Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10838/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 June 2019	**On 13 June 2019**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

A.A.
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. N. Paramjorthy, Counsel, instructed by ABN Solicitors
For the Respondent: Mr. E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Widdup ('the Judge'), issued on 21 March 2019, by which the asylum appeal of the appellant was refused.

2. The Judge made an anonymity order under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. We have decided that the order should continue so as to avoid a likelihood of serious harm arising to the appellant in relation to the allegations made within her protection claim. Unless and until a Tribunal or Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant to these proceedings. The direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

3. The appellant is a Sri Lankan national of Tamil ethnicity. She secured entry clearance as a student and subsequently made an in-country application for international protection. She details that she provided low-level support to the LTTE whilst a school student in Jaffna. She states that she was detained in 2014 following her return from studying in Bangladesh and subjected to serious ill-treatment at the hands of the Sri Lankan authorities after an immigration official at Colombo airport observed that there was an LTTE flag on a picture profile found on her mobile phone. She asserts that she was released following the payment of a bribe and she consequently travelled to this country. Her position is that her account of having been tortured is supported by a scarring report authored by a medical practitioner and also by a favourable psychiatric report. She contends that she has been involved with the TGTE whilst in the United Kingdom.

4. The hearing of the appeal took place on 13 March 2019. The appellant relied upon medical opinion that she was not fit to give evidence and so was not called. By way of the decision and reasons it was not accepted that the appellant has been detained and ill-treated by the Sri Lankan authorities. The Judge accepted that the appellant had attended demonstrations in this country but found that her political profile to be negligible, and she is not someone who can properly be described as having a significant role in separatist politics. Consequently, it was decided that she had not proved to the requisite standard that she is at risk of persecution or serious ill-treatment upon return to Sri Lanka.

5. Grounds of appeal were drafted by Mr. Paramjorthy, who represented the appellant before the First-tier Tribunal. Three grounds were relied upon:

   i) The Judge failed to properly consider the evidence relating to the appellant’s scarring and her history of previous torture.

   ii) The Judge failed entirely to consider the sufficiency of treatment available to the appellant on her return to Sri Lanka; and

   iii) The Judge failed entirely to consider the fundamental question as to whether or not the appellant would be a perceived threat to the

unitary state of Sri Lanka, rather focusing on her personal knowledge of the TGTE.

6. Permission to appeal was granted by First-tier Tribunal Judge Hollingworth by way of a decision dated 24 April 2019. Though permission was granted on all grounds, focus was directed to Ground 1.

7. At the hearing before us the representatives addressed the Judge's approach to the medical evidence, in particular [70] - [74], [99]:

> *'70. Mr. Paramjorthy referred me to the very recent case of KV Sri Lanka (scarring).*
>
> *71. There is a world of difference between the facts of that case and the present. The scars in KV were caused by branding with a hot metal rod. There were five scars on his back and two on his arm. In the view of the Supreme Court such injuries, if the result of SIBP* [self-infliction by proxy]*, could only have been inflicted under anaesthetic by a medical practitioner who had the equipment and drugs to perform this procedure and who was willing to commit a serious offence and contravene medical ethics and good medical practice. These were factors which should have been considered in assessing the relative likelihood of SIBP as opposed to torture.*
>
> *72. The appellant's case does not involve injuries which would need to be inflicted under anaesthesia by a doctor. They are cigarette burns. If this is a case of SIBP such burns could have been self-inflicated on the appellant's knees by proxy.*
>
> *73. I note that Dr. Al Wakeel was not asked about SIBP nor did he consider it as a possibility. The statement in his report that the injuries were most likely caused intentionally does not therefore exclude the possibility that they were cause by the appellant self-harming or by someone else doing so at her request.*
>
> *74. I emphasis that I do not find that this is a case of SIBP but I do say that the possibility that they were self-inflicted is greater in this case than in the case of KV and is not excluded by the opinion of Dr. Al Wakeel.*
>
> *…*
>
> *99. The evidence of Dr. Al-Wakeel fails to consider SIBP and the evidence of Dr. Dhumad is flawed and of little weight.'*

8. We observe that the issue of SIBP was not raised within the respondent's decision letter of 28 August 2018.

9. The Judge was provided by Mr. Paramjothy with what was then the very recent judgment of the Supreme Court in KV (Sri Lanka) v. Secretary of State for the Home Department [2019] UKSC 10; [2019] 1 WLR 1849. The Supreme Court considered the limit of the role of a medical expert in contributing to the evidence referable to a claim of torture, specifically with regard to SIBP cases.

