



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00169/2019

THE IMMIGRATION ACTS

Heard at Field House
On 15th August 2019

Decision & Reasons Promulgated
On 4th September 2019

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

TS

(Anonymity Direction Made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muquit, instructed by AP Solicitors

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant seeks, with permission, to challenge the determination of the First Tier Tribunal, promulgated on 20th May 2019, which dismissed the appellant's appeal against the refusal of asylum. The appellant's appeal was also dismissed on humanitarian protection, article 2, 3 and article 8 grounds.
2. The appellant is a national of Sri Lanka born in 1972 who left Sri Lanka (either on his own passport or a fake passport) and travelled to the United Kingdom in 2018 via China whereupon he claimed asylum on 21st June 2018. As a Tamil he claimed he

was helping the LTTE in 1987 or alternatively in 2009. He asserted that he was detained by the Sri Lankan authorities in 2017 and 2018. Owing to political imputation he was afraid to return to Sri Lanka, specifically of the authorities. In his asylum interview the appellant stated that he had a medical condition and struggled to remember everything. He provided photographs of scarring on his body, but the Secretary of State maintained, in his refusal letter of 9th December 2018, that he had not provided any indication of the cause of the scars.

3. The grounds of challenge to the First-tier Tribunal determination set out the following:

The first ground asserted the approach to the appeal was procedurally unfair

- the report from the Consultant Psychiatrist, Dr Dhumad, stated that the appellant could give evidence, but he was depressed, hopeless and his concentration poor. Dr Dhumad concluded that the appellant was suffering from learning difficulties and was vulnerable and required special adjustments in court. The skeleton argument relied upon at the First-tier Tribunal drew attention to the psychiatric report and the applicant's vulnerability. Despite this the Judge did not take the report into account when considering the appellant's account.
- the Judge made no findings on whether he accepted the diagnoses of Dr Dhumad for example PTSD or moderate depressive episode and only considered whether the appellant had poor concentration and learning difficulties. In merely accepting the respondent's assessment of Dr Dhumad's report the Judge failed to consider paragraph 14.5 of the report.
- the Judge did not refer to the conclusion of Dr Dhumad that the PTSD symptoms were closely related to torture experience.
- the Judge made no finding on the conclusion of Dr Dhumad rejecting that the appellant was feigning symptoms.
- Dr Dhumad had expressly stated that he had not recorded everything said to him by the appellant but only those matters that he considered relevant to his assessment.
- torture victims were frequently unable to provide a consistent account of their history and there may well be an explanation for the inability to be consistent other than the lack of credibility.
- the impression given was that the Judge was better placed to assess the appellant's concentration and memory.

The second ground took issue with the assessment of the report of Dr Martin as follows:

- at [150] of the determination the Judge noted that Dr Martin concluded at 6.1 that the scars were typical of the events described by the appellant of being intentionally burnt yet he had not claimed so. The body of his

report (5.5 - 5.7) found the scars were typical of injuries cause by being deliberately beaten by long narrow blunt instruments as claimed. The Judge made no reference to this and failed to read the report as a whole.

The third ground asserted the Judge had failed to make adequate findings:

- the Judge failed to make findings of the appellant's wife's witness statement which corroborated the appellant's claims
- there were no findings on the photographs of the appellant's attendance at demonstrations in Sri Lanka
- there were no findings on whether the appellant's family members were LTTE members
- the Judge failed to apply paragraph 339K of the Immigration Rules such that past persecution was a strong indication of future risk absent good reason.

