Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00163/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Sent**
On : 23 July 2013	**On : 25 July 2013**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muquit, instructed by K Ravi Solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Sri Lanka born on 3 October 1975. He left Sri Lanka and arrived in the United Kingdom on 10 November 2010, together with his daughter, with a student dependant visa issued on 25 October 2011 and valid until 17 October 2011. He joined his wife, who had entered the United Kingdom on 16 January 2010 with leave to enter as a student. The appellant

claimed asylum on 14 October 2011, with his wife and daughter as his dependants, and was interviewed on 14 November 2011. His claim was refused on 14 December 2011 and a decision was made by the respondent on the same day to remove him from the United Kingdom. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal by Judge Emerton on 3 February 2012 and was dismissed. Permission to appeal to the Upper Tribunal was granted on 26 March 2012. At an error of law hearing on 6 July 2012, Deputy Upper Tribunal Judge Birrell and I found that Judge Emerton had made errors of law in his decision such that the entire decision had to be set aside and re-made by the Upper Tribunal.

The Appellant's claim

2. The basis of the appellant's claim is that he fears persecution on return to Sri Lanka as a result of his previous involvement with the LTTE. He claims to have been forced to join the LTTE in 2002 and to have been trained by them and then sent to work from time to time as a border guard. From April 2006 until the end of 2008 he worked at Kilinochchi hospital in the LTTE medical ward looking after injured people. At the same time he was working as a laboratory assistant in a government school. He married his wife in August 2006. In June 2008 he went to the government controlled area and was arrested by the army police in Kandy on 9 June 2008. He was taken to court the following day and from there sent to prison, where he was held for one week and ill-treated. He was released through the court on 16 June 2008 when his uncle bribed a CID officer. He then returned to Kilinochchi to the hospital where he was living. At the end of 2008 he moved with the medical department to Vattakachchi, as the army were advancing on Kilinochchi, and he then moved to Thiramapuram and then to Visuamadu. On 20 February 2009 he surrendered to the army and was taken to an IDP camp in Vavuniya. He remained there for three days without registering and managed to escape. He stayed in Velikulam for one week. He feared being arrested because his ID card showed that he was from Kilinochchi and so he went to Colombo where his brother was living. He stayed in the house of his brother's friend, a Muslim, who assisted him in obtaining his passport. On 24 June 2010 he was identified by someone and was captured by the CID. He was detained for two months. During the first month he was questioned and beaten until he admitted to being LTTE and signed a document. He was released on 21 August 2010 when his brother and uncle paid a bribe and he stayed in Colombo until he came to the United Kingdom. On two occasions CID officers came looking for him. On 11 November 2010 the Muslim man took him to the airport and assisted him leaving the country. He joined his wife whom he had sent to the United Kingdom in January 2010.

3. The respondent, in refusing the claim, noted discrepancies in the appellant's evidence and, on that basis, and in view of the ease with which he managed to leave Sri Lanka, did not accept that he had been arrested, detained and tortured. The respondent did not accept that the appellant was living in Colombo when he made his visa application and considered his delay in claiming asylum undermined his credibility further. It was not accepted that

he would be at any risk on return to Sri Lanka or that his removal would breach his human rights.

4. For his appeal, the appellant produced the photographs of his scars from torture, as previously presented to the respondent when interviewed, together with a medical report on the scars from Mr Andres Martin, Consultant in Emergency Medicine. Both he and his wife gave oral evidence before the judge.

5. In his determination, Judge Emerton referred to the medical report and concluded that the evidence from the doctor was "equivocal", as it was not consistent with the torture relied upon by the appellant in his claim. He accepted, from the report, that the scars on the appellant's back were highly consistent with the description of torture, but considered that there was no explanation as to why the scarring was consistent with the time span described, given that the appellant had claimed to have been detained on two occasions, in 2008 and 2010, whilst the doctor had referred only to the appellant's account of ill-treatment in 2010. The judge therefore considered that there was inadequate evidence that the appellant was beaten at the time claimed and, whilst he accepted that the appellant may well have been beaten by the authorities, he did not accept that that was recent and that it post-dated the end of the civil war in May 2009. He did not accept that the appellant was of current interest to the authorities and considered that he would be at no risk on return to Sri Lanka. He accordingly dismissed the appeal on asylum, humanitarian protection and human rights grounds.

