Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/03129/2014
& AA/03285/2014

THE IMMIGRATION ACTS

Heard at Stoke on Trent
On 13 October 2014

Determination Promulgated
On 29 October 2014

Before

Deputy Upper Tribunal Judge Pickup
Between

SA
AS
[Anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Ms P Solanki, instructed by Biruntha Solicitors
For the respondent: Mr G Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, SA, date of birth 23.10.74, and her husband, AS, dated of birth 30.1.71, with two non-appellant children, born 7.10.03 and 7.1.06, are citizens of Sri Lanka.

2. These are their linked appeal against the determination of First-tier Tribunal Judge Roberston, who dismissed their appeals against the decision of the respondent, dated

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30.4.14 & 7.5.14, to refuse their asylum, humanitarian protection and human rights claims. The Judge heard the appeal on 20.6.14.

3. First-tier Tribunal Judge Macdonald granted permission to appeal on 18.7.14.

4. Thus the matter came before me on 13.10.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Robertson should be set aside.

6. In essence, the grounds of appeal assert that the First-tier Tribunal Judge erred in failing to adjourn the case to allow an all-female court, erred in her approach to the medical evidence of Drs Lord and Ghosh, and erred in the approach to the appellant's health claim under article 8 ECHR. Effectively, it is claimed that the judge made up her mind on the issue of credibility before considering the medical evidence.

7. In granting permission to appeal, Judge Macdonald found no merit in the adjournment ground. However, noting that both medical reports were strongly supportive of the first appellant's account of rape and ill-treatment and that she has been suffering from the effects of that ill-treatment thereafter, "It is arguable, for reasons given in the grounds, that the judge failed to factor in the terms of the medical reports before concluding that the accounts given before her were not credible – the Mibanga point."

8. "As the judge noted it is only if there were arguably good grounds for doing so that it was necessary for her to consider article 8. She gave clear reasons for finding that exceptional circumstances had not been established. Nevertheless, for reasons relating to the arguably inadequate assessment of the medical evidence, permission to appeal is granted… on all grounds."

Failure to adjourn the hearing

9. The reasons given for seeking an all-female Tribunal hearing was because the first appellant claimed that she did not feel comfortable speaking about some of the things that had happened to her with a male. At §7 of the determination the judge noted that counsel for the appellants was "anxious to proceed in spite of the fact that both the interpreter and the Presenting Officer were male." In other words, the judge was being urged to proceed and not to adjourn the hearing. The request had been made only 2 days before the hearing and was refused on application because it was not raised at the preceding CMR of 5.6.14. The judge noted that at no time did the first appellant appear to be or state that she was distressed by the questioning from a male presenting officer or the presence of a male interpreter.

10. Ms Solanki submitted that despite instructed counsel's request for the case to proceed the judge should have, of her own motion, adjourned the appeal hearing. I reject that submission. It has to be assumed that instructed counsel would have had the best opportunity to judge the situation and best represent the interests of her client. It is inconceivable that the request to proceed was not made without express instructions and agreement of the first appellant. If she was willing to proceed in the circumstances, there was no basis for the judge to take a different view. I find that there is thus no merit in the ground of appeal relating to adjournment.

11. Treatment of Medical Evidence

12. Ms Solanki took me to various parts of the medical reports and the determination to suggest that the consideration of the medical evidence was made after the detailed credibility findings between §26 and §47. She also submitted that the treatment of the medical evidence in the determination was inconsistent with the contents of the report. For the reasons set out herein, I do not accept these submissions demonstrate any material error of law.

13. The Rule 24 response, dated 30.7.14, submitted that the judge had directed herself appropriately, point to §25 where the judge stated that the findings were made after consideration of all the evidence in the round and that this self-direction was repeated, stating that the findings were made with regard to the evidence as a composite whole. "It is clear that there was no error in respect of the judge's approach to the evidence before him. Mibanga did not require that a decision maker considered the medical evidence first in his findings. Furthermore, Mibanga was a case that turned on its very particular facts."

14. Reference was also made by the Secretary of State to HH Medical the Evidence Effective Mibanga Ethiopia [2005] UKAIT 00164, where the Tribunal held that there was a danger of Mibanga being misunderstood. "Judgements in that case are not intended to place judicial fact finders in a form of forensic straightjacket. In particular, the Court of Appeal is not to be regarded as laying down any rule of law as to the order in which judicial fact finders are to approach the evidential materials before them. To take Wilson J's cake analogy, all its ingredients cannot be thrown together into the bowl simultaneously. One has to start somewhere. There is nothing illogical about the process by which the immigration judge in the present case chose to approach his analytical task."

