Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/14080/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 July 2017	**On 3 August 2017**

Before

Deputy Upper Tribunal Judge MANUELL

Between
Mr HAJARUPAN KONAMALAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani, Counsel
(instructed by Duncan Lewis & Co, Solicitors)
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by First-tier Tribunal Judge Landes on 8 June 2017 against the decision and reasons of First-tier Tribunal Judge NMK Lawrence who had dismissed the protection and human rights appeal of the Appellant. The decision and reasons was promulgated on 12 May 2017.

2. The Appellant is a national of Sri Lanka, born there on 30 January 1980. He entered the United Kingdom over 15 years ago, on 22 February 2002, without leave and claimed asylum. In the claim he advanced at that time he stated that he and his brother had been forced to assist the LTTE against their will, to avoid compulsory recruitment. He said that in September 2001, while transporting food for the LTTE, his brother had been killed by the Sri Lankan army and the Appellant had been detained for one month. At Thoppur Army camp the Appellant had been beaten and tortured. He was left with scarring to his legs and headaches from inhalation of pepper smoke. He was afraid of the LTTE and of the Army. His father paid a people smuggler to arrange the Appellant's departure and the Appellant travelled overland to the United Kingdom.

3. The Appellant's asylum claim was refused by the Respondent on 11 April 2002 and 12 December 2002, on credibility grounds. The Appellant's appeal was heard at Birmingham in the First-tier Tribunal's predecessor, the IAA, on 7 March 2003. The Appellant was represented by counsel. A full bundle had been filed and served, which included country background materials and a witness statement made by the Appellant dated 28 February 2003, i.e., a few days prior to the appeal hearing. No Home Office Presenting Officer appeared. The Appellant failed to attend. The judge refused an adjournment and the appeal proceeded by way of submissions.

4. The appeal was dismissed in a detailed determination promulgated on 7 April 2017. The judge found that the Appellant was not a reliable witness. The judge noted that the Appellant "disavows any sympathy or support for the LTTE: see [12] of the determination. At [13] the judge

found that "The Appellant is contradictory as to what medical advice and/or treatment he sought or received. He has asserted that he has been left following his torture by the army with physical injuries and psychological trauma but he has produced no medical report to substantiate these allegations, although he is aware of the existence of a medical centre in Birmingham." The judge also examined the Appellant's claims at their highest and found that the 2002 ceasefire was holding and that he was safe to return in any event. His appeal rights were exhausted as at 23 April 2003.

5. On 17 February 2010 the Home Office's Case Resolution Directorate wrote to the Appellant. On 24 May 2010 his solicitors responded, requesting leave to remain on his behalf. On 10 January 2014 that was refused. On 22 May 2014 further representations were made, which were refused on 1 August 2014. On 1 December 2014 the Appellant's solicitors applied for judicial review, which application was refused on 30 July 2015.

6. On 11 December 2015, the Appellant was convicted of assault occasioning actual bodily harm. He was sentenced to 15 months imprisonment. On 29 December 2015 the Appellant was served with notice of the Secretary of State for the Home Department's intention to make a deportation order against him.

7. On 7 January 2016 his solicitors made further representations. This time it was claimed that the Appellant would face persecution because he had taken part in in public protests against the Sri Lankan government and had participated in operations conducted by the LTTE. He had been in the United Kingdom for 14 years and had no contact with his family who had left Sri Lanka. The further representations were refused, on credibility grounds and with reference (as to the claim of public protests in the United Kingdom), to GJ (Sri Lanka) CG [2013] UKUT 00319 (IAC). The Appellant's crime excluded him from humanitarian protection: paragraph 339D(iii) of the Immigration Rules. It was held that the Appellant had not made a fresh claim: paragraph 353 of the Immigration Rules. The Appellant's human rights claim was certified. A deportation order was made on 30 March 2016.

8. Judicial review proceedings followed. These were compromised by the Respondent, who granted the Appellant an "in country" right of appeal. His protection claim in its final form following the consent order made on 4 October 2016 was refused in a reasons for refusal letter dated 7 December 2016, to which further reference will be made as necessary. That decision was the subject of the appeal which came before Judge NMK Lawrence.

