Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08463/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 June 2013	**On 28th June 2013**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

S S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Jegarajah
For the Respondent: Ms M Tanner

DETERMINATION AND REASONS

1. The appellant is a citizen of Sri Lanka and it is not in issue that he was born on 22 January 1985.

2. The appellant claimed asylum. That claim was refused on 30 August 2012. He appealed that decision. In a decision dated 26 October 2012 the appeal was dismissed on all grounds. However, a Deputy Upper Tribunal Judge found that the determination could not stand and it was set aside.

The appeal was then remitted to the First-tier Tribunal for a rehearing on all issues.

3. Following the rehearing and by a decision dated 18 March 2013 First-tier Tribunal Judge Lingard dismissed the appeal on all grounds. The appellant again sought permission to appeal and this was granted in the following terms:-

> "… The appellant, a citizen of Sri Lanka, appealed a decision to refuse him asylum. First-tier Tribunal Judge Lingard (the judge) dismissed the appeal because she found that the appellant was not truthful about the core of his claim and therefore was not at risk on return. It is arguable that the judge has not given sufficient reasons for such a finding bearing in mind that she acknowledged that the appellant gave a detailed account of events which was supported by the medical evidence which said that the appellant's scars were highly consistent with his account as to how he got them. The judge's reasons were that the appellant was not a blood relative of his witness as claimed, which does not go to the core of the appellant's account, and that he delayed in applying for asylum. The judge also relied upon the way the appellant answered questions at the hearing. It is arguable that such reasons are insufficient to disbelieve a consistent and detailed account supported by expert medical evidence".

4. The respondent filed a Rule 24 response by letter dated 8 May 2013. The contents of the letter are to the effect that the judge concluded for good reasons that the appellant did not give a credible account. Where a judge is minded to reject an account for reasons that are "not impinged upon" by the medical report the part that such report can play in establishing credibility is by its nature very limited. The judge was entitled to conclude that the appellant was not credible and by application of the relevant risk factors was not at risk on return. The grounds amount to a disagreement with the judge.

The Hearing before me

5. Thus the matter came before me. Both representatives made oral submissions. Upon enquiry being made it was clear that if an error of law was found such that a fresh hearing was required in the Upper Tribunal it would not have been possible for the hearing to take place on the same day as the error of law hearing, because of the lack of time available. In the light of the history of this appeal I therefore decided to reserve my decision on the error of law point.

6. The main thrust of Ms Jegarajah's submissions is that although the determination of Judge Lingard looks as though she has given thorough reasons for coming to her decision in fact the judge has failed to engage with the core of the claim. Although there are legitimate findings against the appellant they do not go to the crux of the claim. The appellant has

been broadly consistent throughout and there is expert medical evidence in support of the claimed history. Ms Jegarajah made many other points. These I noted and have considered in this determination.

7. Ms Tanner for the respondent submitted that this is a balanced determination. The judge was clearly unimpressed with the appellant's reasons for failing to claim asylum for the length of time before he did. At the screening interview no health concerns were claimed and as far as the expert medical evidence was concerned there were a number of explanations as to how the appellant may have acquired the scars that he has. The judge was entitled to find that the medical report was to an extent ambiguous. The judge did not have a closed mind to any of the evidence and was entitled to conclude as she did for the reasons given.

My Deliberations

8. The FTT Judge heard oral evidence from the appellant and the witness – his cousin. The judge was therefore best placed to make the observations that she did concerning the manner in which the appellant gave his evidence as recorded (particularly in paragraph 84) of the determination. The appellant was found by the judge to be a well-presented young man who has been well educated and was found able to articulate and express himself in a coherent way through the court interpreter. From paragraph 74 to 78 the judge finds a lack of credibility that the appellant and the second witness are blood relatives and gives reasons for that finding. However, I agree with Counsel's submissions that this was not an issue that had been taken by the respondent or indeed mentioned at the hearing. It was one taken up by the judge after the hearing and if clarification was required, for the first time, then this could have been dealt with at the hearing.

9. Despite that error there is recognition by the judge in paragraph 78 that these matters did not relate to the core or crux of the appellant's claims.