4. Permission to appeal was granted on the basis that it was arguable that the judge failed to adequately consider the reports of Dr Dhumad and Dr Martin.
5. Mr Muquit at the hearing before me submitted that the Judge had given legally inadequate reasons for discounting the medical reports and had not addressed the appellant's PTSD in terms of his vulnerability. The report was merely side lined. Dr Martin had made an error in his report, but post hearing had accepted this mistake and written a letter. The Judge had not applied *KV v SSHD [2019] UKSC 10* particularly paragraphs 21 to 22. Nor had the Judge applied *AM (Afghanistan) v SSHD*. An assessment of cognitive impairment was not a finding on PTSD. The reports should not have been disregarded.
6. Mr Melvin apologised for the lack a Rule 24 response. He submitted the grounds had little merit. The skeleton argument from Counsel in the First-tier Tribunal had concentrated on the suicide risk in terms of Article 3. The Judge had the vulnerability of the appellant and the medical reports at the forefront of his mind when assessing the credibility of the account. In a lengthy decision the Judge had assessed all of the evidence. The challenge was merely an attempt to reargue the case. The solicitors must have read the report of Dr Martin prior to its submission and the error was not raised at all during the hearing before the First-tier Tribunal. Essentially the Judge considered all of the evidence and found it wanting.

Analysis

7. The skeleton argument made no reference to a typographical error in Dr Dhumad's report merely that the psychiatric report and the medical evidence assisted the claim of the appellant that he had suffered previous past persecution. The main thrust of the skeleton argument asserted that the *GJ and others (war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)* guidelines applied to the appellant and that he was at risk of suicide. *J v SSHD [2005] EWCA Civ 629* and *Y (Sri Lanka) v SSHD [2009] EWCA 362*

were extensively cited. That is not to say that the judge erred in his approach to the medical reports.

8. Prior to his findings the Judge referred to both medical reports the psychiatric report from Dr S Dhumad [79] and noting that the report of Dr A I Martin was a scarring report; he had had regard to both reports. In his assessment the Judge at [110] specifically refers to the consideration of the medical reports as part of the evidence as a whole. He specifically addressed the point at 14.5 of Dr Dhumad's report as I have explained below.
9. The Judge specifically recorded at [81] of his determination that Dr Dhumad assessed the appellant as having a moderate depressive episode and suffering from PTSD symptoms. He was also said to be suffering from borderline learning difficulties. The Judge noted at [82] that the appellant was pronounced by the medical expert as fit to attend and give evidence but that he was described as 'depressed, hopeless and his concentration is poor'. It cannot be argued that the Judge was unaware of the reports and did not have them at the forefront of his mind when making his assessment of the evidence.
10. As recorded by the Judge at [101] of the determination his Counsel accepted that there were inconsistencies in the appellant's evidence; the number of days spent in detention varied

'from one day to fifteen days and to four days in his evidence before the Tribunal. There is also an issue as to whether he was involved with the LTTE in 1987 or 1999. Nor was there any reference to a detention in 2017. He also accepted that there was no mention of any detention during 2018 in his screening interview'.

11. The question was whether the inconsistencies were so fundamental that it undermined the credibility. The Judge noted that Counsel referred to his diagnoses of PTSD and depression which undermined his ability to remember dates correctly.
12. The Judge was fully cognisant of the mental health conditions in the report but nonetheless stated *'when all allowances are made, the appellant has to come across as someone who is telling the truth'*. That discloses no legal error. The Judge appreciated the wider context and Dr Dhumad had indeed confirmed that the appellant was fit to attend and given evidence at court. It was open to the Judge to take into account the appellant's screening interview at which the appellant stated that apart from an occasional headache he had no disabilities and no medical conditions. The Judge also noted that the appellant was able to give coherent answers to the questions asked of him in the screening interview on 21st June 2018. From [115] onwards the Judge carefully analysed the information given in the substantive asylum interview. The Judge noted that the appellant, had been reassured that he would be given an opportunity to clarify responses, and that nothing would be disclosed to the Sri Lankan government or other authorities in that country. The appellant, at the substantive interview, confirmed that he understood everything and had an interpreter. The Judge nevertheless at [119] specifically stated that he took into account that during the interview the appellant responded that he had depression

and bad memory problems. Crucially, the Judge identified that one month prior to his asylum interview the appellant had made a signed asylum statement on 14th October 2018 and set out his claim in some detail but there was ‘no contention in that statement that he suffered any memory loss’. This was the appellant’s own unprompted evidence.

