Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13687/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th November 2018	**On 30 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

NL
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Jegarajah of Counsel, instructed by Greater London Solicitors Limited
For the Respondent: Miss Z Kiss, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge McAll (the judge) of the First-tier Tribunal (the FtT) promulgated on 13th August 2018.

2. The Appellant is a Sri Lankan citizen who arrived in the UK on 31st May 2016 and claimed asylum the following day. His asylum claim was based

upon political opinion, support for the LTTE (Liberation Tigers of Tamil Eelam).

3. The claim for international protection was refused on 7th December 2017, and the appeal heard by the FtT on 27th July 2018.

4. The judge heard evidence from the Appellant and dismissed the appeal on all grounds. The judge found at paragraph 52;

> "The Appellant claims that he fears persecution by the state. I have not found the Appellant to be a credible witness and I am satisfied that the Appellant has fabricated his asylum claim and that he has not been detained and tortured as he claims. The Appellant left Sri Lanka in 2012 and returned back there in 2013 and I am satisfied he has had no problems there since his return and that he can safely return back there and be reunited with his family."

5. The Appellant applied for permission to appeal to the Upper Tribunal and permission was granted by Judge Scott-Baker of the FtT, and I set out the grant of permission in part below;

> "2. The grounds assert that the First-tier Tribunal Judge erred in law in failing to give due weight to the fact that the Appellant's sister died in battle and was commemorated as a LTTE martyr; that a material error of fact had been made in rejecting the sister's history as a risk factor as the Appellant had been deported from France but the Appellant's evidence was that the claim had not been determined; that the judge had erred in law in marginalising the medical report as the evidence was inconsistent; that the judge was flawed in finding that he had no evidence before him to show that LTTE members were rounded up in 2016.
>
> 3. At [29] to [30] the judge considered the Appellant's claim that his sister had fought for the LTTE and had been killed in battle and accepted that she had. However there was no further consideration of any risk to the Appellant by virtue of that factor and further throughout the decision findings have been made in isolation devoid of any reference to the background material.
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> 4. The medical evidence has also arguably been considered in isolation without consideration of the finding of PTSD by the examining doctor. At [33] the judge found that the Appellant's evidence as to his torture was inconsistent and at [46] rejected the Appellant's claim to have been sexually assaulted whilst in detention but gave no reasons for this finding.
>
> 5. Arguably the judgment contains errors of law.
>
> 6. Permission is granted."

6. Following the grant of permission the Respondent did not provide a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008. Directions were subsequently issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision must be set aside.

The Upper Tribunal Hearing

7. Ms Jegarajah relied upon the four grounds upon which permission to appeal had been granted.

8. Firstly it was submitted that the judge had erred by failing to assess the risk to the Appellant caused by him having a sister who had died fighting for the LTTE and was recognised as an LTTE martyr.

9. Secondly it was contended that the judge had erred by making a mistake of fact when considering the asylum claim made by the Appellant in France. It was submitted that the judge had erred by finding that the asylum claim in France had been dismissed.

10. Thirdly it was submitted that the judge had erred by adopting a flawed approach to the medical evidence. The Appellant relied upon an expert medical report prepared by Dr Goldwyn. It was submitted that the judge had marginalised the medical opinion of Dr Goldwyn and had given reasons for rejecting the opinion that the Appellant had been tortured, from paragraph 40 onwards of his decision, well after adverse credibility findings had already been made.

11. It was submitted that the subjective evidence should be considered in the context of the clinical opinion and not after a decision to reject the claim had already been made. Reliance was placed upon Mibanga v SSHD [2005] EWCA Civ 367 in which it was held;

> "Where there is medical evidence corroborative of an Appellant's account of torture or mistreatment, it should be considered as part of the whole package of evidence going to the question of credibility and not simply treated as an add on or separate exercise for subsequent assessment only after a decision on credibility has been reached on the basis of the content of the Appellant's evidence or his performance as a witness."

12. It was submitted that the judge had made no reference to the actual clinical opinion of Dr Goldwyn, who had made findings that scars were "highly consistent", "typical" and "diagnostic of". It was submitted that the error in considering the medical expert report was material, because if the torture claim was accepted, given that the torture occurred significantly post-conflict, this would have been indicative that the Appellant would still be at risk.

13. The fourth Ground of Appeal submitted that the judge had made an error of fact at paragraph 36 in which he found that he had not been directed to any specific reference in the country information to suggest that there was a roundup of former LTTE members taking place in 2016 when the Appellant was arrested. It was submitted that the Appellant's case was not that LTTE members were "rounded up", but that the Appellant was detained in 2016 specifically in respect of his LTTE sister, and he had previously left the country illegally, and previously breached reporting conditions.

14. I then heard submissions on behalf of the Respondent. Miss Kiss submitted that the FtT decision disclosed no material error of law. It was submitted that the judge was entitled not to accept the medical report in its entirety, as the doctor had accepted the Appellant's account at face value, and Miss Kiss questioned whether the doctor had in fact read the documents provided to her.

15. Miss Kiss referred to paragraphs 38, 41 and 43 of the FtT decision, submitting that the judge had made findings in those paragraphs, which were open to him to make on the evidence.

16. Miss Kiss submitted that when read as a whole, the judge had considered all the evidence, and had given adequate reasons for findings made. It was accepted that the judge had erred at paragraph 36 by making reference to a "roundup" of former LTTE members in 2016, as it was accepted that this was not the Appellant's case, but it was submitted that this error was not in any way material.

