Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06801/2016

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Decision & Reasons Promulgated**
On 25 September 2017	**On 31 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

KN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S. Caseley, Counsel instructed by Migrant Legal Project
For the Respondent: Mr. K. Hibbs, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Woolley, dated 15 January 2017, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse to grant asylum.

2. As this is an asylum appeal, I make an anonymity direction.

3. Permission to appeal was granted as follows:

> "I find that the lengthy grounds to identify properly arguable errors of law, particularly ground 1, 3, 4, 5 and 8, but I grant permission on **all** grounds."

The hearing

4. I heard submissions from both representatives following which I reserved my decision.

Submissions

5. Ms Caseley relied on the grounds of appeal. In relation to ground one she submitted that there had been no suggestion in cross-examination that the Appellant's injuries had been caused in a separate way, namely self-infliction by proxy ("SIBP"). In relation to ground three she referred to the case of AM [2012] EWCA Civ 521.

6. In relation to ground four, at [45] the judge stated that Dr. Battersby had not been provided with the email at C1 of the Respondent's bundle. She submitted that the judge had seen this email as she had seen the reasons for refusal letter where the email was quoted in full. In relation to Dr. Bailey's report, I was referred to [23] of the decision. It was submitted that the opinions of Dr. Battersby and Dr. Bailey concurred. The judge had rejected the Appellant's credibility but Dr. Battersby had undertaken a critical analysis of the Appellant and had not just relied on the Appellant's own evidence. I was referred to page 20 of her report. Consistent with the case of JL (medical reports-credibility) China [2013] UKUT 00145 (IAC) she had observed the Appellant. The judge had accepted that Dr. Battersby was an expert who had complied with the case law and therefore the judge's findings were unsustainable. Dr. Battersby had made a clinical judgment as well as taking into account the Appellant's account. I was referred to paragraph [52] where the judge states "I find that his history is enough to have induced PTSD without any torture". Ms Caseley submitted that it was not the role of the judge to make such a finding.

7. In relation to ground five the judge had made negative inferences from the fact that the Appellant had not provided documentary evidence. It was trite law that there was no expectation on an appellant to have obtained evidence from his persecutors.

8. In relation to ground six concerning the Appellant's entry and exit to Dubai in 2007 and 2008, the judge failed to take into account the guidance when determining that it was plausible that he could have left. Although AN and SS (Tamils – Colombo – risk?) Sri Lanka [2008] UKAIT 00063 had not been promulgated at the time that the Appellant travelled, the evidence contained in the decision related to this time, and indicated that only those who were of more serious interest to the authorities would be stopped.

9. In relation to ground seven, Judge Doran had found that the Appellant was a genuine student, but facts arising since this decision indicated that the Appellant had delayed in travelling on his student visa. Something had gone wrong, and even on the Home Office's case, with reference to the email at C1, the Appellant was not a genuine student if he was not travelling on the correct visa. The judge should have taken that into account.

10. In relation to ground eight it had been argued before the First-tier Tribunal that there was evidence such that the judge could have departed from country guidance case of GJ. The judge rejected the report from Dr. Pedersen. There was compelling evidence regarding a deterioration in the treatment of returnees, either those who were failed asylum seekers, or those who had some LTTE involvement. There were no findings on any part of that evidence. It had been submitted at the First-tier Tribunal that the risk categories should not be construed too narrowly, and Dr. Pedersen's evidence had not been challenged. Given the crucial nature of the evidence in the Appellant's case, the judge should have made findings or referred to the reports. As it was found that he was a failed asylum seeker and a low level supporter of the LTTE, the judge was required to proceed to make findings on the evidence.

11. I was referred to the Freedom From Torture Report, and to paragraph 6.5 of the Respondent's Country Information and Guidance: Tamil separatism which pointed to a different conclusion from GJ. Although the CIG was not referred to in the skeleton before the First-tier Tribunal, Ms Caseley submitted that it had been provided at the hearing. In any event, it was the Respondent's guidance, and the Respondent had a duty to bring it to the attention of the judge. I was referred to the case of UB (Sri Lanka) [2017] EWCA Civ 85.

