



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02860/2018

THE IMMIGRATION ACTS

Heard at Field House
On 1st March 2019

Decision & Reasons Promulgated
On 28th March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

[R S]

~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Anzani, of Counsel instruction by L&L Law Solicitors

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sri Lanka whose date of birth is recorded as [~] 1991. On 2 March 2016 he claimed international protection as a refugee on the basis of perceived connection with the LTTE such that were he to be returned to Sri Lanka his life would be at risk from the authorities.
2. On 14 February 2018 the Respondent refused the Appellant's application and he appealed. On 25 October 2018 his appeal was heard by Judge of the First-tier Tribunal Cary, sitting at Taylor House. Judge Cary, in his Decision and Reasons,

which runs to 100 paragraphs, dismissed the appeal both on international protection and on human rights grounds.

3. Not content with that decision, by Notice, dated 22 November 2018, the Appellant sought permission to appeal to the Upper Tribunal. The application made to the First-tier Tribunal, dated 28 November 2018, was refused but a renewed application was made to the Upper Tribunal by Notice dated 13 December 2018 resulting in permission being granted by Upper Tribunal Judge McWilliam. She granted permission on all grounds.
4. It is important to the background of this appeal to note that the Appellant had been diagnosed as suffering from schizophrenia with lack of capacity. The Appellant proceeded with a litigation friend but did not himself give oral evidence at his appeal. Evidence was however received from the litigation friend Mr Suandaralingham together with, and importantly, medical evidence. The principal medical evidence was from Dr Andres Izquierdo-Martin FRCSEd FRCM, Consultant in Emergency Medicine whose report is dated 20 June 2018 who reported on the scarring upon the Appellant's body. There was also a report from Dr Robin Lawrence MA MRCP MRCPsych, General Adult Psychiatrist whose report is dated 24 June 2018 later supplemented by a report dated 11 October 2018.
5. At the core of the Appellant's case, taken from his witness statement dated 22 August 2018, was the contention that his father had been a staunch LTTE supporter whose whereabouts had not been known since 2002. After reports were filed with a view to trying to find the Appellant's father, threats were received from the Sri Lankan authorities. On 3 December 2010 the Appellant, on his case, was arrested and kept in detention for three months during which he suffered ill-treatment at the hands of the authorities before being released on condition that he should report every two weeks. With the help of an agent the Appellant left the country. It was further his case that he was advised by family members to make his way to Canada. He was provided with false documentation. Eventually the Canadian authorities removed the Appellant to Sri Lanka where he arrived on 14 July 2013. The Appellant was arrested by the Sri Lankan authorities and detained for about two and a half years during which time he was tortured. Again, with the use of false documents, on 8 February 2016, he was able to leave Sri Lanka eventually arriving in the United Kingdom where he claimed international protection.
6. Part of the reasoning of Judge Cary in rejecting the Appellant's account was the absence of evidence of the Appellant ever having left the United Kingdom in 2013 and in particular nothing from the Canadian or US authorities supporting the Appellant's contention that he was removed to Sri Lanka as he contended. I refer here to paragraph 62 of the Decision and Reasons.
7. As a general proposition I observe that, "absence of evidence is not evidence of absence." However relevant to the considerations which arise in this appeal is the absence of what a judge might consider to be evidence that could have been easily obtainable. In **TK (Burundi) v SSHD [2009] EWCA Civ 40** the Court of Appeal held

that where there were circumstances in which evidence corroborating the appellant's evidence was easily obtainable, the lack of such evidence must affect the assessment of the appellant's credibility. It followed that where a judge in assessing credibility relied on the fact that there was no independent supporting evidence where there should be and there was no credible account for its absence, he committed no error of law when he relied on that fact for rejecting the account of the appellant.

8. In her submission to me, Ms Anzani accepted that if it were open to Judge Cary to find that the Appellant was not in Sri Lanka in 2013 then the appeal fell away, and it was further accepted that was the starting point therefore.
9. There were six grounds of appeal.

