



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

Appeal Number: AA/10406/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 8 September 2015**

**Decision and Reasons Promulgated
On 25 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**A M
(ANONYMITY DIRECTION MADE)**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Mukit, Counsel, instructed by Kanaga Solicitors
For the respondent: Mr Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka born on 26 April 1985. He appealed against the decision of the respondent on 6 November 2014 to refuse his asylum claim but his appeal was dismissed on asylum, humanitarian protection and human rights grounds and under the Immigration Rules in a decision by First-tier Tribunal Judge Andrew Davies (“the FTTJ”) promulgated on 13 March 2015.
2. The appellant sought permission to appeal and this was granted by First-tier Tribunal Judge Nicholson on 17 April 2015. He noted that “contrary to the judge’s comments at paragraph 23, Dr Martin [the medical expert on scarring] indicated that the scars were not simply ‘consistent’ with infliction by a third party but rather than an intentional cause was the only likely explanation and it was ‘extremely unlikely’ that they had been self-inflicted by the appellant himself. ... Moreover, as ground 1 points out, Dr Martin said that there was ‘not’ (presumably he meant ‘no’) presenting fact making infliction by proxy more than a remote possibility. ... It is arguable in the circumstances that, when accepting Dr Martin’s report at paragraph 23, the judge did not fully appreciated that Dr Martin was not simply saying that

the scars were 'consistent' with infliction by a third party – he said that an intentional cause was the only likely explanation and effectively ruled out self infliction by the appellant himself. It is also arguable that the judge proceeded on the basis that Dr Martin was simply saying that it was scientifically impossible to differentiate proxy injury from torture related injury, without fully appreciating that Dr Martin thought there was no more than a remote possibility of proxy injury.”

3. Thus the appeal came before me today.

Submissions

4. Mr Mukit relied on the detailed grounds of appeal which I summarise as follows:
 - (i) The approach to Dr Martin’s medical report on scarring is flawed; he had not applied the guidance in **KV (scarring – medical evidence) Sri Lanka [2014] UKUT 00230 (IAC)**; material parts of Dr Martin’s opinion had not been taken into account including his opinion that the cause of scarring was consistent with the appellant’s account. This evidence should have been treated as positive to the appellant’s case rather than neutral. Given Dr Martin’s opinion it was not open to the FTTJ to find the scars were caused in ways other than those described by the appellant.
 - (ii) The FTTJ’s approach to the report of Dr Dhumad was flawed in that although the FTTJ accepted the appellant had the symptoms reflective of mental health vulnerabilities, he had not been treated as a vulnerable witness in accordance with the relevant practice direction. This was an error of law (**JL (medical reports – credibility) China [2013] UKUT 145 (IAC)**).
 - (iii) The reasoning at paragraphs 18 and 19 ignored the principle that the actions of perpetrators are not to be measured by the yardstick of reason.
 - (iv) The reasoning ignored material evidence, country information about the use of agents and offended the guidance in **GJ**.
 - (v) No reasons were given for discounting the significance of the appellant’s participation in UK Tamil activities (albeit it was accepted that these activities did not amount to involvement “in politics”)
5. In addition, Mr Mukit made the point that the first occasion when the medical evidence was addressed by the FTTJ was at paragraph 23. This was contrary to the guidance in **Mibanga [2005] EWCA Civ 367**.
6. Mr Avery submitted that the order of considering the evidence, including the medical evidence, was not relevant; the important point was that the FTTJ had taken it into account. It should be considered in the round when making findings of fact.
7. Mr Avery noted Dr Martin’s opinion as set out in the final sentence of paragraph 23 of the FTTJ’s decision, namely that “He makes it clear that scientifically it is impossible to differentiate the proxy injury from the torture related injury”. There was no reasoning given by Dr Martin for his conclusion at page 6 of his report that there is no presenting fact making it more than a remote possibility. The guidance in **KV**, he said, was that it was not possible to differentiate between torture and self-infliction by proxy (SIBP). That was the case here. The medical report of Dr Martin was deficient for failure to justify the assertions made.

8. I invited Mr Avery to make submissions on the second ground, namely the failure of the FTTJ to take into account the vulnerable witness guidance. He submitted that the appellant had been represented at the hearing and this guidance should have been drawn to his attention, notwithstanding the psychiatric report which was before the FTTJ at the time.
9. Mr Mukit submitted that the FTTJ had misconstrued Dr Martin's evidence; Dr Martin had addressed the issues raised by the guidance in **KV** by looking at the presenting facts. There had been no allegation in the reasons for refusal letter that the injuries were SIBP; there was no presenting fact to suppose SIBP was at issue. On clinical analysis he had discounted the alternatives.

The Hearing

10. Having read the papers and heard the parties' submissions I indicated that I would find there were material errors of law in the decision and reasons of the FTTJ, albeit I reserved that decision at the hearing. I invited submission on disposal and both Mr Mukit and Mr Avery were in agreement that the appropriate course was for the matter to be remitted to the First-Tier Tribunal for a fresh hearing by other than FTTJ Andrew Davies.

