



**Upper Tribunal
(Immigration and Asylum Chamber)**
PA/04058/2019

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 24 January 2020**

**Decision & Reasons
Promulgated
On 29 January 2020**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

**ST (SRI LANKA)
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr Chelvan, instructed by MTC & Co Solicitors

For the Respondent: Ms Isherwood, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission granted by a judge of the First-tier Tribunal, against a decision which was issued by Judge Chana on 13 September 2019. By that decision, the judge dismissed the appellant's appeal against the respondent's refusal of his protection and human rights claims.

2. For reasons which will shortly become clear, I need say very little about the appellant's claim. It had essentially three components. The first related to the appellant having fallen under suspicion of assisting the LTTE during the course of his employment with World Vision International. The second aspect of the claim was that the appellant had information about the unlawful sale of body parts from Sri Lanka to India. The third related to his sur place activities in favour of the Transitional Government of Tamil Elam ("TGTE") and protesting publicly against the government of Sri Lanka whilst in the UK.
3. The judge seemingly accepted that the appellant had worked for World Vision but not that he had been involved with the LTTE, or that he had been suspected of any such involvement. She found there to be no merit in the assertion that the appellant would be at risk because of information he had discovered about body parts being sold to India. She concluded that any sur place activities had been undertaken opportunistically and that they would not give rise to any suspicion on the part of the Sri Lankan authorities that the appellant was a threat to the unitary state of Sri Lanka. She dismissed the appeal accordingly.
4. The appellant's solicitors sought and were granted permission on a number of grounds, the first of which related to the judge's assessment of the appellant's credibility. It was said in this ground that the judge had been presented with a medico-legal report which suggested, amongst other things, that the appellant was a vulnerable witness but that the judge had failed to consider the extent to which the conditions described in that report (PTSD and depression) might have accounted for the difficulties in the appellant's account.
5. In her written response to the grounds of appeal, the respondent noted that there was no indication in the judge's decision that the appellant's counsel before the FtT had made any request for the appellant to be treated as a vulnerable witness, nor was there any 'indication that the appellant put forward at the hearing an issue about recalling aspects of his evidence.' In those circumstances, the respondent formally resisted ground one.
6. I explored those grounds of resistance with Ms Isherwood at the start of the hearing. I noted that the judge's Record of Proceedings began with the following:

[Counsel for the appellant]:
A be treated as a Vulnerable Witness based on report.
I tell A to tell me if he needs breaks etc.

7. Ms Isherwood readily accepted, in these circumstances, that the experienced member of the Bar who had represented the appellant in the FtT *had* asked the judge to treat the appellant as a vulnerable witness in light of the medical evidence then available.

8. I moved on to the second point in the respondent's notice under rule 24. There was before the judge a detailed medico legal report prepared by Dr Gallagher of Freedom from Torture. At p19 of that report there is a section entitled 'Interpretation of Psychological Evidence'. Within that section, at [125] of the report, the doctor concluded that the appellant met the diagnostic criteria for a depressive illness. At [127], he concluded that the appellant was suffering from Post-Traumatic Stress Disorder. Having reached those conclusions, there was then a paragraph which I must set out in full:

"[128] He described poor memory for aspects of his experiences in detention in 2008. There are several possible explanations for this which are not mutually exclusive, so it is possible more than one is involved. First it should be noted that in normal healthy individuals temporal memory is poor. As Cameron puts it: "After many years of studies, researchers agree that in remembering we have access to 'very little temporal information'. There is no question that we can remember events in considerable detail and still have only a vague idea of when they happened, or how often, or for how long, or in what order". In addition there are specific aspects of [ST's] situation that may impact on his memory. He is suffering from depression and PTSD both of which impair memory. Also, he said that he experienced episodes of loss of consciousness during torture. He surmised that this was due to blows to the head which, in the absence of any alternative explanation, is most probable. Memory impairment is a recognised consequence of brain trauma and may persist for many years. To determine whether he is experiencing lasting consequences from head injury would require specialist assessment outside my area of expertise. Such testing may be compromised by the confounding effects of his mental health problems, a difficulty acknowledged in the Istanbul protocol, paragraph 249, which states that "Torture can cause physical trauma that leads to various levels of brain impairment... neuropsychological assessment and testing may be the only reliable way of documenting the effects. Frequently the target symptoms for such assessments have significant overlap with the symptomatology arising from PTSD and major depressive disorder."

9. As can be seen, therefore, there was clearly a basis before the FtT on which the appellant had contended that there was an

'issue about recalling his evidence'. The respondent was wrong to contend otherwise in her rule 24 response, as Ms Isherwood again accepted.

10. The consequence of Dr Gallagher's report and the submission made by counsel before the FtT was that the judge was bound to apply the approach described in the Joint Presidential Guidance Note No 2 of 2010 when assessing the credibility of the appellant's account. The material part of that guidance note is at [15], which states as follows:

'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.'