Ground 1: The Judge misdirected himself and made unreasonable and/or irrational findings when assessing Dr Izquierdo-Martin's report and the Appellant's credibility.

10. Dr Izquierdo-Martin reported on the scarring. In his report he identified four scars: one on the back, two on the upper limbs, and one on the lower limbs. He refers to the Istanbul Protocol adopted by the General Assembly of the United Nations on 4 December 2000 (Resolution 55/89) which provided as follows:

"187...For each lesion and for the overall pattern of lesions, the physician should indicate a degree of consistency between it and the attribution given by the patient. The following terms are generally used:

- (a) *Not consistent: The lesion could not have been caused by the trauma described;*
- (b) *Consistent with: The lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;*
- (c) *Highly consistent: The lesion could have been caused by the trauma described, and there are few other possible causes;*
- (d) *Typical of: This is an appearance that is usually found with this type of trauma, but there are other possible causes;*
- (e) *Diagnostic of: This appearance could not have been caused in any other way than that described.*

188...Ultimately, it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story..."

11. Dr Izquierdo-Martin noted to what each of the scars was attributed by the Appellant. Dr Izquierdo-Martin was of the opinion that in respect of three scars the appearance and pattern was *typical* of injuries caused by being unwillingly and deliberately beaten with long narrow blunt implements as described by the Appellant. He went on to consider alternative causes. The remaining scar is described as *consistent* with having been deliberately caused but it was accepted that alternative causes might have been a skin infection or other inflammatory skin condition. The possibility of accidental injury was considered as a possibility. Self-inflicted injury was thought to

be very unlikely in view of the position of the scar. As to the age of the scars, there was no doubt in the opinion of Dr Izquierdo-Martin that they were more than six months old and consistent with being more than two years old.

12. It is of note that the description of, "typical" is the second highest in the assessment of attributions and therefore worthy of considerable respect in the overall assessment of credibility.
13. In the grounds, at paragraph 8, objection is taken to Judge Cary's analysis of Dr Izquierdo-Martin's report and in particular to paragraph 64 of the Decision and Reasons where he stated, "*None of the relevant scars identified by Dr Izquierdo-Martin fall within the diagnostic category referred to in the Protocol.*" Whilst the use of the descriptor "typical", rather than "diagnostic", left open the possibility of other causes, the approach of the judge, it was submitted, was to put the standard of proof too high. It is to be remembered that in this jurisdiction the judge is to consider whether there is a "real risk". It is the "lower standard" that is to be applied.
14. Still further it is submitted that Judge Cary had misdirected himself at paragraph 64 when saying that Dr Izquierdo-Martin's report was of "limited value" when assessing the Appellant's credibility. The submission was that although at paragraph 40 of his Decision and Reasons, Judge Cary referred to the guidance in **JL (Medical reports-credibility) China [2013] UKUT 145 IAC**, he did not properly apply it. Paragraph 32 in the case of **JL** reads as follows:

"Further, to say that it is not for a medical expert to make credibility assessments can amount to a failure to recognise that a medical report, even if it may be of limited value, is evidence independent of the claimant's evidence: see R (on the application of AM). As stated by Rix LJ at [30] of this judgment:

"If an independent expert's findings, expert opinion, and honest belief (no one suggested that her belief was other than honest) are to be refused the status of independent evidence because, as must inevitably happen, to some extent the expert starts with an account from her client and patient, then practically all meaning would be taken from the clearly important policy that, in the absence of very exceptional circumstances suggesting otherwise, independent evidence of torture makes the victim unsuitable for detention. That conclusion is a fortiori where the independent expert is applying the internationally recognised Istanbul Protocol designed for the reporting on and assessment of signs of torture. A requirement of "evidence" is not the same as a requirement of "proof", conclusive or otherwise. Whether evidence amounts to proof, on any particular standards (and the burden and standard of proof in asylum cases are not high) is a matter of weight and assessment"."