10. In paragraphs 79 onwards the judge refers to the failure of the appellant to claim asylum until over one and a half years after arriving in the United Kingdom, this being shortly before his student visa was due to expire. The judge recognises that this has to be taken into account in her deliberations but does not go to the centrepiece of the appellant's account regarding his experiences in Sri Lanka and India. The judge notes during the course of the appellant's main interview that he was asked why he did not claim asylum on arrival and what prompted him to do so when he did. The appellant said he was frightened of claiming asylum for fear of being deported. He had come to know just before he claimed asylum that his parents had been visited by representatives of the authorities asking his whereabouts. The second witness confirmed that he had advised the appellant to claim asylum but the appellant had decided to "take the risk". When the appellant made his statement he indicated that he was frightened of claiming asylum because he was scared of being returned to

Sri Lanka and was hoping, whilst he was here, that the situation would improve there so he could return.

11. The judge would have none of it. At paragraph 80 she does not accept the explanation and gave the reason that it is the appellant's case that he has lived with his sister and brother-in-law since arriving here. He would have been well aware that a claim for asylum in the United Kingdom would not prompt his departure until there had been a thorough examination of the asylum claim and the appeal process finalised. Although it took a long time for the appellant's brother-in-law to have his asylum application dealt with the appellant would have been aware also that although his brother-in-law's claim had been refused by the respondent he had won his appeal against that decision and been granted refugee status during 2007.

12. The judge then went on to find in paragraph 81 that she did not accept as credible the appellant's oral evidence, that he asserted for the first time at the appeal hearing, that because of his ill-treatment he was not in the right mindset to deal with making an asylum application before he did so. The reason for coming to that credibility finding is given that whilst it is reasonable to think that someone who had been badly treated over a relatively lengthy period might be so affected as to feel in no fit state to make an asylum application, had this been the case the appellant would have referred to this much earlier on. The judge found it telling that the appellant did not make this point when making his statement for the previous hearing which was adopted as part of his evidence-in-chief before her.

13. The grounds seeking permission to appeal appear to assert at paragraph 6 that the judge considered the issue of delay as a peripheral matter, yet it forms the heart of the judge's assessment of credibility. It is argued that this approach reflects the application of a standard of proof too high in circumstances where the adverse effect of the delay is regarded as outweighing the probative value of evidence, such as the medical evidence, corroborative of the appellant's core claim of being the victim of torture.

14. It is clear enough that the judge recognised that disbelieving the appellant in relation to the explanations given for why he failed to claim asylum at an earlier date did not of itself mean that the appellant did not experience what he said occurred to him in Sri Lanka and India prior to coming to the United Kingdom. Nevertheless that delay and then the late assertion at the hearing as to why he did not claim asylum at an earlier date being found not credible by the judge weighed in the balance when assessing the truth or otherwise of the core of the claim. I can see no error by the judge in her reasoning on those matters.

15. The judge also weighs in the balance the fact that the appellant provided a relatively detailed account of his movements within Sri Lanka during the pertinent periods leading up to his arrival in the UK. However, the judge adds the comment that she cannot entirely discount that the appellant has

committed to memory a set of accounts for the sole purpose of obtaining refugee status in this country. She notes that at various points of his oral evidence "the appellant began to provide answers to some questions in a way that came across as a regurgitation of rehearsed material rather than a spontaneous recollection of events". The judge then gives examples.

16. The judge benefited from having heard oral evidence from the appellant. The judge noted that when pressed to give more detail during cross-examination he became vague in his responses and she was left with a certain impression. Again the judge gives a balanced consideration of that matter directing herself not to place any weight against the appellant in relation to credibility regarding any inability for him to be specific about the frequency of the ill-treatment meted out over a six month period of detention. The judge commented that although the appellant did not say so "but if someone is ill-treated in an incarcerated state it may well be that the victim loses a sense of time although, interestingly, this is not what the appellant has stated".

17. In relation to the scarring the judge directs herself appropriately that she must approach medical evidence with appropriate care and give good reasons for her decision.