11. The importance of that guidance has been underlined in various authorities, some of which were helpfully placed before me by the appellant. There is the decision of the Upper Tribunal in JL (China) [2013] UKUT 145 (IAC). There is then the important judgment given by the Senior President of Tribunals, with whom Ryder and Gross LJ agreed, in AM (Afghanistan) [2017] EWCA Civ 1123; [2018] 4 WLR 78. Most recently, there is the decision of Lane P and Mr Ockelton V-P in SB (vulnerable adult: credibility) Ghana [2019] UKUT 398 (IAC), the judicial headnote to which is as follows:

"(1) The fact that a judicial fact-finder decides to treat an appellant or witness as a vulnerable adult does not mean that any adverse credibility finding in respect of that person is thereby to be regarded as inherently problematic and thus open to challenge on appeal.

(2) By applying the Joint Presidential Guidance Note No 2 of 2010, two aims are achieved. First, the judicial fact-finder will ensure the best practicable conditions for the person concerned to give their evidence. Secondly, the vulnerability will also be taken into account when assessing the credibility of that evidence.

(3) The Guidance makes it plain that it is for the judicial fact-finder to determine the relationship between the vulnerability and the evidence that is adduced."

12. It is unfortunately very clear, as was accepted by Ms Isherwood, that the judge did not adopt the correct approach to the medical evidence. She did not consider whether, in light of counsel's submission at the start of the hearing and the medical evidence upon which it was based, whether the appellant was a vulnerable witness. And she did not consider, if so, whether there was a relationship between that vulnerability and the difficulties with the evidence that was adduced. What she did, instead, was to note that there were extensive difficulties with the consistency and plausibility of that account which caused her to have 'grave doubts' about the truthfulness of the same. That might have been the case, but the observations made by Dr Gallagher at [128] of his detailed report provided the prism through which those difficulties fell to be considered. The judge erred in law in failing to look through that prism. That failure represented an error of law for the reasons explained in the authorities I have set out above and tainted the FtT's assessment of credibility as a whole.
13. I should note that the judge did not overlook the medical evidence. This is not a case in which the expert evidence was simply ignored, and it is only fair to the judge that I should observe that there is a section of her decision which is addressed to that report. At [48], the judge stated that the appellant had 'provided a medicolegal report to demonstrate the torture that he claims that he experienced from the authorities in Sr Lanka.' The judge then proceeded, over the course of [48]-[55], to analyse what was said by Dr Gallagher about the appellant's physical and mental state. Unfortunately, it is clear that the judge's focus in these paragraphs was on the extent to which the report *supported* the appellant's account of events in Sri Lanka. The judge was plainly alive to the point made in Mibanga [2005] INLR 377 and subsequent authorities, which is that the presence of scars and mental health conditions such as PTSD may lend support the account given by an asylum seeker. What she was clearly not alive to was the altogether separate question posed by [15] of the Joint Presidential Guidance, which is the extent to which the vulnerability described in the report might serve to explain the difficulties in the account given to the respondent or the Tribunal. That separate question was not considered at all by the judge.
14. Ms Isherwood accepted, in the circumstances, that the decision could not stand. That concession was plainly correct and I shall so order.
15. As to relief, Ms Isherwood was neutral. For his part, counsel for the appellant initially submitted (at length) that the appropriate

course was for the matter to be retained in the Upper Tribunal and to be designated as suitable for country guidance on sur place activities.

16. I do not propose to rehearse the detailed submissions made by counsel in support of that submission. Although I accept that there is clearly a need for country guidance on the question of sur place activities in Sri Lankan asylum claims (particularly TGTE activities), I come to the clear conclusion that this case is not a suitable vehicle for the same. The reasons for that conclusion should be clear from the above. The appellant's protection claim comprises the three elements I have set out above. As a result of the conclusions I have reached above, there are now no findings in respect of the first two elements. Counsel for the appellant might be correct in his submission that there is little room for doubt about the appellant's sur place activities but the risk arising from those activities cannot sensibly be considered in a vacuum. There must be proper findings made about the whole of the appellant's claim before detailed consideration can be given to the country situation to which the appellant can be returned.
17. Undeterred by that observation, counsel sought to submit that the Upper Tribunal could 'stagger' its assessment of the appellant's case, by hearing his evidence and making findings of fact and then, at a separate hearing, giving detailed consideration to the country situation with a view to giving country guidance. That submission was unmeritorious for two reasons. Firstly, and most importantly, if (as I accept to be the case) there is a need for country guidance on the sur place question, that aim is best achieved expeditiously by selecting a case which does not need to undergo such a 'staggered' assessment, in which the findings of fact are already settled. Using this case as a vehicle would be likely to prolong, rather than to expedite, the issuance of new guidance on this important issue. Secondly, the cost to the public purse of having two hearings in the Upper Tribunal would be greater.
18. In the circumstances, I indicated to counsel that the appeal would not be put forward as suitable for country guidance. He asked for further time to take instructions on the relief sought in those circumstances, which I duly gave. In writing, very shortly after the hearing, he indicated to me that it was the appellant's request that the matter should be remitted to the First-tier Tribunal to be heard de novo by a judge other than Judge Chana. Having reminded myself of the terms of the Practice Statement, and considering the extent of the findings now required, I

consider that to be the appropriate course and I shall so order. I do so without objection from the respondent.

Notice of Decision

The decision of the FtT is set aside in its entirety. The appeal is remitted to the FtT for hearing de novo before a judge other than Judge Chana.

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 their 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.



MARK BLUNDELL
Judge of the Upper Tribunal (IAC)