13. Thus, the Judge had factored into his assessment the issues of depression and PTSD but considered the reliability of the account on the appellant’s own evidence in a written statement. The Judge noted at [122] that the account was ‘not complicated’, and fairly concluded that

‘he has given materially contradictory accounts with regard to key events and aspects of his claim. This was particularly so when he was asked about when he first became involved with the LTTE – a core aspect of his claim. His replies have ranged between 1987 and 1997 and he also referred to 2008’.

14. Specifically, the Judge found at [122]

‘these cannot simply be explained as a failure to recollect minor factual details, which might be understandable in the circumstances. He has given materially discrepant accounts in respect of very significant events which he claims occurred during his life in Sri Lanka’.

15. It is evident thus that the Judge did weigh consider the relevant evidence given by the appellant and his credibility in the light of the psychiatric report. It is a matter for the Judge to assess the evidence, which he did in the round and it is not inevitable that the Judge must accept the explanation that the appellant’s inconsistent and contradictory account fell to the psychiatric condition. The Judge carefully highlighted the inconsistencies between the answers given in his witness statement and his asylum interview – during which the appellant was given a break and confirmed that he felt fit and well [AIR Q62].
16. As the Judge pointed out from [129] in relation to the detentions in his screening interview, he stated he was detained in 1989 and that then ‘*the problem seems to have died down a bit but he does not know what will happen in the future*’, in his asylum statement (14th October 2018) he was arrested in June 1989 but in his substantive interview not only did he vary the length of time during which he claimed he was detained from four to fifteen days but also the appellant then claimed he had been detained in 2017 and 2018. During his oral evidence, having been pronounced fit to give evidence by Dr Dhumad, he resiled from the claim that he was detained in 2017. In his screening interview he did not refer at all to his 2018 detention and indeed stated that he had never been detained. Nor did the appellant claim that he encountered repercussions from the Sri Lankan authorities in 2017 [137].
17. Mere disagreement about the weight to be accorded to the evidence, which is a matter for the judge, should not be characterised as an error of law, *Herrera v SSHD* [2018] EWCA Civ 412.

18. The Judge also took into account the context in which the appellant made his asylum application. That could not be ignored when assessing credibility. The appellant had, immediately prior to his asylum claim, made significant efforts to come to the UK in March 2018 for employment. He applied for a six-month visa as a seaman/seafarer. Following checks conducted by the respondent it was revealed that the letter produced by him was bogus and the application refused under paragraph 320 of the Immigration Rules. The appellant claimed, as the Judge recorded that the appellant wished to obtain employment in the UK and that he had used an agent but was not aware that a fraudulent document had been produced. It was only three months after that initial refusal he made his asylum claim.
19. Again at [143] the Judge specifically refers to Dr Dhumad's report and the Judge accepted the respondent's submission that not much detail was recorded by Dr Dhumad to form the basis of a thorough assessment. He had interviewed the appellant for a matter of two hours. Specifically, the assessment of cognitive impairment by Dr Dhumad was not accepted at 14.5 of the medical report. It is a matter for the Judge as to what evidence he accepts. As the Judge stated at [145], Dr Dhumad had not stated upon what basis his view of cognitive impairment was formed

'Nor has he set out the basis for his assertion that the appellant has poor concentration and learning difficulties. There was no reference to any language difficulties during his assessment'.

It was entirely open to the Judge to find a lack of detail in the report; there were no underlying psychometric testing for cognitive impairment and *'no evidence of thought disorder'*. The Judge implicitly factored in the mental health problems, including PTSD and depression, but did not accept, following a careful analysis of the evidence that the report substantiated that the appellant's comprehension was poor, reasoning that the appellant gave

'a considerable amount of detail in respect of his family, including his brother's and sister's responsibilities within the LTTE. He was also able to explain what happened to him in 2008 when he started working for the LTTE' [147].

