



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08189/2017

THE IMMIGRATION ACTS

Heard at Field House
On 4 June 2019

Decision & Reasons Promulgated
On 03 July 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR S A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Anzani, Counsel instructed by

For the Respondent: Mr Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Sri Lanka of Tamil ethnicity born on 2 September 1986. His appeal came before the Upper Tribunal for consideration of whether or not there was an error of law and in a Decision and Reasons promulgated on 11 April 2019, I found a material error of law in the decision of the First-tier Tribunal by reason of the reliance by the judge on the Appellant's responses in his screening interview absent any or proper consideration of the Appellant's credibility, in light of his confirmed vulnerability due to mental ill-health and PTSD. A copy of that Decision and Reasons is appended.

2. The appeal then came before the Upper Tribunal for hearing on 4 June 2019. The Appellant sought to rely on a skeleton argument drafted by his Counsel, Ms Anzani, and served prior to the hearing and an updated bundle 4 submitted by his solicitors which included in, particular, evidence that he had been referred to the Refugee Support Service for psychological treatment and a psychiatric report by Dr Obuaya, a Consultant Psychiatrist, dated 21 May 2019.
3. At the outset of the hearing, Mr Jarvis on behalf of the Secretary of State submitted that whilst the decision of the First-tier Tribunal had been set aside in its entirety, he had noted that the First-tier Tribunal Judge had accepted much of what the Appellant had said. Mr Jarvis indicated that he had read the contents of bundle 4 and in particular the psychiatric report of Dr Obuaya and he accepted there was fairly extensive multi-disciplinary evidence as to the Appellant's mental health. Mr Jarvis submitted that whilst the medical evidence is not absolutely determinative of the Appellant's claim, that it was difficult for the Secretary of State to argue against the weight of the evidence now available. Mr Jarvis accepted in light of the new medical evidence that the Appellant has produced significant and fairly compelling evidence as to his mindset, both now and historically, and as a consequence the Secretary of State's position is that the Appellant had made out his claim to the lower standard, i.e. that he had been detained and ill-treated in Sri Lanka on account of his perceived political profile. On that basis it was accepted by the Secretary of State that the Appellant would be at risk if returned to Sri Lanka now due to his historic experience of persecution, in light of the country guidance decision in GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319.
4. Ms Anzari was content to accept the concession made by Mr Jarvis and for the appeal to be allowed on the basis that the Appellant has a well-founded fear of persecution in Sri Lanka.

Notice of Decision

5. In light of Mr Jarvis's helpful concession, I find that the Appellant has a well-founded fear of persecution in Sri Lanka on account of his perceived political opinion arising from his Tamil ethnicity and the perception that he was involved previously with the LTTE. As a consequence he falls within the risk categories set out in GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319.
6. It is therefore unnecessary for me to go on to determine whether or not Articles 3 and 8 are engaged given my decision to allow the appeal on refugee protection grounds.

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 his 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 *Rebecca Chapman*

Date 29 June 2019

Deputy Upper Tribunal Judge Chapman



IAC-FH-CK-V1

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

Appeal Number: PA/08189/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 1 April 2019**

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MR S A
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms V Laughton, Counsel, instructed by Tamil Welfare Association
(Romford Road)
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Sri Lanka of Tamil origin. He was born on 2 September 1986. He arrived in the UK on 12 February 2017 and claimed asylum the same day. He was given a screening interview, when he stated that he had worked as a fisherman. He stated that he had not been detained and he had not been accused

of being involved with any armed or violent organisation, group or party although he had been coerced into joining the Tamil Tigers in 2006. He stated that he fled because a friend had been killed for no reason and he was afraid of the CID and military because after his friend's death they had visited his home. He was subsequently interviewed substantively on 26 July 2017, when he said he wished to correct an answer that he had provided at his screening interview, and that was that he had been detained by the government forces.