12. In response Mr. Hibbs submitted that UB had been decided after the First-tier Tribunal hearing. More generally, he submitted that the grounds were an attempt to rehear the case again. The points raised had been considered and the grounds were a mere disagreement with the findings and the weight which had been placed on various parts of the evidence. In relation to the email at C1, whether or not the judge believed this email, its contents were pivotal to the case. If as a factual matter the Appellant's account could not have happened, then anything which was relied on was irrelevant and the case was doomed to fail. If the Appellant was not tortured then the injuries were not received for the reasons given. There had been no request from the Appellant for the airline liaison officer to be produced. This was not expert evidence, but primary evidence. The judge's findings on C1 were central as, if the Appellant had been somewhere else, the events which he had claimed had happened could not have done.

13. In relation to SIBP, ground one missed the point. If the Appellant's account was not credible then the scars were caused by another reason. The reasons for refusal letter and cross-examination pointed to the conclusion that the events could not have happened as claimed because of the evidence at C1. There was a multitude of reasons why the scars could have occurred. The medical evidence indicated burns

which were over six months old, and this was as far as medical evidence could go. Only the Appellant knew how the scars had been caused but it was not as a result of being stopped at the airport in 2009 as the Respondent had shown that this could not have happened as claimed.

14. In relation to ground two, an explanation had been provided regarding redaction. This was not an expert opinion, but was primary evidence. I was referred to [34] and [36]. It was open to the judge to give weight to the email. The case had not been advanced before the First-tier Tribunal that the airline liaison officer was lying. He was not an expert but was relaying what he had seen.

15. In relation to ground three, a doctor was only as good as the information which he had been given. The Appellant may have been scarred, but not on the date indicated by him. The judge agreed that the scarring had occurred, but when and by what means was the issue. The judge had taken on board the medical experts and had considered their evidence, but because of the evidence at C1, it could not be correct that the Appellant had suffered the injuries for the reasons given. It was a matter of weight and assessment, and it was for the Tribunal to assess the evidence and come to an opinion on the credibility of the story.

16. In relation to ground four, Dr. Battersby had had sight of the reasons for refusal letter where the email at C1 was set out but she had not gone into the detail of the reasons for refusal letter and the email. Her report did not reference the email which indicated simply that the Appellant was not where he claimed to be. She had not dealt with this point. It had been accepted in the report that a psychiatrist was not in a position to establish the credibility of a claimant (see [45]). The issue of suicide had never been considered but was then raised as an issue. The judge was entitled to take this into account [45].

17. With reference to [43], the email at C1 had not been put to Dr. Bailey. This showed that the Appellant was not there at the time and place that he said. The burden of proof did not shift to the Respondent to show where the Appellant was. If the Appellant was not credible than these matters all fell away, and it was not for the Respondent to prove a negative.

18. In relation to ground five, this comment of the judge was obiter. Looking at the situation in the round, the judge had not found the Appellant credible and there was no documentary evidence before him. Without more, how could he accept the Appellant's word.

19. I was referred to [49]. The judge had set out the expert evidence [38] to [40]. He had read the case law. He had looked at the case law regarding the evidence, and had correctly applied the case of AAW (expert evidence – weight) Somalia [2015] UT 00673 [40]. The leading nature of questions put to an expert cast a shadow over the expert's evidence.

20. In relation to the sur place claim I was referred to [46]. The judge had considered the evidence in the round. The Appellant's evidence was that he was too busy studying and working, indicating that was a genuine student. I was referred to [47]. There was no material error. The finding that he was a genuine student did not materially affect the decision as the Appellant had not been detained at the airport illegally. Section 8 must be held against the Appellant.

