Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/12736/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th May 2016	**On 3rd June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

VV
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Rothwell, Counsel instructed by Birnberg Peirce & Partners
For the Respondent: Mr. S. Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Robison promulgated on 25 February 2016 in which she dismissed the Appellant's appeal against the Respondent's decision to refuse to grant asylum.

2. As this is an asylum case I have made an anonymity direction, continuing that made in the First-tier Tribunal.

3. Permission to appeal was granted as it was considered arguable that the judge may not have sufficiently factored in that the psychiatrist had other medical reports before him and was not just going on what he had been told by the Appellant.

4. I heard submissions from both representatives, following which I reserved my decision which I set out below with reasons.

Submissions

5. Ms Rothwell relied on the grounds of appeal. She submitted that the judge had not made a clear finding as to whether the Appellant was a vulnerable witness and, if so, whether such vulnerability affected the quality of his evidence. I was referred to paragraph [26] of the case of JL (China) [2013] UKUT 00145 (IAC). It was incumbent upon the judge to apply the guidance. The Appellant was a vulnerable person and to fail to acknowledge this was a material error of law.

6. In relation to the treatment of the medical report of Dr. Dhumad, I was referred to paragraph 10.5 of Dr. Dhumad's report. There had been evidence before Dr. Dhumad that the Appellant had being diagnosed with PTSD by Dr. Wright in January 2015. I was referred to the letter from Dr. Wright dated 30 March 2015 which referred to a diagnosis of PTSD (page 48 of the Appellant's bundle).

7. The screening and asylum interviews had taken place in December 2014, yet the Appellant had not been diagnosed with, or treated for, PTSD until January 2015. The judge had not taken this into account. I was referred to paragraph 17.12 of Dr. Dhumad's report. The judge had placed much weight on the fact that the Appellant had given only the core of his case at interview and had expanded on it in his statement. Dr. Dhumad had said that there would be a difference between the information given at interview and that given in his statement. The Appellant would not have given such a full account to the Respondent as to his own solicitors. She submitted that it was not clear how much time the Appellant had spent with his solicitors. For the judge to rely on the screening and asylum interviews was an error of law and she ought to have taken into account the diagnosis of PTSD. I was referred to paragraph 17.6 of Dr. Dhumad's report which indicated that the Appellant was re-traumatised when he came to the United Kingdom and again when his father was detained, which had affected his PTSD.

8. Ms Rothwell submitted that the judge had not taken into account the reports of Dr. Wright (page 48), Dr. Brady (page 50) or the therapist (page 51). The fact that this evidence had been before Dr. Dhumad had not been taken into account in her assessment of Dr. Dhumad's report. The

judge had found that Dr. Dhumad had believed everything that the Appellant had told him, but in paragraph 17.7 of Dr. Dhumad's report he dealt in detail with the fact that the Appellant could have been fabricating his story. In paragraph 17.8 he stated that it would be inconceivable that an experienced examiner could be so massively deceived by fabrications.

9. The judge had found it difficult to reconcile the Appellant's diaspora activities with his PTSD. She submitted that in other psychiatric reports, medical professionals had often told people in the Appellant's position to get involved with other activities.

10. She raised a further ground of appeal, to which Mr. Kandola did not object, and which I accepted, in relation to the treatment of the Appellant's father's witness statement. This is addressed by the judge in paragraph [94]. She submitted that the judge decided that she could not place weight on this statement because, since the Appellant was not credible, neither was his father. The father's witness statement was detailed, and the decision did not deal with it adequately. She submitted that the judge had made up her mind about the credibility of the Appellant and that of his father prior to taking the father's statement into account. The judge should have looked at this statement alongside the other evidence, but instead she had focused on what evidence the Appellant could have obtained, for example from a lawyer.