The Judge assessed that during the hearing the appellant showed *'no signs of poor concentration'* and *'was able to understand the questions and gave appropriate and relevant answers'*. Thus, the Judge having factored in the PTSD and mental health condition, rightly turned his attention to the question of the thought impairment. The Judge gave a sound analysis of the medical report and adequate reasoning of his rejection of the suggestion that the appellant had poor comprehension. The Judge balanced the various factors but did not find the cognitive impairment was adequately assessed or reasoned in the report of Dr Dhumad so as to explain the glaring inconsistencies in the evidence. That deduction was made having already acknowledged the mental health condition, even if it were not apparent in the appellant at the screening interview stage. The appellant had been assessed by Dr Dhumad as fit to give evidence despite his PTSD. Having recorded the diagnosis at [81], the findings of PTSD and depression by Dr Dhumad were implicit in the

findings of the Judge, who proceeded directly to the analysis of the credibility of the evidence. It is not for the Judge to countermand such a diagnosis because he is not a medical professional, and he did not attempt to do so, but it was his task to assess the import of the whole report against the evidence as a whole and that is what the Judge did. It was open to the Judge, on the basis of the report's detail, however, to challenge, the finding of cognitive impairment. Further, that someone has PTSD does not automatically mean that their evidence is unreliable. It was not a question of feigning symptoms because the Judge did not overtly reject the mental health difficulty. He just did not accept that the condition accounted for all the discrepancies disclosed. That Dr Dhumad did not refer to or omitted information from his report which was relayed to him by the appellant cannot form the basis of criticism of the approach to the medical evidence.

20. At the outset of his assessment the Judge stated that he made allowances for the appellant's vulnerability by stating he acknowledged the doctors' reports and noting 'in assessing his evidence I make allowances for nerves, the problem of giving evidence through an interpreter and the difficulty of remembering precisely details of matters that happened some time ago'. I am not persuaded that the Judge ignored the appellant's vulnerability; instead at the start of his assessment reminded himself of the difficulties faced by such an appellant. It is, however, for the Judge to make the assessment of the evidence and that is what he did. Nothing in *AM Afghanistan* [states that the evidence should not be considered holistically, and the authority accepts that the weight to be placed upon factors of vulnerability may differ depending on the matter under appeal. There was no criticism recorded either at the hearing by Counsel in attendance or subsequently by that Counsel of the procedures adopted by the Judge at the hearing.
21. As the Judge pointed out in relation to Dr Izquierdo-Martin's report neither party made submissions thereon. The Judge was criticised in the grounds for failing to refer to the body of the report, rather concentrating on the conclusion and approaching the report contrary to the guidance in *KV* at paragraphs 21 and 22. As held in *KV*:

"21. In para 33 of his judgment, set out in para 19 above, Sales LJ suggested that the references in para 187 of the Istanbul Protocol to the "trauma described" relate only to the mechanism by which the injury is said to have been caused. That is too narrow a construction of the word "trauma". It is clear that in the protocol the word also covers the wider circumstances in which the injury is said to have been sustained. Paragraph 188 of the protocol, set out in para 16 above, which Sales LJ had himself quoted in para 31 of his judgment, guides the expert towards the type of evaluation which is important in assessing "the torture story". Paragraph 105 of the protocol recommends that, in formulating a clinical impression for the purpose of reporting evidence of torture, experts should ask themselves six questions, including whether their findings are consistent with the alleged report of torture and whether the clinical picture suggests a false allegation of torture. Paragraph 122 says:

“The purpose of the written or oral testimony of the physician is to provide expert opinion on the degree to which medical findings correlate with the patient’s allegations of abuse ...”

22. *In another case of alleged torture, namely SA (Somalia) v Secretary of State for the Home Department [2006] EWCA Civ 1302; [2007] Imm AR 1 236, the Court of Appeal, by the judgment of Sir Mark Potter, President of the Family Division, held in paras 27 and 28 that the task for which an asylum-seeker tendered a medical report was to provide “a clear statement as to the consistency of old scars found with the history given ..., directed to the particular injuries said to have occurred as a result of the torture or other ill treatment relied on as evidence of persecution”. In paras 29 and 30 Sir Mark quoted paras 186 and 187 of the Istanbul Protocol and commended them as particularly instructive for those requested to supply medical reports in relation to alleged torture. In RT (medical reports - causation of scarring) Sri Lanka [2008] UKAIT 00009 the Asylum and Immigration Tribunal in para 37 described the SA (Somalia) case as a landmark authority in the identification of the purpose of a medical report in relation to alleged torture and in the indorsement of the Istanbul Protocol.”*