18. It is said that the judge erred in not expressly approaching the report as being independent evidence of torture when in fact it was. It is said that the judge obviously discounted the medical report's value and relevance by reference to the view taken of the appellant's credibility. It is argued that because of what the judge said at paragraphs 88 and 89, namely that the medical evidence was only prompted by an instruction given to Mr Martin by the appellant's solicitors as opposed to the appellant's GP, the judge treated the report as though Mr Martin did not reach an independent view.

19. I do not read paragraph 88 in that way. The judge states that although it is not at all damaging to the appellant's case Dr Martin does not refer to having any knowledge about the appellant's GP or any previous medical history that may be noted with that GP or elsewhere. The appellant has adduced no record of his dealings with his GP in the UK and has not adduced any medical evidence emanating from Sri Lanka. I do not find this is a reference to the non-independent view of Dr Martin but more a comment on the behaviour and health of the appellant who as a fact had adduced no record of his dealings with his GP in the UK. At paragraph 82 the judge notes that the appellant refers at his screening interview to being in good health, that he does not take medication, and when questioned more specifically in his main interview about having any health issues, the appellant answered in the negative. The judge was entitled to find that it was reasonable to think that if the appellant had any health concerns either mental or physical since arriving in the United Kingdom he would have referred to them at an earlier date.

20. The judge was entitled to find it surprising that there is no reference to Mr Martin having viewed any papers relating to the appellant's asylum claim or appeal. The report appears to rely solely on what the appellant told him during the examination and a physical examination of the appellant for which relevant photographs were taken and form part of the report. The judge was entitled to comment also that while the appellant confirmed at the hearing that the report accurately reflects what he told Mr Martin there is no reference to an interpreter being used and no indication that the appellant would be able to get across what he wanted to say in English.

21. At paragraph 90 onwards of the determination the judge refers to scarring in detail. At paragraph 94 the judge refers to Mr Martin not discounting in each case that there could be other reasons for the scarring than those the appellant claims were caused during his detention. The scars were found to be highly consistent with the mechanisms of injury described by the appellant of being tortured although Mr Martin noted that it is possible that they could have been caused accidentally.

22. Having read the medical report scars 2, 3, 4, 6 and 7 are found to be "highly consistent" with the account put forward by the claimant and scars 1 and 5 are found to be "consistent" in the manner described. However, although earlier in one paragraph the "scars 2" are said to be "highly consistent of being burned with a hot object such as the one described by the claimant" this finding comes with the caveat that "the scars are not fully specific of intentionally caused injuries and they could have been caused by unrelated accidental injuries or other reasons such as a skin infection".

23. Scars 3 and 4 are referred to thus: - "However the larger round scar, also could have be (sic) part of a vaccination scars and the other scars could have been caused by an accidental injury for example with hot oil while cooking".

24. In relation to scars 5 the characteristics of the scars are found to be non-specific of intentionally caused injuries and they could have been caused accidentally after a fall, for example, during training".

25. With scars 6 and 7 "The characteristics of the scars are not fully specific of intentionally caused injury and it also could have been caused by other mechanism of injury such an (sic) accidental fall". The scars are found to be mature and their appearance is consistent with the time span described by the "claimants" (appellant). Mr Martin concluded as follows:-

> "Overall, following the recommendations in Chapter V, Section D, paragraph 188 of the Istanbul Protocol were (sic) it states that 'ultimately it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story'. They are not fully specific of intentionally caused injuries but they did not show any inconsistencies with the description of events by the claimant; and in my opinion

those scars are highly consistent with the mechanisms of injury described by the claimant of being tortured, although possible that they could have been caused accidentally".

26. The judge herself notes that none of the suggested alternative causes for scarring to the appellant's body, which, on the face of it, appear to be relatively random and different in the case of each scar, relate to the appellant having sustained in one way or another most if not all of his injuries as a result of being involved in a shell attack incident, which is where he states he obtained scarring to his face in 1990. The scars are referred to as being mature and there has been no assessment of whether those scars may have been as a result of self-inflicted wounds in any way.

27. The judge directs herself that any alternatives she might suggest are purely speculative in nature. She recognises that she is not medically trained and must give due and careful consideration to the report of someone who is.