6. Permission to appeal against that decision was sought on the grounds that the judge's approach to the medical evidence was unlawful. The doctor was aware of the appellant's claim to have been previously detained in 2008 and his conclusions that the scars were consistent with a detention in 2010 were therefore not equivocal.

7. Permission to appeal was granted on the grounds raised.

8. At the error of law hearing DUTJ Birrell and I found the judge's determination to be materially flawed, for the following reasons:

> "In deciding not to place any material weight upon the medical report, Judge Emerton proceeded on the basis that the medical expert had not been provided by the appellant with complete information about a previous period of detention in 2008. As such, he found that any conclusions specifically attributing the scars on the appellant's body to a period of detention in 2010 were not reliable, having failed to take account of the possibility that the injuries had occurred in 2008. However it appears that Judge Emerton fell into error in his assessment of the information available to the medical expert and did not consider Mr Martin's comment at the beginning of his report, that the history of the report was restricted to those aspects that he considered relevant to the physical findings and that the absence of a reference to an incident did not necessarily mean that it was not described to him. In addition, the instructions from the appellant's solicitors to Mr Martin, which have now been produced to the Tribunal, clearly show that the doctor was made aware of the appellant's claim to have been beaten during his 2008 detention.

> Furthermore, contrary to the Judge's finding at paragraph 24 of his determination, that the appellant gave no description in his interview of being beaten on his back with blunt instruments, the evidence he gave at question 275 did not exclude such a description. As such, his conclusion at paragraph 24, that the medical report was not consistent with the "torture" relied upon by the appellant in his asylum claim, is not one that is sustainable on the basis of the reasoning followed.
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> For these reasons we find that the Judge's assessment of the medical evidence was flawed. As acknowledged by Judge Emerton, the medical report was a key piece of evidence and it was clearly integral to his overall credibility findings. As such, any error he made in assessing the medical evidence infected his overall assessment of the appellant's credibility and was a material one. We find, therefore, that a material error of law has been established and that the Judge's determination cannot stand and must be set aside in its entirety. All matters are to be re-determined afresh."

Appeal hearing and submissions

9. The appeal then came before me on 23 July 2013, by which time there was a new country guidance case, GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319. It was not considered that a panel was required to hear the appeal and a transfer order had been made to that effect.

10. Mr Tarlow initially applied for an adjournment of the hearing on the basis that he had come prepared for an error of law hearing and was unaware that that matter had already been resolved and that the appeal was to be heard again. I gave him some time to read the papers but he did not feel that he had managed to get to grips with the case. Mr Muquit objected to an adjournment on the grounds that it was already more than a year since the error of law had been found and that it was unfair on the appellant not to proceed, particularly as he was paying privately. I advised Mr Tarlow that I was minded to proceed with the appeal, in particular given that he would in any event have had to familiarise himself with the medical report and the appellant's account of detention and torture in preparing for the error of law and ought thus to be prepared to some significant extent. I offered him further time to read through the papers but he advised me that he was ready to proceed.

11. The appellant then gave evidence before me through the official interpreter. He adopted his statement and confirmed the evidence upon which he was relying. When cross-examined by Mr Tarlow he said that he was with Mr Martin for about four hours and he told him about what had happened to him in Sri Lanka. It was the doctor who had taken the photographs that were attached to the report. (Mr Muquit clarified that the original photographs at pages 43 and 44 of the appeal bundle had been produced by the appellant at his asylum interview, whilst the copy photographs attached to the medical report had been taken by the doctor). With regard to activities in the United Kingdom he had attended a commemorative event in Rayners Lane last year, on 18 May 2012, and was also involved in the Heroes Day celebrations on 27 November 2012. He confirmed that he was and remained sympathetic to the LTTE cause.

When re-examined, he said that he had not given any funding to the LTTE since coming to the United Kingdom because he had no one to send the money through.

