



**Upper Tribunal
(Immigration and Asylum Chamber)**
PA/05688/2017

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 5 January 2018**

**Decision & Reasons
Promulgated
On 7 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

[R K]

Respondent

Representation:

For the Appellant: Mr. N. Bramble, Home Office Presenting Officer
For the Respondent: Mr. P. Lewis, counsel instructed on a public
access basis

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of India, of Tamil origin, born on [] 1974. He last entered the UK on 23.10.12 and claimed asylum the following day, on the basis that he helped the LTTE from 2000-2008, as a consequence of which he had been arrested and detained in 2003 and from 2008 to 2012 during which time he was tortured. He was released from detention in September 2012 and fled to the UK. His asylum

application was refused on 16.5.13 and his appeal against that decision was dismissed on 17.7.13 and he became appeal rights exhausted shortly after. On 28.2.14 the Claimant lodged further submissions supported by medical evidence from Dr Turvill and Dr Singh and a country expert report from Chris Smith.

2. The appeal came before First tier Tribunal Judge Boyes for hearing on 13.9.17. In a decision promulgated on 26.9.17, the appeal was allowed on the basis that the new evidence relied upon by the Claimant cast serious doubt on the previous findings of the Tribunal and applying Devaseelan, the Judge found that the Claimant had been tortured and persecuted in the past and had a well-founded fear of persecution if returned to India.

3. The Secretary of State sought permission to appeal, in time, against this decision, on the basis that the First tier Tribunal Judge criticised the findings of the previous judge, when it was not open to him to do so, no arguable error of law having been found by the Upper Tribunal in refusing permission to appeal against that decision.

4. Permission to appeal was granted by First tier Tribunal Judge Holmes in a decision dated 17.11.17 on the basis that it was arguable that the judge's approach to the decision of the Tribunal of 17.7.13 was flawed and it was not open to the judge to adopt the approach he did.

Hearing

5. At the hearing before me, Mr Bramble relied upon the grounds of appeal. He submitted that the Judge was clearly aware of the circumstances in which the appeal came before him and that it was on the basis of further submissions, the previous asylum claim having been refused by the Secretary of State in May 2013, his appeal dismissed by the First tier Tribunal in July 2013 and permission to appeal refused to the Upper Tribunal in August 2013.

6. The Judge set out at [18] findings from the previous First tier Tribunal decision and the Secretary of State contends that the Judge materially erred at [28] where criticism is levied at the previous judge on the basis that his assessment of causation of the Claimant's injuries descended into speculation and the hypothetical. There was no basis for finding fault in the original Tribunal decision because the appeal had been examined on two separate occasions with grounds to overturn it and these had been clearly shown to have no merit because permission to appeal had been refused. Thus the findings of the previous judge must stand and the starting point for the judge coming to an alternative conclusion is materially flawed.

7. In his submission, Mr Lewis submitted that the judge's decision was entirely lawful. He approached the evidence in an appropriate and lawful way and correctly used the original judge's decision as a starting point as required by Devaseelan. Mr Lewis submitted that it is not controversial that fresh evidence in the form of expert and medical evidence is clearly capable of persuading a subsequent judge to reach a different decision. Judge Baldwin heard the appeal in 201, when an application for an adjournment was refused and the judge proceeded to dismiss the appeal, in part due to the absence of any medical evidence and the judge found that the evidence of scarring consistent with mistreatment was due to occupational injuries [29].

8. Mr Lewis submitted that it was entirely open to the judge to approach the first determination as a starting point but find that it was not binding. A fresh claim had been made and evidence from the Medical Foundation had been provided, confirming the presence of scarring consistent with the claim of torture. That evidence was considered by the Secretary of State and whilst the claim was refused, at page 8 of the refusal letter 2dated 5.5.17, the Secretary of State considered the evidence from the Medical Foundation and stated "*it is therefore acknowledged that you have faced ill-treatment but the report does not confirm that injuries caused by mistreatment by the Indian authorities.*" He submitted that this is a departure from the previous decision as the Secretary of State accepted that his scarring was due to ill-treatment rather than occupational injuries. Thus the medical evidence was clearly accepted by the Secretary of State and was not challenged at the hearing before Judge Boyes.

9. With regard to the expert report of Chris Smith, he considered the account given by the Claimant and concluded that the claim made by him was entirely consistent with his expert knowledge. This evidence was also unchallenged by the Secretary of State. Notably, the objective evidence before Judge Baldwin concerned Sri Lanka rather than India. It was entirely plausible that the Claimant's account was one that was credible and it was open to the judge to rely upon that to conclude that the Claimant had been a victim of persecution. Mr Lewis submitted that this is not a case where the judge could properly be criticized for departing from the conclusions of previous Judge *cf. LD (Algeria)* [2004] EWCA Civ 804. He further submitted that the criticisms that have been made are not made out on the evidence before this judge, as compared to the evidence before the previous judge, particularly the fact that there had been no country evidence in relation to India. He asked that the decision be upheld.

10. There was no reply by Mr Bramble on behalf of the Secretary of State.

Findings

11. The challenge by the Secretary of State hinges on the decision in Devaseelan [2003] Imm AR 1, which was endorsed by the Court of Appeal in LD (Algeria) [2004] EWCA Civ 804, which provides as follows at [30]:

“30. Perhaps the most important feature of the guidance is that the fundamental obligation of every special adjudicator independently to decide each new application on its own individual merits was preserved. The guidance was expressly subject to this overriding principle.