11. In reference to the first ground, Mr. Kandola referred me to paragraphs [13], [36], [75]-[78] and [87]. He submitted that the judge was aware that the Appellant should be treated as a vulnerable witness, and was aware of the guidance. However, at paragraph [79], the judge had found that the case turned on credibility owing to the glaring change in the nature of the case between the interview and the witness statement. Paragraph [87] of the decision reflected this radical change to the Appellant's case. He submitted that it was clear from the decision that the judge knew that she had been asked to take the vulnerability of the Appellant into account but found that this did not account for the radical change in the Appellant's case before the Tribunal.

12. In relation to the second ground I was referred to paragraph [35] of the decision. The judge stated that Dr. Dhumad's opinion was corroborated by other medical professionals. It was clear that the judge knew that Dr. Dhumad's report was predicated on the reports of the other medical practitioners. He submitted that the judge did not need to put this under the heading of 'Findings' and it was not incumbent on her to recite all of the evidence. The expert evidence had been considered properly. I was referred to paragraph [91]. Adequate reasons had been given when dealing with the expert report.

13. In relation to the Appellant's father's statement, the judge had acknowledged it in paragraph [94]. She had given two reasons for not accepting it in the context of other concerns. She had noted that other

evidence, for example from a lawyer, could be more objective. In summary he submitted that the grounds were no more than a disagreement with the findings of the judge.

14. In response Ms Rothwell submitted that the judge had not made a finding regarding whether or not the Appellant was a vulnerable witness in accordance with JL. I was referred to paragraph 4.1 of the screening interview where the Appellant had been told not to go into detail. The asylum interview was fairly detailed. Dr. Dhumad had said that it would not be expected that the Appellant would give a full account in an interview situation. The interview had lasted from 1:26pm to 5:10pm and the Appellant had had a headache during this time because of having to give this evidence. She submitted that there was an error of law in dealing with the interview versus the statement.

Error of Law

Ground 1

15. While the judge acknowledges that it has been submitted that the Appellant is a vulnerable witness, for example in paragraphs [13] and [36], there is no clear finding in the "Findings and conclusions" section (paragraph [72] onwards) that the Appellant is a vulnerable witness and that his evidence will be treated differently because of this. The judge mentions the guidance when recording the submissions [36], but there is no indication in the findings that she has taken this guidance into account when considering the evidence of the Appellant.

16. JL states in paragraph [26] that "it is incumbent on a Tribunal judge to apply the guidance given in the Joint Presidential Guidance Note No 2 2010, Child, Vulnerable adult and sensitive appellant guidance." It then quotes paragraphs 14 and 15 of the guidance.

> "14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those who are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
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> 15. 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."

17. JL continues in paragraph [26]: "Whilst in [14] above the focus is on oral evidence, it is clear from [15] and the guidance read as a whole that the

same approach should inform assessment of discrepancies in the written record." In paragraph [27] it refers to the need for the judge to acknowledge whether any differences could be explained by the Appellant being a vulnerable person.

18. It is not clear that what is set out in the Appellant's representative's submissions has been accepted by the judge, and is a finding. It is clear from the decision that the judge has set out the submissions in some detail before moving to her "findings and conclusions". She does not refer back to the submissions in the "findings and conclusions".

19. In paragraph [75] the judge states that the case turns on an assessment of credibility.

> "I was conscious too that Ms Walker has asked, again on the basis of the medical reports, for the appellant to be treated as a vulnerable witness and that no adverse inference should be drawn from his failure to give evidence, and in any event that place [sic] too much weight should be placed on any inconsistencies revealed in the documents lodged."

20. This does not constitute a finding that the judge is treating the Appellant as a vulnerable witness. It paragraph [76] the judge addresses the inconsistencies in the evidence and in paragraph [77] sets out the explanation for these inconsistencies, without making a finding that the explanation accounts for these inconsistencies. The same is the case in paragraph [78].

21. In paragraph [79] the judge states:

> "I considered that, even if I place little weight on what may be described as more minor inconsistencies, at the core of this case is the appellant's claim to have come to the attention of the authorities in 2014 because of his renewed connection with LTTE and specifically with those seeking to lead a revival of the movement."