10. At the hearing we indicated to the representatives our concern as to the Judge's adverse criticism of Mr. Al-Wakeel's scarring report for not considering the possibility of the appellant's scarring being caused by SIBP. Such criticism negatively influenced the Judge's overall assessment of the report. The approach adopted by the Judge is consistent with the procedural approach to medical reports and SIBP adopted by the Upper Tribunal in KV (Scaring – medical evidence) [2014] UKUT 230 (IAC). However, this approach was rejected by the Court of Appeal on appeal: [2017] EWCA Civ 119; [2017] 4 WLR 88, at [87] - [96]. At [94] Sales L.J. (as he then was) held:

> *'Contrary to the UT's guidance, I do not consider that it is incumbent on medical experts in scarring cases to refer to the possibility of SIBP, where the Secretary of State has not raised it as an issue, unless there is some feature of the case which engages the duty of the medical expert to bring it to the attention of the tribunal, pursuant to the guidance in the Practice Direction. Subject to that duty, an expert witness does not have to raise and comment on issues which have not been raised by the parties to the proceedings.'*

11. This element of the Court of Appeal's reasoning was not subject to consideration by the Supreme Court.

12. We further observe that Mr. Al-Wakeel did consider as to whether the scars were caused by other means and in concluding that his clinical findings were 'typical' of cigarette burns he framed his conclusion in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol).

13. Before us Mr. Tufan fairly, and appropriately, accepted that there was an issue with the approach adopted by the Judge to the medical evidence of Mr. Al-Wakeel.

14. We further drew the representatives' attention to the judgment of ME (Sri Lanka) v. Secretary of State for the Home Department [2018] EWCA Civ 1486, where the Court of Appeal concluded on the facts of the case before it that the important question in the appellant's claim was whether there was a real risk of his being detained and beaten if he were to be returned. The fact that his arrest took place long after the cessation of the conflict in Sri Lanka should have led to the conclusion

that he was perceived at that time as being of significant interest to the authorities, and therefore a person who fell into category (a) of the risk categories identified in GJ and Others v Secretary of State for the Home Department [2013] UKUT 319 (IAC). We noted in the matter before us that if the Judge erred in law as to his consideration of the appellant's arrest and detention in Sri Lanka in 2014, and his assessment of the medical evidence was a core consideration in such regard, it was a material error as it impacted upon his assessment as to whether or not the appellant fell into one of the risk categories identified in the Country Guidance decision of GJ and Others.

15. Mr. Tufan accepted that this was the case and that in all of the circumstances the decision and reasons were subject to a material error of law.

16. In light of the above the Judge's decision must be set aside.

17. The representatives were in agreement that none of the findings could stand and that in such circumstances the matter should be remitted to the First-tier Tribunal rather than be relisted before the Upper Tribunal. In such circumstances, we did not proceed to consider Grounds 2 and 3.

Remittal to First-Tier Tribunal

18. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25 September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

    (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

    (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

19. In this case we have determined that the adverse credibility findings cannot stand. The appeal will be remitted to the First-tier Tribunal so that a new fact-finding exercise can be undertaken. None of the findings of fact are to stand and a complete re-hearing is necessary.

Notice of Decision

20. For all of these reasons, the decision discloses an error on a point of law such that it must be set aside. We set aside the Judge's decision promulgated on 21 March 2019 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

Direction

21. We remit the matter to the First-tier Tribunal sitting at Hatton Cross to be heard before any First-tier Judge other than Judge Widdup.

Signed: D. O'Callaghan

Upper Tribunal Judge O'Callaghan

Date: 11 June 2019