“The first adjudicator's determination is not binding on the second adjudicator; but, on the other hand, the second adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first Adjudicator it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second adjudicator may be quite different from what might have been expected from a reading of the first determination only. The second adjudicator must, however, be careful to recognise that the issue before him is not the issue before the first adjudicator. In particular, time has passed; and the situation at the time of the second adjudicator's determination may be shown to be different from that which was obtained previously. Appellants may want to ask the second adjudicator to consider arguments on issues that were - or could not be - raised before the first adjudicator; or evidence that was not - or could not have been - presented to the first adjudicator.”

It is further clear from the decision in Devaseelan that:

“39. In our view the second Adjudicator should treat such matters in the following way.

*(1) **The first Adjudicator's determination should always be the starting-point.** It is the authoritative assessment of the Appellant's status at the time it was made...’*

Thus it is clear that a previous decision of a judge is the starting point for consideration of an appeal by a second judge, but a different conclusion can be reached by that judge if the arguments or evidence at the time of the second appeal are different.

12. The challenge in this particular case is to the judge's analysis at [28] of the decision, which provides as follows:

“Taking the previous judgment as the starting point I note that there were numerous applications for the matter to be adjourned in order to instruct an expert about the injuries upon the appellant. Prior to the hearing and at the hearing this was refused. The report was actually obtained the day prior to the appellant becoming appeal rights exhausted. Criticism is levelled at the appellant in the report, particularly at paragraph 29, about the causation of the injuries. I am afraid that the examination of the causation of the injuries by the judge descended into speculation and the hypothetical. I have reached the conclusion that the criticism of the appellant in terms of the injuries cannot remain and I can place no sensible reliance on the conclusions of the judge.”

The reference to criticism being levelled at the appellant in this report is a reference to [29] of the decision of Judge Baldwin where he held *inter alia*:

“The Appellant has been inconsistent in his evidence about when his leg scar was caused... Having left the Tribunal unclear whether the injury occurred in c.2003 or between 2008 and 2012 and no clarity whatsoever as to precisely how this grievous injury was occasioned one is bound to consider other possibilities. One does not need to be a farmer or a fisherman to be aware that the risk of serious injury or death in these occupations is high. The Appellant is on his own evidence one who lived on a farm and had also engaged in commercial fishing ... Given the lack of clarity on the “when” and “how” it would seem more likely than not that this Appellant’s leg scarring was occasioned by an occupational injury.”

In respect of the context of this finding, an adjournment had been requested both prior to and at the outset of the hearing in order to obtain a report from the Medical Foundation and then given the length of time that would have taken, from a different expert. Judge Baldwin refused the adjournment request and proceeded in the absence of any supporting medical evidence in respect of the Appellant’s scarring.

13. The appeal came before Judge Boyes consequent to representations made on 17.2.14, which appended and relied upon a Medical Foundation report from Dr. Phyllis Turvill dated 10.1.14. The Secretary of State saw fit to treat this evidence as a fresh claim but refused it, with the right of appeal.

14. Dr Turvill’s report at [50] found that the Appellant’s scar on his left thigh and the scars on his soles were highly consistent with his account and other scars were consistent with his account of having

been beaten.

15. Thus Judge Boyes had the benefit of this further medical evidence, not before Judge Baldwin, which he summarised at [29] of his decision:

[29] ... The evidence of Dr Turvill shows that the most serious of the appellant's injuries; the scar on the left thigh and the injuries to the soles of the feet are highly consistent of the appellant's account."

It was on this basis that the Judge preferred the evidence of Dr Turvill to the findings by Judge Baldwin as to the cause of the Appellant's scarring, particularly the scar on his left thigh.

16. Judge Boyes also had the benefit of a psychiatric report from Dr Mala Singh dated 14.1.14, in which she concluded that the Appellant suffers from PTSD and severe depression with psychotic symptoms and she found at [12.1] that he will not be able to give a coherent and logical account of himself. At [35] of his decision Judge Boyes expressly accepted this evidence and accorded it weight, finding:

"The previous tribunal in my view was too quick to denigrate the appellant which is apparent by what we now know to be the case with regards to his mental health."

17. Judge Boyes further had regard to a report by the country expert, Chris Smith at [32] and [33] of the decision and accepted his evidence that the imprisonment of the Appellant for four years was entirely plausible and that he would still be of interest to the Indian authorities. This evidence was also not before Judge Baldwin.

18. I have concluded that, whilst the criticisms of the findings of Judge Baldwin could have been more felicitously phrased, Judge Boyes gave clear and sustainable reasons for departing from the findings of Judge Baldwin, in light of different and compelling medical and country expert evidence. I find that Judge Boyes' approach and findings are not contrary to the guidance set out in Devaseelan and the subsequent jurisprudence.

Decision

19. For the reasons set out above, I find no material errors of law in the decision of First tier Tribunal Judge Boyes and I uphold that decision.

Rebecca Chapman
Deputy Upper Tribunal Judge Chapman

2 February 2018