21. In relation to [55] the judge went through the evidence regarding GJ. The Appellant not been at risk when he lived in Sri Lanka. The Appellant would have to show that every failed asylum seeker who was a Tamil would be at risk on return, and the CIG did not state this. The Appellant had never been a member of the LTTE. The Judge could not be held at fault if matters had moved on.

22. The judge had considered the Appellant's travel in 2007 and 2008 in his global conclusions. The Appellant was not stopped, and was not checked. He was willing to take the risk and return. There was nothing preceding the claimed event in July 2009 which caused him to come to the United Kingdom.

23. In response, Ms Caseley submitted that the email at C1 was primary evidence. It stated that the Appellant was denied boarding, no more than that. The Appellant's evidence contradicted this as he said that he had passed boarding procedure. Cross-examination on this evidence was necessary. The Respondent was obliged to cross-examine on SIBP and should have put to the Appellant that the scars were not caused in the way claimed. The Appellant was not cross-examined to the effect that he was making it all up. This was an issue of procedural fairness. Even if the judge had accepted the email and found that the Appellant was denied boarding, the Appellant needed to be cross-examined on where he was. This was very important as it was an unusual case.

24. In relation to risk on return it had been accepted that the Appellant was an LTTE supporter [49]. It was not the case that the judge was assessing the situation for all Tamils, but was the specific case of an LTTE supporter. Even if the judge had not accepted that the Appellant had been detained and tortured, he still needed to consider the risk on return to the Appellant. The judge's findings as to risk did not take into account the background evidence set out in the skeleton argument. The evidence provided by the Appellant consisted of more than Dr. Pedersen's report. There was a great deal of relevant background evidence applicable to someone with the Appellant's profile. The judge had an obligation to give reasons for why the objective evidence was different. This applied even if the email at C1 was accepted.

Error of law decision

Ground one: failure to take into account the fact that the Appellant had not been cross-examined on any alternative cause for the scarring

25. The judge states at [51]:

"I have accepted that he does have scarring to his back which could not have been self-inflicted. Although I have found that Dr Bailey was under no obligation to consider SIBP on the basis of the information that he was given, I have found that he was not given the whole picture. Under KV (scarring) I am not obliged to make any definitive finding as to whether scarring is the result of SIBP (Para 295). I am obliged however, to say whether I think that SIBP is a real possibility. I find that there are several presenting features of the case that make SIBP a real possibility. I have not accepted that the appellant is credible in his account of the 4th July 2009 or of being held in detention and tortured thereafter. It follows that I cannot accept that the scarring happened then. The appellant has given no evidence of any other encounter with the Sri Lankan authorities and there is therefore no other occasion he can point to as to when the scarring took place. In summary, I find that the appellant is not credible in his account of being tortured at the hands of the Sri Lankan authorities in July 2009, or indeed at any time. He did not receive the scars on his back in the way he claims."

26. The grounds referred to the case of RR (Challenging Evidence) Sri Lanka [2010] UKUT 274 (IAC). The headnote to RR states:

"(3) If the Appellant or expert chooses to give oral evidence then the Respondent's cross examination should fearlessly and clearly include the suggesting to the Appellant or expert that, for example, an injury was not caused in the way alleged by the Appellant but by a different mechanism.

(4) If the Respondent does not put its case clearly it may well be very difficult for the Tribunal to decide against an Appellant who has not been given an opportunity to deal with the Respondent's concern."

27. It was not submitted on behalf of the Respondent that the Appellant had been cross-examined on an alternative cause for the scarring and I find that it is agreed that he was not. The headnote to RR is clear that *"the Respondent's cross examination should fearlessly and clearly include the suggesting to the Appellant or expert that, for example, an injury was not caused in the way alleged by the Appellant but by a different mechanism."*

28. The reasons for refusal letter states at [17] "It is considered that given that you did not present yourself for examination by Dr Bailey until five years after the alleged event, self infliction is more than a fanciful possibility". The judge makes a finding that goes further than this when he states that SIBP is a "real possibility". He further finds that the Appellant "did not receive the scars on his back in the way he claims."