9. Permission to appeal was granted because it was considered that the judge had arguably erred in his approach to the (numerous) medical reports, which he had given inadequate reasons for giving little or no weight to, as the case may be. It was also arguable that the judge had failed to have regard to relevant evidence, such as the Appellant's claimed diaspora activity and the country expert report. The various other grounds raised were discouraged.

10. Standard directions were made by the tribunal. A rule 24 notice in letter form dated 27 June 2017 opposing the onwards appeal was filed by the Respondent.

Submissions

11. Mr Bandegani for the Appellant relied on the grounds earlier submitted and the grant of permission to appeal, including the grounds which had been discouraged. He submitted that the judge should have permitted the Appellant and his expert medical witnesses the opportunity to address the concerns expressed in the determination. That had affected the fairness of the hearing. The medical evidence had not been challenged by the Home Office and there were no alternative medical reports. If the judge had medical expertise of some kind then he should have declared it to the parties. The reasons which the judge gave for giving little weight to Dr Kane's diagnosis were inadequate. As a GP there was the ability to make a mental health assessment and the judge was wrong to suggest otherwise.

12. The judge had not applied anxious scrutiny to the evidence and had failed to look at the materials produced. The judge's appraisal of the evidence had not been rational.

The judge had failed to note that the Secretary of State for the Home Department had not applied her own policy as to evidence of torture. No submissions as to the Appellant's adverse credibility had been advanced by the Respondent at the hearing. The expert country report of Dr Nadarajah had not been considered by the judge when examining the evidence. The current country background material had not been considered. Torture was in regular use in Sri Lanka and the Appellant was at risk on return. The decision and reasons were wholly inadequate. The onwards appeal should be allowed and the appeal reheard in the First-tier Tribunal by another judge.

13. Mr Clarke for the Respondent relied on the rule 24 notice. The judge had been fully entitled to reach his adverse credibility findings. There was no material error of law and the decision and reasons should stand. Mr Clarke submitted that this was a Devaseelan* [2002] UKIAT 00702 appeal. Judge Lawrence had been right to take the earlier determination as his starting point, because there were important and relevant findings, especially as to the absence of any supporting medical evidence as to the claimed torture, despite the possibility of obtaining such evidence which had existed when the appeal was heard. The Appellant had been represented by counsel at his first appeal hearing and the findings reached were not unsafe in any sense. The judge had been entitled to assess the reasons why no medical evidence had been provided: see [42] of Devaseelan* (above). He had directed himself correctly. There was nothing which had warranted a departure from Devaseelan*.

14. There was no requirement for the judge to seek the Appellant or the Appellant's experts' responses to his adverse view of the evidence they had provided. No procedural fairness issue arose. JL (China) [2013] UKUT 00145 (IAC) had been followed. The judge had evaluated the medical evidence in an entirely rational way. The Respondent's response to the medical reports had not been in breach of Home Office policy. It was plain from the various reasons for refusal letters, not least the last, that the Respondent rejected the Appellant's medical and psychiatric evidence, and had given considered reasons for that position. It was far from a case where the medical evidence was unchallenged. The medical evidence was

some 15 or more years post the events the Appellant had put forward in support of his claim and the judge was entitled to factor that into his assessment. It was true as the judge had noted that the Appellant's expert Dr Kane had not seen the first determination. The judge had repeatedly returned to the medical evidence in his assessment of the Appellant's appeal. The judge had given sufficient reasons for giving the medical evidence little weight. The Appellant had lied in that process, for example to Dr Clarke over his conviction.

15. The judge had been entitled to observe that the Appellant's sympathy for the LTTE had changed completely since 2003. The judge's assessment of the tattoo was open to him. It may be that the judge had not dealt with the Appellant's Facebook claim explicitly but any error of law there was not material. Nor was it correct that the judge had failed to take into account Dr Nadarajah's country background report: there were several references showing that it had been part of the consideration of the whole of the Appellant's evidence.

