from the other comments the judge made about the evidence. The judge's findings on or approach to the psychiatric evidence cannot be categorised as perverse.
23. I am also not satisfied that the judge failed to deal with the fact that the appellant had given explanations in his most recent affidavit on some issues relating to his credibility (ground 4). In [50] the judge noted that the appellant had provided evidence to address some of the issues with his previous evidence, for example, the fact that he had an elder brother but that he had failed to deal with many of the significant challenges to his credibility giving as an example in [51] the failure to deal with not claiming asylum that the earliest opportunity particularly in relation to his later return to the UK. This ground is again an attempt to re-open issues of fact.

24. In respect of whether the appellant would be at risk in relation to attending demonstrations in the UK (ground 5), I am satisfied that the judge dealt properly with these issues. While photographs might have been taken of demonstrators and one official might at one time have made a “throat slitting” gesture, the issue for the judge was whether there was a real risk of harm on return for the appellant in his particular circumstances. It is clear from her decision that she took into account the current risk categories in GJ and others (post-civil war: returnees) Sri Lanka [2013] UKUT 319. She found that he was not and would not be perceived to be a threat to the integrity of Sri Lanka nor would be perceived to have a significant role in post-conflict Tamil separatism nor was he a journalist or human rights activist criticising the Sri Lankan government.
25. In summary, I am satisfied that the judge reached a decision properly open to her for the reasons she gave having reviewed all the evidence and taken into account the country guidance. The grounds do not satisfy me that the judge was perverse in her approach to the assessment of the evidence or in her findings of fact or that the grounds reveal any other error of law such that the decision should be set aside. Rather, they are in substance an attempt to re-argue issues of fact where the judge reach findings properly open to her.

Decision

26. The First-tier Tribunal did not err in law and it follows that this decision stands and the appeal is dismissed.

Signed: H J E Latter
November 2018

Dated: 19

Deputy Upper Tribunal Judge Latter