15. I observe however that at paragraph 33 in **JL**, not referred to in the grounds, the Upper Tribunal adopted the observations of the Court of Appeal in the case of **SS (Sri Lanka) [2012] EWCA Civ 155 at [21]**:

“Generally speaking, the weight, if any, to be given to expert (or indeed any) evidence is a matter for the trial judge...A judge’s decision not to accept expert evidence does not involve an error of law on his part, provided he approaches that evidence with appropriate care and gives good reasons for his decision.”

16. Criticism is made in the grounds on the basis of the submission that although Dr Izquierdo-Martin had given independent evidence of the cause of the scars, Judge Cary was silent on the point.
17. It was open to Judge Cary to note and take into account that none of the relevant scars fell within, “the diagnostic category”. It was true. Judge Cary was required to evaluate the overall risk to the Appellant. The scarring to the Appellant, and more particularly its causes, were essential to the overall evaluation of the Appellant’s credibility. It is clear, that without more, Dr Izquierdo-Martin had identified a real risk that the scarring had been caused as the Appellant contended. The need to give significant weight to that evidence became all the more important however in the context of an Appellant who might have been suffering from mental illness.
18. A further point taken in the course of submission was that at the end of paragraph 64 Judge Cary had written:

“It is clear that if I find after paying due regard to the medical evidence that the Appellant’s account of how he came to be scarred by torture is implausible I do not have to come up with a definitive alternative account of how the scarring occurred”.
19. That is superficially true, but the assessment of credibility requires an holistic view of the evidence. The judge needed to stand back and look at it from various angles, and apply the lower standard of proof as it applies to a vulnerable appellant (see paragraph 210 of the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status), against background material supportive of the circumstances in which the Appellant contended he sustained his injuries, (and I refer here not only the medical evidence but the material going to the Sri Lankan government’s attitude to those associated with the LTTE) and at least consider the likelihood of alternative causes, even if not specific in the finding of what they were. No one had suggested, for example, that they were self-inflicted.

Ground 2: Irrationally and/or unreasonable rejection of Dr Lawrence’s evidence without adequate reasoning

20. Repeating the submissions in relation to Ground One, it was submitted that Judge Cary erred in the manner in which he approached the psychiatric report of Dr Lawrence and in particular in finding, as he did, at paragraph 58 of the Decision and Reasons that the Appellant’s psychosis could have been caused by other events and not torture.
21. I repeat the observations made above with respect to the treatment of expert evidence in a case such as this.

22. At paragraph 58 of the Decision and Reasons Judge Cary notes that Dr Lawrence in his consideration of other causes goes on to say:

“That would seem to suggest that there could well be other causes for the Appellant’s symptoms other than the treatment he alleges received from the authorities in Sri Lanka particularly as the Appellant was born and brought up in a warzone and did not leave Jaffna until near the end of the hostilities between the authorities and the LTTE. The Appellant told Dr Lawrence that he has seen “terrible things” and that he slept in a bunker and seen at least one dead body. Indeed Dr Lawrence accepts that his reaction to a helicopter flying overhead “was consistent with trauma associated with having lived in a war zone”.”

23. The concern here is that the approach of Judge Cary to the medical evidence was to look at it piecemeal, instead of part of a package of evidence pointing in a particular direction. Whilst true that there were other possible causes and the Appellant had seen terrible things, what was the impact on the evidence of the scarring be “typical” of the attribution given to it by the Appellant taken together with the psychiatric evidence? Add to that the background material, to which I have referred.
24. Judge Cary appears to have had his focus on other causes when the question was whether there was a real risk, having regard to the totality of the evidence, that the injuries contended for were caused in the manner in which the Appellant described?
25. In his first report Dr Lawrence also had regard to the Istanbul Protocol. The differential diagnosis in the first report was that the Appellant was suffering from a psychosis, possibly secondary depression and Post-Traumatic Stress Disorder. In the alternative, there could be schizophrenic psychosis. He was of the view that it was highly unlikely that the Appellant was simulating his symptoms. After considering alternative causes Dr Lawrence came to the view that the explanation given by the Appellant was consistent with symptoms of Post-Traumatic Stress Disorder and consistent with a diagnosis of major depressive episodes which had created a psychosis. The risk of suicide was said to be low. He went on to say that in his view the Appellant did not have capacity, at the time of writing the report, to understand court proceedings and, at the time of writing his report, delusions and hallucinations rendered him unfit to face cross-examination. The “consistency” of the symptoms corroborated the finding that the scarring was “typical” of the manner of attribution.
26. The second report which is in fact a letter dated 11 October 2018, focussed on capacity. In that second letter, Dr Lawrence stated:

“If I may be allowed to express my opinion concerning the credibility of his story, this man has a definite diagnosis of schizophrenia. It is unusual and unlikely and very difficult for anybody with schizophrenia to deliberately dissimulate. Patients with schizophrenia are generally honest, although their account may vary from day to day, these are not deliberate untruths but reflections of the change in mental state.

In the case of this particular man, he was certainly not malingering, it would have been impossible for him to know and to tell me about the symptoms he has which give him a

definite diagnosis of schizophrenia, unless he was experiencing it and his mental state is consistent with the generality of his description of what happened to him in Sri Lanka."

27. Judge Cary noted an apparent unexplained shift in Dr Lawrence's evidence. Judge Cary was critical of Dr Lawrence, and I refer to paragraph 57 of the Decision and Reasons wherein it was observed that the definite diagnosis of schizophrenia followed an earlier report in which it was said there was no firm diagnosis.
28. I am of the view that Judge Cary was too willing to hold against the weight of the evidence as a whole, this apparent shift, which on one view was no shift at all. In a Court of Law or a Tribunal, the facts are often what the judge finds them to be. It is for that reason that a charge of murder may fail in the Crown Court, but the same facts contended for might be established in civil proceedings. To so easily dismiss the substance of this expert's report because of this apparent shift was unfair to the Appellant. If the judge was so concerned by it, he should have considered causing enquiries to be made, especially given the vulnerability of the Appellant being contended for.
29. In expanding upon the submissions made under this ground, Ms Anzani invited me to find that the Judge had erred in stating that, *"The more a diagnosis is dependent on assuming that the account given by the Appellant is to believe, the less likely it is that significant weight will be attached to it."*
30. Whilst Judge Cary was right to go on to say that it was his responsibility to assess the Appellant's credibility in the light of all the evidence including any medical report, it was the case that Dr Lawrence had explained that persons suffering from the Appellant's psychosis were unlikely to be able to make up their symptoms.
31. Whilst Judge Cary was entitled to be concerned about how it was that Dr Lawrence was able to say in his letter of October that there was a definite diagnosis of schizophrenia when in fact that was not the opinion expressed in the earlier report was something which Judge Cary was entitled to observe. However, whether the Appellant was suffering from schizophrenia or a psychosis was still said to be such that the Appellant required the help of the local CMHTT and whatever the symptoms, they were not symptoms, on the evidence which it would have been possible for the Appellant to make up.
32. In granting permission to appeal Upper Tribunal Judge McWilliam said that it was arguably unclear what the Judge made of the evidence of Dr Lawrence and how it impacted on the assessment and credibility. I have already observed that Judge Cary was critical of Dr Lawrence. With respect to Upper Tribunal Judge Mc William, reading the Decision and Reasons as a whole it would appear that Judge Cary gave very little weight to the report of Dr Lawrence.
33. At paragraph 17 of Ms Anzani's Skeleton Argument, she said:

"Dr Lawrence is a Consultant Psychiatrist. His conclusions were not simply based on taking the Appellant's account at face value. His conclusions followed expert

examination and assessment of the Appellant. He applied the Istanbul Protocol. Contrary to what was said by Judge Cary, Dr Lawrence did consider other causes for what has been observed and the possibility of simulation. Dr Lawrence rejected the possibility of simulation of symptoms and provided cogent reasons for the same, it is submitted that greater weight ought to have been attributed to his findings, and/or at the very least, clear reasons given for rejecting them."