2. His asylum application was refused in a Decision and Reasons dated 10 August 2017. The Appellant appealed against this decision. His appeal was heard by the First-tier Tribunal and dismissed but following an application to the Upper Tribunal an error of law was found and the appeal was remitted for a hearing *de novo*.
3. The appeal came before Judge of the First-tier Tribunal Kinnell for hearing on 16 November 2018. In a Decision and Reasons promulgated on 10 December 2018, the judge dismissed the appeal, primarily on the basis that he simply did not believe that what the Appellant said was true, because if it was, he would not have stated in his screening interview that he had not been detained. The judge found that the Appellant would not be on any watch list because he has never been detained and so would not be at risk on return to Sri Lanka and that any activity in the UK for the TGTE was negligible and did not demonstrate a significant role in relation to post-conflict Tamil separatism.
4. Permission to appeal to the Upper Tribunal was sought in time on the basis that the judge had erred in his assessment of the Appellant's credibility as the judge failed to properly assess his credibility in light of the finding which was evidenced through the medical reports that the Appellant is a vulnerable witness *cf.* the Presidential Guidance Note No 2 of 2010, the UNHCR Handbook, the Respondent's policy guidance, judicial authority and the article by Dr Stuart Turner and Dr Jane Herlihy on the effects of mental ill health on human memory. It was submitted that the Appellant's psychological needs were such that they were too complex for his local IAPT and the symptoms of PTSD were unaffected despite the prescription of 100mg of Sertraline on a daily basis. The Appellant had been observed to have poor recall and memory problems and there was a risk of completed suicide.
5. It was submitted that the judge had further erred in rejecting the letter from the President of the Fishermen's Cooperative Society dated 17 July 2017 on the basis that the author of the letter did not explain how the matters he states in his letter, i.e., that the Appellant had been detained and tortured, had come to his attention and the witness was not available for cross-examination. It was submitted that this point had never been raised by the Respondent nor was it put to the Appellant at the hearing in order to give him the opportunity to respond, which was procedurally unfair, particularly in light of the fact that the Appellant was vulnerable.
6. Reliance was sought to be placed on the decision in Maheshwaran [2002] EWCA Civ 173 at [4]. Attention was also drawn to the judgment in IA (Afghanistan) [2014] EWCA Civ 450, as to the need for caution when relying on asserted discrepancies

between a screening interview and a full asylum interview to justify making a negative credibility finding, see [17]. It was further submitted that the judge's decision was contrary to the approach set out by the Court of Appeal in Mibanga [2005] EWCA Civ 367 at [19](a) and also contrary to the guidance in AM (Afghanistan) [2017] EWCA Civ 112 per the Senior President at [13], [18](a) and [19](a).

7. It was submitted that the judge had further erred in entirely failing to address the risk arising during the re-documentation process, given that the Appellant is a genuine supporter of Tamil nationalism and would have to disclose this fact whilst being interviewed for an emergency travel document, which would bring him to the attention of the Sri Lankan authorities.
8. Permission to appeal was granted in a decision of Deputy Upper Tribunal Judge Maller dated 21 February 2019 in the following terms:

"It is arguable that the judge did not properly factor the effects of the Appellant's diagnosis of PTSD and moderate depression into his assessment of his evidence nor consider whether the discrepancies resulting in negative credibility findings might be referable to such vulnerability. This was an Appellant who had needs too complex for his Waltham Forest IAPT Talking Therapies.

Permission to appeal is granted on all grounds."

Hearing

9. At the hearing before me, Ms Laughton on behalf of the Appellant sought to rely on the grounds of appeal. She submitted that essentially the judge had treated the failure by the Appellant to refer to being detained during his screening interview as determinative of the appeal, but this failed to take into consideration the Appellant's vulnerability in circumstances where the medical evidence was extremely strong. There was a report from Dr Smith of the Medical Foundation and also from Professor Fox, a consultant psychiatrist. There were also documents as to the therapeutic treatment the Appellant had been receiving. She sought to rely on a skeleton argument that she had prepared dated 29 March 2019. She submitted that Dr Smith's report did not only refer to scarring but also to PTSD and specific symptoms the Appellant had been explaining, e.g. the fact that he shows physical distress by gagging and he had also vomited when anxious.
10. The letter at AB1 to 8 from the Appellant's GP and further evidence shows that whilst the Appellant had been referred to a Talking Therapies organisation, it was considered his needs were too complex, so he has been referred to the Psychology Panel at Thorpe Coombe Hospital. She submitted that there was strong corroborative evidence before the judge, who erred in three key areas: firstly, in failing to have regard to the vulnerable Appellants' guidance; secondly, in failing to consider the corroborative effect of the psychiatric evidence and thirdly, in light of Mibanga [2005] EWCA Civ 367 in finding the Appellant's account not to be credible, absent consideration of the medical evidence.