Decision on Error of Law

11. The FTTJ failed to address the medical evidence (which took the form of reports by Dr Martin on scarring and Dr Dhumad on the appellant's mental health) until paragraph 23 onwards in his decision. This is despite the fact that he made negative credibility findings prior to paragraph 23, including findings at paragraph 20 with regard to the appellant's evidence on the cause of scarring.
12. My attention was drawn to the guidance in **Mibanga [2005] EWCA Civ 367** and I bear in mind that this was distinguished in **S v SSHD [2006] EWCA Civ 1153** where the Court of Appeal said that an error of law only arose in this type of situation where there was artificial separation amounting to a structural failing, and not where there was a mere error of appreciation of the medical evidence; **Mibanga** was distinguished. The Court of Appeal said that **Mibanga** was not to be regarded as laying down a rule of law as to the order in which judicial fact finders were to approach evidential material before them. In that case an explanation as to why the medical evidence did not carry weight had been given by the Immigration Judge.
13. In the present case the FTTJ accepts the evidence of Dr Martin. The FTTJ notes Dr Martin's conclusion recording it thus: "the scars on the back and upper limb are consistent with an intentional beating. ... He makes it clear that scientifically it is impossible to differentiate the proxy injury from the torture related injury." Whilst that is an accurate reflection of Dr Martin's opinion, it is only part of it and the FTTJ has failed to engage with Dr Martin's opinion (on page 6 of his report) with regard to certain of the scars: he says this: "It is important to notice the significant number of scars and the severity of the injuries and although SIBP is a possible cause cannot be discarded [sic] and I considered, there is not [sic] presenting fact making it more than a remote possibility." By these words, Dr Martin has engaged with the guidance in **KV (scarring – medical evidence) Sri Lanka [2014] UKUT 00230 (IAC)**. He has considered all possible causes of the scarring. This is despite the fact that SIBP was not raised in the reasons for refusal letter as a possible cause. **KV** states in the headnote at (iv) that "a lack of correlation between a claimant's account and what is revealed by a medical examination of the scarring may enable a medico-legal report to shed some clinical light on the issue of whether SIBP is a real possibility". In the present case the opinion of Dr Martin is that the relevant scars are "typical of the event described by the

claimant of being intentionally beaten". Dr Martin concluded by saying "overall my expert opinion the scars were typical of intentionally caused injuries and that there is a high likelihood that the injuries were caused by a third party as described by the claimant". It was for the FTTJ to make findings on the basis of all the evidence before him but he did so without engaging with the totality of Dr Martin's material evidence as to causation; nor did he take into account the lack of any positive case by the respondent that the injuries were SIBP. The FTTJ's findings are inadequate insofar as the cause of scarring (which is relevant to the issue of his credibility) is concerned.

14. There is no reference, in the reasoning for the adverse credibility findings at paragraphs 19-21, to Dr Martin's opinion or the opinion of Dr Dhamash, the psychiatric expert. The latter is of particular relevance because the FTTJ accepted his opinion that the appellant was suffering from symptoms relating to Moderate Depressive Episode, Post-Traumatic Stress Disorder and an adjustment disorder. Whilst the latter was triggered by the refusal of his asylum claim, it is nonetheless the case that the appellant should have been treated as a vulnerable witness because of his mental health issues and the lack of appropriate medication (according to the psychiatric report). This was a procedural error. I do not accept the submission of Mr Avery that it was appropriate for the FTTJ to ignore the Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance simply because the vulnerability of the appellant had not been specifically drawn to his attention: the psychiatric evidence made clear the appellant's mental health issues. The failure of the FTTJ to treat the appellant as a vulnerable witness according to that guidance is a procedural error amounting to a material error of law; it undermines the fairness of the proceedings. In particular, at paragraphs 14 and 15, the guidance sets out issues to be considered in relation to determinations.

"14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those who are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.

15. The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind".

The FTTJ did not apply with this guidance.

15. I find that the decision of the FTTJ is fundamentally flawed for failure to take into account the totality of the expert evidence which is material to the issue of the appellant's credibility and to apply the guidance on dealing with vulnerable witnesses. These failures impact on the sustainability of the findings with regard to the appellant's credibility and the risk on return. The decision must be set aside.
16. It was agreed by Mr Mukat and Mr Avery that the appropriate way forward was for the matter to be remitted to the First-tier Tribunal for a fresh hearing.
17. Given my references to the appellant's scarring and mental health issues an anonymity direction is appropriate and I make one accordingly.

Decision

18. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
19. The decision is set aside.
20. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal Courts and Enforcement Act 2007 and Practice Statement 7.2(v), before any judge apart from Judge Andrew Davies.

Signed **A M Black**

Deputy Upper Tribunal Judge A M Black

Anonymity Direction

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of 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. We do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed **A M Black**

Deputy Upper Tribunal Judge A M Black