34. As to the weight to be given to the report that was generally a matter for Judge Cary, but I agree that effectively to have dispensed with the evidence altogether as appears to have been done by Judge Cary and give it so little weight was not adequately explained. It is clear reading the decision as a whole that Judge Cary has rejected Dr Lawrence's evidence on the basis that he appears to have accepted at face value what the Appellant was saying to him. I do not see how that would significantly affect the expert opinion that the Appellant (i) would not be able to make up his symptoms; (ii) was mentally ill and (iii) had symptoms consistent with their attribution.

Ground 3: Judge Cary's findings at [61] as to ongoing interest in the Appellant's father following the cessation of hostilities are at odds with the objective evidence

35. It was submitted that Judge Cary made an unreasonable finding at paragraph 61 of his determination by rejecting the Appellant's account that the authorities would have been interested in him because of his father's links to the LTTE. It is suggested that Judge Cary did not have sufficient regard to Counsel's skeleton argument wherein it was submitted that the UN Country Evidence highlighted that the Sri Lankan authorities were interested in anyone with links to the LTTE no matter how remote or indirect and that this confirmed the credibility of the Appellant's account to have been arrested after the cessation of the war because of his father's links to the LTTE.
36. Standing alone this ground might be said to amount to no more than a disagreement with findings of fact. Further and importantly the observation of Judge Cary that it made no sense for the Appellant's family to report the Appellant's father's disappearance to the police, if he were connected with the LTTE, becomes a stronger point against the Appellant the more it is established that the Sri Lankan authorities are interested in anyone with a link to the LTTE no matter how remote or indirect. But that evidence was not to be taken in isolation. A question that Judge Cary ought to have asked in the light of the medical evidence was how reliable was the evidence of the Appellant given his mental health issue? What was the core of the claim? It is to be remembered that Dr Lawrence had opined that, "Patients with schizophrenia are generally honest, although their account may vary from day to day, these are not deliberate untruths but reflections of the change in mental state."

Ground 4: Judge Cary erred in misstating the Appellant's evidence

37. The submission under this ground was that Judge Cary had made unreasonable credibility findings by rejecting the credibility of the Appellant's account to have been tortured in Sri Lanka on the basis of a mistake of fact and peripheral matters which did not affect the credibility of the Appellant's core.

38. At paragraph 50 of the Decision and Reasons, Judge Cary noted that in the asylum interview the Appellant had said that his father had disappeared and that his family subsequently moved from Jaffna to Colombo after the army had tried to arrest him in 2008. That is repeated at the end of paragraph 61 (not paragraph 62 as said at paragraph 27 of the Grounds) but in any event that the Appellant was living in Colombo is repeated at paragraph 67. However, it is submitted that at no time did the Appellant say that the family had moved to Colombo. The point is taken that the Judge held against the Appellant at paragraph 67 that the Appellant was contending that he was receiving treatment in Jaffna when his family were living in Colombo. It is contended that the Appellant had never said that his family had moved to Colombo only that he had.
39. There is merit in this point and Ms Isherwood for the Secretary of State did not point to any evidence which justified the finding that the Appellant's family had moved with him to Colombo.

Ground 5: Judge Cary erred in rejecting the Appellant's claim to have left the United Kingdom in 2013

40. Ms Anzani did not expand upon this to any significant degree before me. However, the point is taken that the Appellant would have been subject to administrative removal. It was the Appellant's case that he left using false documents with no leave to enter Canada or Martinique so that any investigation made by the Appellant's representatives would not have been fruitful in any event. It was submitted that the Judges rejection of the Appellant's account of leaving on false documentation was not adequately reasoned.
41. If the Appellant's evidence were approached through the prism of a well person one can see how Judge Cary came to the view he did, but if one applies the lower standard of proof to a person with established mental health issues then it becomes all the more important to be circumspect when approaching the evidence as a whole.