17. Ms Jegarajah submitted that the decision was flawed and unsafe because the starting point for the judge should have been consideration of the independent evidence of torture, and the judge should then have considered any countervailing credibility factors. It was submitted that the judge had erred by making adverse findings of credibility first, and then considering the medical evidence.

18. It was submitted that the appropriate course would be to set aside the decision of the FtT in its entirety and remit the appeal back to the FtT to be considered afresh.

19. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

20. Dealing with the first Ground of Appeal I find no material error of law. In my view the judge assessed risk on return in the round, and took into account the relevant case law, that being GJ and Others Sri Lanka CG [2013] UKUT 00319 (IAC) and MP (Sri Lanka) v SSHD [2014] EWCA Civ 829. The judge was aware that the Appellant's claim was based upon falling within the risk category set out at paragraph 7(a) of the headnote to GJ. The judge accepted that the Appellant's sister had died fighting for the LTTE, but that finding, without more, would not mean that the Appellant would be at risk. The judge was aware of paragraph 8 of the headnote to GJ which confirms that an individual's past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan government.

21. With reference to the second ground I find no material error of law. The judge at paragraph 23 made a finding that the outcome of the Appellant's French asylum claim "remains unclear". The judge was entitled to note that the Appellant claimed that he and his family felt it was safe for him to

return to Sri Lanka, which to some extent undermined his claim. The judge recorded that the Appellant had also claimed that he was "deported" which is a finding open to him to make on the evidence. It is common ground that the Appellant did make a reference to being "deported".

22. At paragraph 34 the judge sets out the evidence given by the Appellant referring to his asylum claim in France and his return from France to Sri Lanka. At paragraph 35 the judge concludes that the Appellant had provided more than one account of his return to Sri Lanka from France. Again in my view that is a finding open to the judge to make. The Appellant had stated in his witness statement that he was "deported" from France but it is clear that in his oral evidence he stated that he had in fact obtained false documents in order to return back to Sri Lanka from France.

23. I find that there is merit in the third Ground of Appeal. The judge sets out the correct approach at paragraph 32 in which he records that he has considered the medical report and conclusions in the round "with the rest of the Appellant's evidence". In my view the judge errs by not satisfactorily addressing the conclusion in the medical report, and not providing adequate reasons for rejecting that conclusion. I do not accept that there is any merit in the suggestion made that the expert did not read the documents provided to her. It is specifically stated at page 1 of the report that those documents were read. Dr Goldwyn at paragraph 83 specifically states that on reaching her opinions "I have not taken what he has told me at face value".

24. Dr Goldwyn sets out her conclusion at paragraph 113 in the following terms;

> "113. The Istanbul Protocol requires that the examining doctor assesses the overall picture of scarring and mental effects of the alleged torture on the patient. In my professional opinion Mr L's scarring together with the PTSD and depression are diagnostic of the type of torture that Mr L describes."

25. Dr Goldwyn does describe many of the scars as highly consistent with the account given by the Appellant. Highly consistent is defined in the Istanbul Protocol as "the lesion could have been caused by the trauma described, and there are few other possible causes".

26. The conclusion at paragraph 113 is emphatic, in which Dr Goldwyn refers to "diagnostic" which is defined in the Istanbul Protocol as "this appearance could not have been caused in any way other than that described".

27. Therefore Dr Goldwyn has reached a definite conclusion. The judge at paragraph 46 accepts that the Appellant has sustained the injuries outlined by Dr Goldwyn, but finds taking all the evidence in the round, those injuries were not as a result of beatings from the Sri Lankan authorities in the manner outlined by the Appellant. The judge also did

not accept the Appellant's claim to have been sexually assaulted during his detention in 2010.

28. The judge goes on to make reference to other inconsistencies in the evidence given by the Appellant. It is not clear whether the judge accepts the finding in the medical report that the Appellant is suffering from PTSD.

29. In my view the judge does not satisfactorily engage with the conclusion in the medical report that the injuries could not have been caused in any way other than described by the Appellant, and does not satisfactorily explain why that conclusion is rejected.

30. It is of course open to the judge not to accept an expert opinion, but cogent reasons must be given for rejecting that opinion, which in this report is firmly expressed by Dr Goldwyn.

31. I find that this amounts to a material error of law, although it is clear and I acknowledge, that the FtT decision has been prepared with considerable care.

32. I find that the flawed approach to consideration of the conclusion in the medical report, may have infected other credibility findings made by the judge, which means that the decision is unsafe.

33. Dealing with the fourth Ground of Appeal, it is conceded that the judge made an error as outlined in the grounds. This without more is not material, but is relevant when considered together with the flawed approach to the medical evidence.

34. This is an appeal where credibility is very much in issue and I conclude that the decision is unsafe and must be set aside and remade. I have considered paragraph 7 of the Senior President's Practice Statements, and find that it is appropriate to remit the appeal back to the FtT because of the nature and extent of judicial fact-finding that will be necessary in order for this decision to be remade.

35. The appeal will be heard at the Manchester hearing centre and the parties will be advised of the time and date in due course. The appeal is to be heard by an FtT Judge other than Judge McAll.

Notice of Decision

The decision of the FtT discloses a material error of law and is set aside. The appeal is allowed to the extent that it is remitted to the FtT with no findings of fact preserved.

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 Date 21st November 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The Upper Tribunal makes no fee award. The issue of any fee award will need to be considered by the FtT.

Signed Date 21st November 2018

Deputy Upper Tribunal Judge M A Hall