11. In relation to the first point, Ms Laughton submitted that at [20], the judge accepted that the Appellant was to be treated as a vulnerable witness but essentially, he paid only lip service to that and failed to consider vulnerability as a consideration when assessing his credibility. She submitted that the appeal had essentially been dismissed on the basis of one discrepancy between the screening interview and the Asylum Interview Record, and that was the issue of whether or not the Appellant had been detained. She submitted that it is clear from the Presidential Guidance Note at [10.3], [14] and [15] that there are some kinds of disability which are impacted by trauma and thus, comprehension of questioning can be impaired. She submitted that weight should be given to objective indicators rather than the Appellant's state of mind, cf. IL China at [26], and it was incumbent upon the judge to apply the vulnerable witness guidance.
12. In relation to AM (Afghanistan) [2017] EWCA Civ 112, she submitted that it is clear it is an error of law to fail to have regard to vulnerability when assessing an Appellant's account and expert medical evidence. In finding against the Appellant, the judge failed to take into account that the Appellant has problems with memory and recall, see the Medical Foundation report at [114], where it was found due to fear this was likely to impact on his ability to give clear and cogent answers in his screening interview.
13. In relation to the second point and the failure to consider the corroborative aspect of the medical evidence, whilst at [45], the judge found that the medical evidence stated that the Appellant's physical injuries were consistent, it was not found that those injuries were highly consistent or diagnostic. However, nowhere does the judge bear in mind that the Appellant had been diagnosed with severe PTSD and depression. The Appellant's florid, observable symptoms were seen as corroborative of his past experiences of sexual abuse. However, there was no reference at any point to the Appellant's needs and the fact that they were considered too complex to be dealt with by the local mental health team. She submitted that it was significant that the Appellant had been diagnosed with PTSD. Whilst the judge was not obliged to accept the medical evidence, he was obliged to factor it into the assessment of the Appellant's credibility. Ms Laughton submitted that the judge was also obliged to consider the corroborative aspect of the fact that the Appellant's brother had been granted asylum in Australia and that the Appellant's wife has been questioned by the authorities about him. However, this was not even mentioned.
14. In relation to the third point, and that is the application of the Court of Appeal judgment in Mibanga (*op. cit*) and AM (Afghanistan) (*op. cit*) Ms Laughton submitted that a credibility assessment must be holistic and include an assessment of the medical condition at the time evidence was given.
15. Ms Laughton further sought to challenge the Judge's approach to the letter from the President of the Fishermen's Society. This was dealt with extremely briefly by the judge at [40], who found it attracted little weight. She submitted that this point was not put to the Appellant by the judge or indeed by the Respondent, and in a situation where there is a vulnerable witness, in order to be procedurally fair, the Appellant

needs to have the opportunity to address the points being taken against him, *cf.* Maheshwaran [2002] EWCA Civ 173 at [4] and AM (Sudan) [2015] UKUT 00656 (IAC) at 7(v). Ms Laughton submitted that the Fishermen's Union had secured the Appellant's release from detention, as the letter confirmed, the Appellant had reported to the authorities for six months and that the Appellant's wife had complained about a continued ongoing interest in him.

16. The second point Ms Laughton sought to rely on is that the judge had failed to have regard to judicial guidance in respect of the treatment of the screening interview, *cf.* JA (Afghanistan) at [24], where it was found that the Tribunal should be alert to discrepancies between a screening interview and subsequent evidence, particularly when an interpreter is not present or the person is vulnerable due to age or infirmity. The screening interview is supposed to be a preliminary enquiry and not the full reason why the Appellant is claiming asylum.
17. Ms Laughton submitted the screening interview took place after a long journey. The Appellant vomited during the interview. There was no interpreter physically present and the interview was conducted over the telephone and was not recorded. When the Appellant was interviewed in respect of his substantive interview he immediately corrected the error made in the screening interview at the beginning of his interview. The judge failed to have regard to the jurisprudence on this point and all the relevant factors when determining this issue.
18. In relation to the other ground of appeal, Ms Laughton sought to rely on it as set out. As a member of the TGTE the Appellant would be at risk during the documentation process. He would have to disclose his involvement in the UK and could not be expected to lie.
19. In her submissions, Ms Pal on behalf of the Secretary of State stated that the Appellant was a vulnerable witness, as the judge noted at [20]. The judge also made reference to the medical evidence and attached weight to this in the assessment of credibility, see [33] and [34]. The Appellant also took into account the letter from the President of the Fishermen's Society at [39]. She submitted he properly took into account the Appellant's evidence and the reports to the various medical experts and concluded that the Appellant was not credible. She submitted the judge was entitled to make that finding of fact, bearing in mind the Appellant had just fled from his home country and events were fresh in his mind and was entitled on the basis of the evidence to find that the Appellant had never been detained or ill-treated.
20. Ms Pal submitted the judge was entitled to attach little weight to the Fishermen's letter. Matters were not clearly set out in that letter and the author was not available to be questioned on its contents. The judge assessed the Appellant's activities in the UK and found he could not be said to pose a threat to political beliefs or security in Sri Lanka and was not likely to be perceived as a threat. The judge properly concluded the Appellant was not on a watch list and it was not accepted that he had been detained. Thus, she invited the Upper Tribunal to find that the judge's approach and assessment was correct and should stand.