16. In reply, Mr Bandegani reiterated his submissions. JL (China) (above) did not involve a Devaseelan* point. Judge Lawrence had been mistaken to use the first determination as his starting point because the Appellant had not given evidence. Judge Lawrence had gone on to commit a series of errors, such as wrongly giving little or no weight to Dr Nadarajah's report. Similarly the judge had been wrong to dismiss Dr Katona's report because the examination was by telephone. Who could have impersonated the Appellant in the detention centre at a pre-arranged conference call? The judge had not engaged with Dr Obeyo's report. GJ (Sri Lanka) CG [2013] UKUT 00319 (IAC) was not the last word on country conditions in Sri Lanka as the judge had apparently believed. Dr Kane's report had not been properly considered. The judge had erred in relying on KV.

Discussion – No error of law

17. At the conclusion of submissions the tribunal indicated that its determination was reserved. The tribunal has concluded that no material error of law was established and its reasons now follow.

18. The context of this appeal is significant. Sri Lankan protection claims which have been made in large numbers tend to be some of the more difficult encountered in the First-tier Tribunal (IAC) and its predecessors. The Appellant's original claim was dismissed in 2003 on adverse credibility grounds and (importantly) in the alternative at its highest on the basis that country conditions had improved and that the ceasefire was holding. The Appellant, who has never provided a satisfactory explanation of his failure to attend his original appeal hearing (see [51] of his 2017 witness statement), failed to return to Sri Lanka, either in 2003 or following the defeat of the LTTE and the deaths of its leaders on 18 May 2009. As the Appellant had asserted to the Secretary of State that he feared the LTTE for whom he and his late brother had been compelled to provide assistance as labourers, it is reasonable to infer that the Appellant could have returned to Sri Lanka in late 2009, or made a fresh claim then if he now denied or wished to clarify his previous account. There was no evidence placed before the tribunal to show that the Home Office attempted to enforce the Appellant's return between 2003 and 2010, but it is plain that the Appellant knew that his appeal had been dismissed and that he remained in the United Kingdom unlawfully: see, e.g., [61] of his 2017 witness statement: "I can blame the Home Office because of my status in this country made me like that".

19. The present appeal may recall Ward, LJ's opening remarks in TM [2012] EWCA Civ 9: "This is another of those frustrating appeals which characterise – and, some may even think, disfigure – certain aspects of the work in the immigration field. Here we have one of those whirligig cases where an asylum seeker goes up and down on the merry-go-round leaving one wondering when the music will ever stop. It is a typical case where asylum was refused years ago but endless fresh claims clog the process of removal." It should be noted that Lord Justice Ward's comments, properly understood, were directed at all elements of the asylum process, i.e., both appellants and the Respondent.

20. No independent evidence has been provided of any attempt by the Appellant to approach the Home Office

(e.g., to seek assistance in arranging his repatriation) until he was contacted by the Home Office in 2010. He made no fresh claim of his own volition. Since then, as Judge Lawrence noted, the Appellant has pursued a new claim which has been embellished in various stages, only emerging in its final form once deportation was facing the Appellant. Contrary to the guidance in JL (China) (above), the various experts retained on the Appellant's behalf have been provided with few details of his first claim, let alone of the full reasons it was dismissed. As Judge Lawrence rightly observed, that placed a large question mark over the value of their reports, because they were all prepared on the general premise that the Appellant would assist them by telling them the truth to the best of his recollection and ability. As the familiar words of the UNHCR Handbook remind us (see, e.g., [205]), those are the obligations on the person who seeks to invoke the Refugee Convention and to seek international protection.

21. Judge Lawrence had before him not only two or more inconsistent and largely irreconcilable accounts of events said to have occurred in Sri Lanka in 2002 and earlier, but also the Appellant's refusal to accept the guilty verdict against him following his trial for criminal offences committed in the United Kingdom in 2015, as well as the absence of any appeal against that conviction. The large volume of medical evidence produced all related to evidence that was mainly stale by any standard (apart from the *sur place* material), some 15 years or more old, a story which replaced a claim which had been disbelieved, refused and dismissed on appeal.