12. In response to my further enquiries the appellant confirmed that the scarring on his back was from the second detention. He also had scars on his head and other places from being hit. He had scars from the first detention as he was beaten with a pipe and a screw implement was used on his genitals, but the most severe torture occurred on the second occasion. I asked the appellant to clarify how he managed to work for the Sri Lankan government at the same time as working for the LTTE and he explained that he was working full-time for the LTTE but would only have to sign somewhere every month or two months in order to receive his salary from the government. He only managed to do that because the area was under LTTE control. He stopped working as a government laboratory assistant in December 2008, at which time the army were approaching Kilinochchi and they all surrendered.

13. Mr Muquit then sought further clarification about the appellant's work. He said that he started working for the LTTE in 2002 and would be sent to work for the border patrol for a month every three months up until 2006. He also used to dig bunkers and transport injured fighters. In 2006 he started working full-time for the LTTE in their medical department. He did not have any other job apart from working for the LTTE but he still received his salary from the government job as he would go to sign, under orders from the LTTE. He had been appointed to that job by the Sri Lankan state assembly in 1998 but up until December 2008 the Tigers controlled the area and so it was effectively a job controlled by the LTTE. He was arrested in June 2008 when returning back to Kilinochchi and held for one week, following which he resumed his work for the LTTE as he had no other choice.

14. The appellant's wife then gave her evidence. She adopted her statement and, in cross-examination, confirmed that she met the appellant in Vanni in 2004 and married him on 31 August 2006. He was a laboratory assistant in a government school in Kilinochchi, Vanni, and a member of the LTTE. She was not a member herself but she helped them out. Her husband worked as a border guard from around 2002 before they met. He did not receive money from the LTTE but he received a salary from the government. In response to Mr Muquit's re-examination she said that she used to see the appellant a lot after they first met as she was working as a nurse in the Kilinochchi hospital at the time and he was working for the LTTE in their medical section.

15. In response to my further enquiries, the appellant's wife said that he was working as a member of the medical department when they were married and she believed that he stopped working as a border guard in 2004. He continued to receive a salary from the government. When I asked her why the government would pay him a salary for doing nothing she said that the wages only stopped if one of his seniors or other members of staff recorded the fact that he had been dismissed or had not turned up. Otherwise the salary just continued, since everything was under the control of the LTTE. He continued to

get his wages at the time of his first detention but at the time of his second detention they were in hiding and were too scared to go and get his salary.

16. Mr Tarlow then made his submissions. He submitted that the appellant's account was not credible and that, even considering his claim at its highest, he did not fall within the risk factors identified in GJ.

17. Mr Muquit relied on the medical report as confirming the appellant's account of detention and torture and referred also to additional evidence submitted from a Clinical Psychologist in the organisation "Positive", within Nottinghamshire Healthcare Trust. He asked for a positive credibility finding. He submitted that the appellant's account of working for the LTTE but continuing to draw a salary from the government was consistent with the infrastructure of Sri Lanka at the time. He fell within the risk categories in GJ and would be put on a stop list or watch list if returned to Sri Lanka.

Consideration and findings

18. There is no doubt that the appellant's evidence contains discrepancies. However, those discrepancies relate almost exclusively to dates, namely the years when he was detained and the year when he surrendered to the army, and were corrected by the appellant on his own initiative during his interview. Aside from those discrepancies it seems to me that his evidence has remained consistent, throughout his eight to nine hour asylum interview and at both appeal hearings. He has provided a consistent account of two periods of detention, giving consistent evidence as to the circumstances of his arrests, the length of the detention, the reasons for his release and his movements in between and thereafter. His account of his movements leading up to and following his first period of detention, his return to the hospital to continue working for the LTTE, his departure from the hospital with the medical team as a result of the advancing army, his surrender to the army and his short detention in an IDP camp, are all consistent with the background information relating to the country situation at the time.

19. The appellant has also provided a consistent account of his involvement with the LTTE, initially as a border guard and subsequently on a full-time basis in their medical department at Kilinochchi hospital, where he latterly worked with his wife. Although his claim to have been employed as a laboratory assistant in a government school and to have received a salary from the Sri Lankan government appeared to be at odds with his claim to have been working full-time for the LTTE, the explanation that the appellant and his wife offered was consistent and was one that I consider, following my own in-depth enquiries at the hearing, to be a plausible one.