21. In reply, Ms Laughton submitted that it is well-known that there is a fundamental and qualitative difference between referring to the evidence and factoring it in. Whilst there were other credibility issues raised at [49] and addressed above, the judge makes it quite clear that it is the difference between the screening interview and the subsequent evidence that is decisive. The judge's finding as to the Appellant's *sur place* activities was clearly based on his previous negative credibility finding.

Decision and Reasons

22. I find material errors of law in the decision of First-tier Tribunal Judge Kinnell for the reasons set out in ground 1 of the grounds of appeal and fully expanded upon by Ms Laughton. Whilst the judge was aware that the Appellant should be treated as a vulnerable witness in light of the medical evidence and made reference to this at [20] of the decision and reasons, I find the judge did not properly factor in the Appellant's mental health and vulnerability when assessing the credibility of his account as given in his screening interview, which took place shortly after his arrival in the UK, on the same day.
23. In JA (Afghanistan) [2014] EWCA Civ 450, Lord Justice Moore-Bick held *inter alia* as follows at [24]-[25]:

"24. In the absence of a statutory provision of the kind to be found in section 78 of the Police and Criminal Evidence Act 1984, I do not think that in proceedings of this kind the tribunal has the power to exclude relevant evidence. It does, however, have an obligation to consider with care how much weight is to be attached to it, having regard to the circumstances in which it came into existence. That is particularly important when considering the significance to be attached to answers given in the course of an interview and recorded only by the person asking questions on behalf of the Secretary of State. Such evidence may be entirely reliable, but there is obviously room for mistakes and misunderstandings, even when the person being questioned speaks English fluently. The possibility of error becomes greater when the person being interviewed requires the services of an interpreter, particularly if the interpreter is not physically present. It becomes greater still if the person being interviewed is vulnerable by reason of age or infirmity. The written word acquires a degree of certainty which the spoken word may not command. The "anxious scrutiny" which all claimants for asylum are entitled to expect begins with a careful consideration of the weight that should properly be attached to answers given in their interviews. In the present case the decision-maker would need to bear in mind the age and background of the applicant, his limited command of English and the circumstances under which the initial interview and screening interview took place.

25. In my view the common law principle of fairness which underpins the decision in *Dirshe* requires the tribunal to consider with care the extent to

which reliance can properly be placed on answers given by the appellant in his initial and screening interviews and, as I have already indicated, I do not think that it is a foregone conclusion that the Upper Tribunal would decide that they could properly be given the degree of weight which the First-tier Tribunal gave them."

24. I find that, in this context, the Judge erred in placing such weight on the omission by the Appellant to mention in his screening interview that he had been detained that it proved to be the determinative factor in his decision to dismiss the appeal.
25. The decision and reasons of First tier Tribunal Judge Kinnell contains material errors of law. I set that decision aside and adjourn the appeal for a further hearing before the Upper Tribunal.

Notice of Decision

The appeal is allowed to the extent of being adjourned for a hearing *de novo* before the Upper Tribunal.

Directions

1. The appeal shall be listed for 2 hours 30 minutes on 4 June 2019.
2. A Tamil interpreter will be required.

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 his 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 *Rebecca Chapman*

Date 6 April 2019

Deputy Upper Tribunal Judge Chapman