22. That was perhaps bad enough, but there was more. In the tribunal's view, few of Mr Badegani's extensive criticisms of Judge Lawrence's decision and reasons were established, and even those that had marginally more force could not be said to be material, and were not based on a fair reading of the determination as a whole. Mr Bandegani seemed to have forgotten what he said to the judge about Devaseelan* [2002] UKIAT 00702, as the judge did exactly as Mr Bandegani had proposed: see [17] of the decision.

23. It must also be observed that, from the perspective of the Upper Tribunal, minimal assistance if not outright

obstruction had been provided to the First-tier Tribunal by the Appellant and/or his solicitors, notwithstanding the requirements of rule 2 of the 2014 Tribunal Procedure Rule, the overriding objective. This was the Appellant's second protection claim, initiated by him, but his attitude was in some ways similar to that of 2003, when he failed to attend his appeal hearing for no good reason (see [18], above). He failed to attend his second appeal hearing until 1.30pm. Again, no satisfactory explanation was provided. Nor was any satisfactory explanation provided for the failure of the Appellant's solicitors to comply with directions: the hearing date of 10 April 2017 was notified to them on 16 January 2017, following the adjournment granted on that date.

24. As the judge rightly noted (see [5] onwards of his decision), the appeal had been subject to adjournment on 20 January 2017, and another application to adjourn had been made 6 days before the hearing fixed for 10 April 2017 but refused. When the appeal came on before Judge Lawrence, the Appellant was not present and his counsel said he had not been properly briefed. This was wholly unacceptable: see Nwaigwe (adjournment: fairness) [2014] UKUT 418 (IAC) at [6]: "tribunals should be alert to the doctrine of abuse of process". Experienced judges of the First-tier Tribunal (IAC) are well aware of the tactics the judge noted when refusing the repeat adjournment application made to him.

25. The tribunal observes that such applications tend to create the undesirable impression that an appellant wishes to avoid his appeal hearing. In a protection appeal where it is alleged that a citizen of a Commonwealth country faces a real risk of persecution by the government of that country whose duty is to safeguard and protect him, it might reasonably be expected that an appellant would be anxious to have such a scandalous injustice publicly aired at the first possible opportunity, and would accordingly cooperate fully with the First-tier Tribunal to have an effective hearing. That might be thought to apply with particular force where, as with the present Appellant, it had been claimed that he was a committed political activist engaged in *sur place* activities. That cooperation was not, of course, what happened.

26. As to the errors of law asserted, the tribunal agrees with Mr Clarke's submissions. Judge Lawrence was right to apply Devaseelan* [2002] UKIAT 00702, noting that Mr Bandegani (who had appeared before him) agreed that it was the correct starting point, subject to whether the adverse credibility findings had to be revisited in the light of the medical evidence now advanced. The judge proceeded to evaluate the medical evidence produced. The fact that the medical professionals were being asked to work from old or stale evidence without complete information must diminish the value of their conclusions, as the judge properly found. Mr Bandegani's complaint that the judge in effect dismissed Dr Kane's report out of hand was a misreading of the decision. Judge Lawrence was entitled to find that Dr Kane was not possessed of pertinent specialist qualifications or experience: see [20] of the decision and reasons. The judge nevertheless considered the report in detail, and gave sufficient reasons for according it little weight.

27. Contrary to Mr Bandegani's submission, the judge did not pretend to have medical knowledge, and merely drew an uncontroversial distinction between physical and mental illness by way of a simple illustration at [26] of the decision. There was nothing impermissible in that and no error of law.

28. The submission that the judge should have afforded the Appellant and/or his expert witnesses the opportunity to respond to the judge's critique of the evidence was an extravagant and unfounded one. The Respondent's reasons for refusal letters had already stated in detail why the Appellant's medical evidence was not accepted. Home Office policy had been complied with, as the Appellant had had every opportunity to produce medical evidence to support his claim that he had been a victim of extensive, degrading physical and mental torture. There was, of course, no requirement for the Appellant to produce any such evidence. The decision to do so tends to reflect the problem with the Appellant's inconsistent testimony. The Appellant had already had years to prepare his second claim and his appeal, including his response to the reasons for refusal letters, and including any further comments from his experts. He was represented by solicitors and counsel. The battle lines were drawn long before the

hearing. The judge's task was to evaluate whole of the evidence presented, in the round, with anxious scrutiny, which the judge's decision shows was undoubtedly done.