20. Most significant, however, is the medical evidence which I find to be supportive of the appellant's account of his detention. It is not disputed, following that report, and in the light of the photographs showing extensive scarring to his back, that he has been tortured. That was accepted by the First-tier Tribunal. What was not previously accepted, and what the respondent

continues to reject, is the appellant's account of when that torture occurred. However it seems to me that Mr Martin's report provides adequate corroboration of the appellant's account that it occurred during his second detention in 2010. It has now been established, contrary to the First-tier Tribunal's understanding, that Mr Martin had been provided with information about the appellant's ill-treatment during his previous detention. He was therefore aware that the appellant was claiming to have been beaten on both occasions. However, what he had been asked to do was to provide an assessment of the scars and comment on whether they were consistent with the appellant's account. He was not asked to comment on the two periods of detention. His opinion, that the appearance of the scars was consistent with the time span described by the claimant, clearly demonstrates that he found the scars to be consistent with the appellant's own claim that they resulted from torture during a period of detention in 2010.

21. There is, in addition to the evidence previously submitted, further medical evidence referring to the appellant's ill-treatment during his first detention. The appellant had not referred to that previously, although it was not inconsistent with the account he gave at question 125. I have taken that into account as further corroboration of the appellant's claim.

22. In the light of the above, and having heard from the appellant and his wife, both of whom I found to come across as truthful and credible witnesses, I accept that the appellant has presented a genuine account of his experiences in Sri Lanka. As Mr Tarlow acknowledged, much of the reasons for refusal has fallen away with the new country guidance, in particular that relating to the ease with which the appellant was able to leave the country (paragraph 170 of GJ). The refusal letter acknowledged the internal consistency of his evidence but rejected his account to a large extent on the basis of an absence of verification. The reliability of the court document was previously doubted solely on the basis that the appellant's account as whole was not accepted, but I find no reason not to place weight upon it, given my overall findings. Indeed, as Mr Muquit submitted, there was no reason for the appellant to have submitted the document given that the stated outcome of the police investigations did not particularly assist his case. With regard to the discrepancy noted by the respondent in the appellant's account of his whereabouts at the time of his arrest, I see no reason not to accept the explanation he offered and to accept that that was simply a misunderstanding of the question.

23. Having thus accepted that the appellant has provided a credible account of involvement with the LTTE and arrest and detention in Sri Lanka, I turn to the question of risk on return. It was Mr Tarlow's submission that he did not fall within any of the risk factors set out in GJ. However I do not consider that to be the case. I would not go so far as to accept Mr Muquit's suggestion that he would be detained at the airport as a result of his name appearing on a "stop" list. The appellant's evidence was not that there was any outstanding court case or arrest warrant against him and there is no reason to believe that his name would therefore appear on any such list. However I do accept that he falls within the risk profiles identified by the UNHCR and referred to at

paragraph 290 of GJ and that, with regard to the categories identified by the Tribunal themselves, there is a reasonable likelihood that his name would appear on a "watch" list, given his previous level of involvement with the LTTE and the previous interest shown by the Sri Lankan army, both during and after his last detention. As Mr Muquit submitted, such adverse interest would be heightened by the fact that he had not been rehabilitated and that he had spent over two years in the diaspora. I consider it reasonably likely that he would be monitored when he returned to his home area and, given his stated intention to continue to support a separate Tamil state, when taken together with his expression, albeit limited, of such support in the United Kingdom and his previous involvement with the LTTE, there is a reasonable likelihood that he would be perceived to be a threat to the integrity of Sri Lanka and that he would be subjected to persecution as a result.

24. In the circumstances I find that the appellant has been able to demonstrate, to the lower standard of proof, that he would be at risk of persecution if returned to Sri Lanka and his appeal is accordingly allowed on asylum grounds and under Article 3 of the ECHR. As such he is not entitled to humanitarian protection.

DECISION

25. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside. I re-make the decision by allowing the appellant's appeal on asylum and Article 3 human rights grounds.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed

Date

Upper Tribunal Judge Kebede