29. I have carefully considered, with reference to paragraph (4) of the headnote to RR, whether the Appellant had been given an opportunity to deal with the Respondent's concerns, notwithstanding my finding that he was not cross-examined on the possibility of SIBP. I find that the Appellant was aware of the Respondent's case. It was set out in the reasons for refusal letter that the Respondent did not believe that the Appellant was where he claimed to have been on 4 July 2009. This was by

reference to the email at C1. The text of the email was set out in the reasons for refusal letter as follows:

"On 04/07/2009 the passenger was denied boarding on Sri Lankan Airlines Flight UL 501 from Colombo to London Heathrow by the local Airline Liaison Officer.

When questioned, the passenger was unable to confirm details of his local educational certificates or when he followed those courses.

He was advised to call over at the British High Commission for further debriefing.

However, failed to show up and it was later revealed that he boarded a different flight to UK on 18/07/2009."

30. The Appellant's case is that he was detained at the airport by the Sri Lankan authorities after clearing passport control on 4 July 2009, and tortured in detention. The judge sums up the evidence as follows:

"The email says that he was denied boarding while the Appellant says that he was in the departure lounge when he was called down to the CID office. He does not mention that his educational certificates were checked by any Liaison officer, but instead says that after his documents were checked that he was cleared for boarding. He does not mention any advice to call in at the BHC for further debriefing. The email, if it can be accepted, is extremely damaging to the Appellant's case. It would place his whole account of events on the 4th July 2009 at Colombo airport in doubt. The question arises as to whether I can accept this email as evidence."

31. At [36] he concludes in relation to the email:

"The email is from a reputable and official source and is referable to the Appellant by the use of the relevant VA number. It provides a clear account of what happened on the 4th July 2009 and I find must have been based on actual events. I find that I can place reliance on the email dated 10th September 2013 when assessing the credibility of the Appellant's account of the events in July 2009."

32. However, the email does not indicate where the Appellant was when boarding was denied and I find that, even if weight is given to this email, it cannot in and of itself lead to a finding that the Appellant's scarring was caused other than by the Appellant's own account. It was open to the judge to decide the weight to be given to this evidence, but given that the email does not go so far itself as to allege SIBP, reliance on the email does not negate the need for the alternative cause of scarring to be put to the Appellant.

33. The judge found that the Appellant's claim to have been detained on 4 July 2009 was not credible as he placed weight on this email. However, he did not consider the Appellant's own account in coming to this finding. There is no consideration in the

decision of the Appellant's own evidence in his witness statement or his oral evidence. Clearly there is no consideration of the Appellant's response to the suggestion that the scarring was caused by SIBP as this was not put to him. I find that the Respondent's case was not put clearly enough in the reasons for refusal letter to negate the need for cross-examination on SIBP.

34. I accept that this is an unusual case. The Appellant was aware that the Respondent's case was that he was not where he said he was, and he gave an account which directly contradicted the Respondent's evidence. He provided medical evidence to corroborate his claim. The judge was entitled to give weight to the email, and while I find that the possibility of SIBP stems from the Respondent's evidence in the email, I find that for the judge to make a finding that it was a "real possibility" he should have considered the Appellant's own response to this suggestion before coming to this finding. The Appellant was not clearly and openly cross examined on SIBP being a possible cause.

35. With reference to the case of RR, I find that the judge erred in making a finding that SIPB was a "real possibility" in circumstances when this had not been put to the Appellant in cross-examination. I find that this was a material error of law.

36. 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 that there was a procedural unfairness, having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

37. Given that I have found that the decision involves a material error of law which means that the decision must be set aside, there is no need for me to consider the further grounds of appeal.

Notice of Decision

38. The decision involves the making of a material error of law and I set the decision aside.

39. The appeal is remitted to the First-tier Tribunal for rehearing.

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 30 October 2017

Deputy Upper Tribunal Judge Chamberlain