28. I find no misdirection by the judge in any of the paragraphs relating to scarring. The judge recognises that she does not have to accept that the appellant is telling the truth about his experiences on the basis of the medical report. No medical report can speak to the circumstances in which scarring to the body could have occurred. It is in the context of those assessments and other matters to which the judge has referred that she has viewed Dr Martin's conclusions about scars being "highly consistent" with the appellant's accounts.

29. The judge appears to be struck, although she states that she places no weight on it, in paragraph 96, that no reference was made by the appellant to Mr Martin of having been the victim of mental/psychological torture or having any medical problems of any long-term nature (other than the physical effect of being scarred) due to treatment meted out to him in Sri Lanka. The appellant confirmed at his initial interview and in answer to a specific question at his main interview that he has no health issues and was fit and well.

30. The judge dealt with the second witness's evidence and was entitled to conclude that she could give little if any weight to that witness's account of the appellant having been a victim of human rights violations in Sri Lanka since everything that he had to say about those matters related to hearsay evidence. The judge was entitled to view the evidence in that way despite the likelihood that she erred in finding that the blood relative point affected the witness's credibility.

31. With regard to returning to his home in Jaffna a very short time after the appellant claims the authorities went there searching for him the judge is saying nothing more than that she does not find any reasonable explanation for him having taken that risk. Clearly the judge does not accept that the appellant would stay at his home under any circumstances for two days when he was aware that the authorities had said that they

would return to the house because they had not found him on the first occasion that they came. The judge was perfectly entitled to make that point.

32. The judge was also entitled in paragraph 100 to disbelieve the appellant when he said that the authorities had come to his parents' home to look for him just before he claimed asylum, bearing in mind that they had not done so since 2006/2007 and he had been in continual contact with his parents throughout. On the appellant's version of events he was detained in Colombo and this had been in 2010 and he did not claim asylum until approximately two years later. The judge was also entitled to find that this was a concocted story made up for the purpose of giving a reason why he claimed asylum so long after arrival in the United Kingdom.

33. The judge in paragraph 101 accepts that there is a possibility of someone of adverse interest being able to successfully pass through official immigration and emigration processes within Sri Lanka without being questioned or stopped and can do so by using an agent with relevant contacts. However, the judge finds that it is clear from the general background materials that security has always remained very tight on incoming and outgoing Sri Lankan citizens by the immigration authorities, police and army in Sri Lanka. The judge found and was entitled to do so that it is of some significance that the appellant was prepared to run the risk of travelling to and from Sri Lanka when visiting India then leaving Sri Lanka again bound for the United Kingdom using his own passport.

34. The judge found some measure of significance to be placed on the fact that the appellant was prepared to take these risks on more than one occasion using his own identity. This is so because the appellant says that he was very fearful of being apprehended by the authorities bearing in mind that latterly he was using official channels of travel, in light of having been a torture victim and fearful of apprehension by those who had tortured him. The judge might well have added a sentence to the effect that she did not believe the appellant on the point.

35. Viewed overall the judge has engaged with all of the evidence that was put before her, has made relevant findings and has engaged with the core of the claim. The judge was entitled to find that the appellant's credibility was damaged but took into account the medical evidence which formed part of her overall assessment in her findings of fact.

36. The medical evidence on any view although stating that the injuries are highly consistent with the mechanisms of injury described by the appellant, nevertheless put forward other possible explanations so the judge was not bound by the findings of the report, which might be described as non conclusive and equivocal. Put another way, it was not perverse of the judge to come to the conclusions that she did on the evidence that was before her.

37. The judge directed herself correctly as to the law, burden and standard of proof and although there are certain fair criticisms of the determination, overall and for the reasons given the judge was entitled to dismiss this appeal for the reasons that she gave.

Conclusion

38. For the above reasons the decision of the First-tier Tribunal Judge stands.

39. I was not addressed in relation to the continuation of the anonymity direction. I note that the original determination gave reasons for making such a direction which direction has continued throughout. In those circumstances and particularly in the absence of argument to the contrary, the anonymity direction continues.

Signed Date 27th June 2013

Upper Tribunal Judge Pinkerton