29. The submission that the judge failed to engage with the other medical reports is unfounded. Those reports were numerous, a virtual barrage. The judge identified each of the authors of the medical reports by name, including Dr Obuaya, and explained why he gave their reports limited weight. Complaint was made that the judge acted irrationally or perversely when giving little weight to Dr Katona's report, but he was correct to draw attention to the fact that Dr Katona did not actually meet the Appellant at any stage. It was open to the judge to find that it was a perfunctory and inadequate process. The judge did not say that he gave no weight to Dr Clarke's report but rather (see [30] of the decision and reasons) but rather no weight to the account the Appellant gave Dr Clarke, including the Appellant's denial of his guilt despite his conviction following due process of law.

30. Detailed guidance was given in JL (China) about the preparation of medical reports for the First-tier Tribunal, as summarised in the headnote. The opening words are: "*Those writing medical reports for use in immigration and asylum appeals should ensure where possible that, before forming their opinions, they study any assessments that have already been made of the appellant's credibility by the immigration authorities and/or a tribunal judge (SS (Sri Lanka) [2012] EWCA Civ 155 [30]; BN (psychiatric evidence discrepancies) Albania [2010] UKUT 279 (IAC) at [49], [53]))."* The headnote also states: "*The more a diagnosis is dependent on assuming that the account given by the appellant was to be believed, the less likely it is that significant weight will be attached to it (HH (Ethiopia) [2007] EWCA Civ 306 [23]).*" And "*Even where medical experts rely heavily on the account given by the person concerned, that does not mean their reports lack or lose their status as independent evidence, although it may reduce very considerably the weight that can be attached to them.* The tribunal agrees with Mr Clarke that the judge's approach and findings reflected that guidance. The points made in JL(China) above relate to content and weight, and are applicable to all types of appeal. That JL

(China) was not a Devaseelan* appeal is of no consequence.

31. Mr Clarke submitted that the judge might have dealt with the Facebook evidence presented by the Appellant, but that was a counsel of perfection. The Appellant's evidence was set out at [65], a brief paragraph of his long 2017 witness statement, but no print outs were produced either to the judge or to Dr Nadarajah. Dr Nadarajah made no mention of the Appellant's alleged Facebook activities in his report. Everything pointed away from the Appellant's being a reliable witness, not least his refusal to accept his guilt following his conviction. It was not a material error of law not to have dealt with the Facebook claim, if indeed it could be characterised as an error of law at all, as it was just a part of the Appellant's claimed *sur place* activities which the judge found fell well short of placing the Appellant at real risk on return.

32. Mr Bandegani's submission that the judge failed to engage with the expert report of Dr Nadarajah was similarly unfounded. The judge addressed that report in detail, at a logical stage of his "in the round" assessment. The judge accepted that Dr Nadarajah was qualified to act as an expert and went on discuss the report (see [32] to [36] of the determination). The judge gave proper reasons for finding that the report attracted little weight. The judge was correct to point out that the Appellant could remove the LTTE tattoo that he had received in the United Kingdom, and that Dr Nadarajah said that no research on such visible signs of (claimed) LTTE affiliation had been conducted.

33. The judge's careful analysis of the Appellant's "fresh" claim revealed it to fall well short of the standard of reasonable likelihood. The Appellant's lack of credibility made it unnecessary to embark on further examination of the current country background material. The Appellant has abused the hospitality extended to him by the United Kingdom and engaged in crime, yet he denied his guilt. The tribunal considers that none of the criticisms of the judge's decision and reasons has substance or merit. The judge dealt comprehensively with the "fresh" claim. The onwards appeal is dismissed.

DECISION

The appeal to the Upper Tribunal is DISMISSED

The decision and reasons of the First-tier Tribunal stand unchanged

Signed **Dated** 1 August 2017

Deputy Upper Tribunal Judge Manuell