22. Dr Marin’s report did refer to the Istanbul Protocol, but it was a brief report. That the body of the report considered scarring on the back merely in one sentence at 4.3 that is *‘several faint mildly hyper-pigmented linear scars – attributed to being beaten’*. Much of the report was generic in nature. As the expert stated at 4.5 *‘where the lesions are consistent with their attributed cause, the lesion[s] (sic) is nonspecific and there will be many other alternative causes. For such lesions I have not listed every conceivable alternative cause but have outline the most relevant one’*.
23. The doctor proceeded to record that the appellant stated that *all* the scars on arms, back, legs and trunk, were inflicted in the same way and then that they were *‘typical of injuries cause by being unwillingly and deliberately beaten’* with long narrow blunt implements as described by the claimant. There are two points. Bearing in mind the scars were all considered together it is difficult to see how Dr Martin could rule out accidental injuries on all the scars from other causes, such as professional or training (the report did not reflect that the appellant had applied for a post as professional seaman and referred to fishing in his asylum interview), but moreover in his conclusion at 6.2, Dr Martin definitively stated with reference to the scars on the back – for the first time not massing all injuries together - that *‘the scars on the back, are typical of the events described by the claimant of being intentionally burnt’*.
24. Rightly, and without error of law the Judge noted *‘However, as noted by Dr Martin at 3.6, the appellant never claimed to have been burnt. It is thus not clear why he described intentional burning’*. The Judge clearly read the report and at [153] found that having failed to mention his detention of 2018, the appellant had supplied Dr Martin with a fictitious account that the scars emanated from his detention in 2018.
25. The Judge’s assessment did not depart from the guidance in KV. It was open to the Judge to find that the medical findings did not correlate with the account of the appellant. On the evidence before the Judge there was a contradiction in the report.

Dr Martin's report was submitted by the appellant and must have been read prior to provision in evidence. There was a lack of consistency and detail in the report. I note subsequently there was a further letter submitted by Dr Martin attempting to correct his report, but the Judge cannot be criticised for evidence not before him. The criticism that the Judge should have looked at the content of the report is not borne out by a careful reading of the report as I have outlined above. It was the summary and conclusion that gave the interpretation as to the scars on the back.

26. Nothing in the third ground takes the matter forward. The Judge does not have to refer to every piece of evidence *Budhathoki (reasons for decisions)* [2014] UKUT 00341: judges needed to resolve the key conflicts in evidence and explain in clear and brief terms their reasons for preferring one case to the other so parties could understand why they had lost. That is what the judge did. He addressed the evidence of the live witness as being vague. The Judge carefully assessed the claim of the appellant himself in the context of the evidence overall as set out at [156] 'having considered the evidence as a whole' he rejected the appellant's claim that he left Sri Lanka to seek safe haven in the UK, finding instead that he 'came here for employment'. With reference to the photographic evidence the Judge found that the appellant was not perceived as a threat, not registered as a member of the TGTE, not on any computerised stop list and there were no outstanding court orders against him. In terms of his activity in the UK, as recorded, Counsel accepted that these would not be sufficient on their own to found an asylum claim.

27. As set out in *Shizad (sufficiency of reasons: set aside)* [2013] UKUT 00085 (IAC)

"(1) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge.

(2) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her."

28. The grounds do not disclose a material legal error. The reasoning was sound. On the evidence, the conclusions were open to the Judge. He addressed the two medical reports and found the appellant had in fact submitted a deceitful application to achieve his purpose; overall the claim lack credibility. As confirmed at [19] in *UT (Sri Lanka)* [2019] EWCA Civ 1095, mere disagreement with a decision is insufficient and that

"Baroness Hale put it in this way in AH (Sudan) v Secretary of State for the Home Department at [30]:

"Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

29. The determination of the First-tier Tribunal contains no material error of law and the determination will stand. The appeal of AS remains dismissed.

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 23rd August 2019

Helen Rimington

Upper Tribunal Judge Rimington