Ground 6: Judge Cary erred in his assessment of risk on return

42. In looking at the overall credibility assessment and the fifth ground I was asked again to have regard to the acceptance of Judge Cary of the submission made by the Presenting Officer at the hearing in the First-tier Tribunal that neither the US nor the Canadian authorities had any biometric details relating to the Appellant. There was said to be no evidence that the Appellant had ever left the United Kingdom in July 2013 as claimed and that his solicitors appear to have made no attempt to verify any part of the journey and made no attempt to liaise with the authorities in Canada or Martinique if that is where the Appellant ultimately ended up before his removal to Sri Lanka. I refer to paragraph 62 of the Decision and Reasons. It is submitted that there would not have been any such evidence available and that is therefore unfair to hold that against the Appellant.

Analysis

43. The attack on the weight given to the medical evidence must be seen in the light of the mental illness of the Appellant. The extent to which the Appellant was mentally ill was therefore an extremely important finding to be made by the Judge. The more the Appellant was mentally ill the more unreliable such evidence as he gave, albeit third-hand, to the Tribunal.
44. Reading the Decision and Reasons it is clear that Judge Cary did not think much of Dr Lawrence's evidence. However, I come to the view that Judge Cary too easily dismissed it and gave it insufficient weight. The evidence was to be read together with the other medical evidence and background material which together offered support to the core of the case being advanced by the Appellant.
45. Whilst I am confident that Judge Cary did not mean to give the impression that he was focussed on why the appeal should be dismissed, rather than asking if there were substantial grounds for believing the Appellant, standing back and reading the Decision and Reasons as a whole, it does come across that way.
46. I come to the view that Judge Cary fell into error by looking at the pieces of evidence in isolation; the one from the other, rather than weighing the evidence in favour of the Appellant as a piece and taking an holistic view when he ought also, having given appropriate (by which I mean more) weight to the medical evidence and due allowance to the medical condition when considering the core of the Appellant's account as advanced on his behalf. What is not clear from reading the Decision and Reasons is the extent to which Judge Cary accepted that the Appellant was ill.
47. That the scarring was found by Dr Izquierdo-Martin to be more than two years old did not necessarily mean, that the injuries were caused in 2013 to 2016 as suggested by the Appellant but the weight of the evidence certainly pointed to there being a real risk of that being the case.
48. For all the reasons set out above, I find that the Decision of Judge Cary cannot stand and must be set aside because of the various errors in the approach to the evidence identified.

Remaking

49. Little is to be gained from remitting this case to the First-tier Tribunal and neither party suggested that I should take that course.
50. I take the view looking at the totality of the evidence that it points very heavily in the Appellant's favour. It will be appreciated that whilst the standard of proof is the lower standard, I find that even if the standard were higher, still I would have found that the Appellant has made out his case. That the scarring was, at least in part typical of what one would expect to find having regard to the Appellant's account from an expert, whose expertise has not been challenged is to be given considerable weight.

51. Contrary to the view of Judge Cary, I take the view that the evidence of Dr Lawrence finding, as he did that the appellant was mentally ill, whether schizophrenia or psychosis was also evidence deserving both of respect and considerable weight.
52. The background material supported the Appellant's account. I accept too that certain aspects of the evidence given by the Appellant might be unreliable but there is medical evidence which explains why that might be the case.
53. On the absence of evidence of the appellant having come into contact with the Canadian, US or authorities of Martinique, I accept that the argument could be made for better evidence on that point but overall, I give the Appellant the benefit of the doubt on that evidence given that I otherwise accept that as to the core of the Appellant's account the evidence is made out.
54. For the avoidance of doubt I find that the Appellant as established that he is known to the authorities in Sri Lanka and that were he to be returned he would be at risk, even at the airport on arrival or soon after arrival. In coming to that view, I have had regard to the guidance in **GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)**.

Notice of Decision

The appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside and remade such that the Appellant's appeal on international protection grounds (as a refugee) is allowed. It necessarily follows that the appeal is allowed also on human rights grounds (Articles 3 and 8)

Signed

Date 25 March 2019

Deputy Upper Tribunal Judge Zucker