22. There is no reference in this paragraph to attaching limited or different weight to the inconsistencies because of the Appellant's vulnerabilities. Indeed, at the end of this paragraph, contrary to placing limited weight on these inconsistencies, the judge states:

> "I attach particular weight to these omissions because they go to the heart of the appellant's claim to have come to the authorities' attention in 2014 and in explaining the reasons why he fled".

23. I find that the judge attaches "particular weight" to the omissions without referring to the Appellant's vulnerability, or to the fact that Dr. Dhumad had set out in his report that the Appellant was likely to give more evidence to his own solicitors in a less stressful situation than he would have given at either his screening interview or his asylum interview. "On the basis of my examination of him and what he told me, I am convinced

that he would not be able to face the stress of being asked to give evidence and answer questions, particularly questions about his traumatic experiences in Sri Lanka" (17.12). This is exactly what the Appellant was being asked to do in his asylum interview yet no reference is made to Dr. Dhumad's report. I find the failure of the judge to make any conclusion as to whether or not the Appellant should be treated as a vulnerable witness, and the failure to treat the evidence accordingly, is a material error of law.

Ground 2

24. In relation to the second ground and the treatment of Dr. Dhumad's report, when setting out the submissions of the Appellant's representative, the judge states that Dr. Dhumad's opinion is corroborated by treating practitioners ([35]), but as above, I find that this is a record of the submissions, not a finding. There is no reference in paragraph [91] to the fact that, prior to his interview with the Appellant, Dr. Dhumad had sight of other medical practitioners' reports which had already diagnosed PTSD. The judge states:

> "It appeared that Dr Dhumad did not have the benefit of any medical reports relating to the appellant's physical health, and that his conclusion was based, with the benefit of his expert experience, on what he had been told by the Appellant."

25. I find that as significant as the benefit of any medical reports relating to the Appellant's physical health, are those reports relating to his mental health. These are referred to in paragraph [35], but it cannot be inferred that paragraph [35] has been subsumed into the findings in paragraph [91]. There is no reference to the fact that a diagnosis of PTSD had been made independently some months before Dr. Dhumad's interview.

26. It is clear that the Appellant had given an account to Dr. Dhumad, but this was in the context of Dr. Dhumad being aware that the Appellant had already been diagnosed with PTSD. In paragraphs 17.7 and 17.8 Dr. Dhumad considered whether or not the Appellant could have been fabricating his claim. I find that he did not believe everything that he was told by the Appellant, but examined whether or not what he was being told was because of fabrication by the Appellant before him.

27. I find that the failure to give more weight to the report of Dr. Dhumad given that it had been written not only on the basis of the interview with the Appellant, but also with the benefit of evidence from other medical practitioners, and given that he expressly considered other causes, is a material error of law as it affects the findings as to the Appellant's credibility.

Ground 3

28. I have considered the Appellant's father's witness statement which sets out what had happened since the Appellant left Sri Lanka. I find that

paragraph [94] does not deal adequately with this statement. Instead of considering it in the round, the judge made her finding as to the Appellant's credibility and, simply on the basis that she found the Appellant not to be credible, she found that his father's statement could not be relied on either. I find that the judge should have considered all of the evidence in the round and, instead of finding that the Appellant could have obtained more evidence, she should have taken into account the evidence which was before her. This statement corroborates the Appellant's claim, but no weight is given to it at all on the basis of a credibility finding which is in itself flawed for failure to take into account the vulnerability of the Appellant, and the failure to attach weight to the report of Dr. Dhumad.

29. I have taken account of the Practice Statement dated 10 February 2010, paragraph 7.2. This contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. Given the nature and extent of the fact-finding necessary to enable this appeal to be remade, and having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

Notice of Decision

30. I find that the decision involves the making of a material error of law and I set the decision aside.

31. The appeal is remitted to the First-tier Tribunal for re-hearing.

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.

Signed Date 3 June 2016

Deputy Upper Tribunal Judge Chamberlain