15. For the reasons set out herein I find that it is unfair to criticise the judge for the order in which the evidence was dealt with. In particular I find no evidence that the judge inappropriately excluded the medical evidence from the assessment of credibility. However, I also find that the extent to which the medical evidence could assist the credibility assessment was rather limited on the facts of this case. The claim is that because of the authorities interest in the second appellant's involvement in the diversion of funds to the LTTE, that the first appellant was taken in for questioning and subjected to ill-treatment. After a very detailed examination of the evidence in relation to the second appellant's claim, the judge found that he was not involved in

money as claimed, his account of the method and reasons for transfer lacking credibility. When the judge came to consider the credibility of the first appellant, she took into account the extent and limitations of the medical evidence and also the finding that the second appellant's factual account of money transfer was not credible. I find no error of law in that approach.

16. I note that at §25 of the determination the judge stated that she embarked on her findings of fact on the evidence in the round, exercising caution with regard to credibility and plausibility, assessing the evidence against the background evidence. The judge specifically stated that, "Although I set out my findings on the various aspects of the Appellants' credibility sequentially, I have taken all the evidence as a composite whole in reaching my conclusions." At §26 the judge considered whether mental health issues were likely to cause the first appellant difficulties in giving evidence during the hearing, but concluded that they did not, for the reasons stated.

17. At that point the judge also recorded that she had notified the parties, in advance of the evidence and thus findings of fact, that she would apply KV (scarring – medical evidence) Sri Lanka [2014] UKUT 00230 (IAC), in the assessment of the medical evidence. It is clear that the medical evidence was at the forefront of the judge's mind when considering the evidence. That decision held that "whilst if best practice is followed medico-legal reports will make a critical evaluation of a claimant's account of scarring said to have been caused by torture, such reports cannot be equated with an assessment to be undertaken by decision-makers in a legal context in which the burden of proof rests on the claimant and when one of the purposes of questioning is to test a claimant's evidence so as to decide whether (to the lower standard) it is credible."

18. I do not accept that the judge's approach was inconsistent with Mibanga. There was no artificial separation of the medical evidence from the credibility findings. In any event, I find that only limited support could be gleaned from the medical evidence when assessing credibility. I note that whilst the existence of some of the injuries, assessed as diagnostic of healed lacerations to the eyebrows, and the application of a hot solid object to the skin of the right arm and leg, have the potential to support the appellant's account, the report itself was rather perfunctory, and completed without sight of the reasons for refusal, perhaps explaining why further questions were posed to the doctor, resulting in the second report. This explained that there was no way to distinguish between falls and blows to the eyebrows. To the extent that the doctor points out that there must have been two separate incidents but that the appellant only recalled one, her account could also be regarded as inconsistent with the medical evidence. Whilst the doctor considered that the 3 scars to the arm and legs were diagnostic of burns. The doctor could only say that the pattern was not likely to be accidental but deliberate placement of a hot object consistent with the appellant's account. At §4 of the second report Dr Lord explains that it was not possible to determine why, by whom, and in what circumstances burns occurred. Dr Lord claims that she has considered all other possible causes and came to the conclusion that the overall picture was of someone subjected to ill-treatment, as claimed by the appellant. After considering these issues, the judge stated, "I have therefore given

little weight to the report of Dr Lord which only establishes that A1 has injuries, not how those injuries were inflicted." In other words, the medical evidence did not particularly assist the first appellant to demonstrate that she had been mistreated by the Sri Lankan authorities as claimed. The judge did not state that the injuries did not happen, but on an assessment of the evidence she was not satisfied to the lower standard that the injuries were occasioned as claimed. I have to say that even if the determination had been structured differently, I fail to see how the outcome would have been any different, either as to the factual claim of the second appellant as to involvement in money diversion to the LTTE, or the first appellant's claim to have been detained and mistreated because of the second appellant's involvement.

19. It is clear that the First-tier Tribunal Judge took all of this into consideration at §47 of the determination. The determination expressly stated that the judge was taking all of the evidence into consideration in the round. At §47 and §48 the judge drew attention to some inadequacies in the medical evidence, noting that the only description of the appellant's ill-treatment was set out at §11 of the first report, which did not go into the sort of detail considered in KV, which made clear that there is no means of distinguishing between scars from torture and those by proxy. A careful reading of the determination makes it clear that however they were inflicted and for what reason, the judge concluded that Dr Lord could not assist in the resolution of that issue. Given that the judge did not accept the account of the second appellant as to LTTE involvement it follows logically that any ill-treatment of the first appellant cannot have been at the hands of the Sri Lankan authorities, there being no other proffered explanation and the burden being on the appellant to demonstrate such. It is only after that finding that the judge reaches the conclusion at §49 that, to the lower standard of proof, she found that the appellants are not at risk of persecution on return to Sri Lanka.

20. The judge dealt with the evidence of Dr Ghosh as to mental health issues, between §51 and §54 of the determination. It is arguable that the mental health condition is a product of the mistreatment and thus is supportive of the first appellant's claim, but again whilst potentially consistent with the claimed mistreatment, the judge had to consider the evidence in the round. Ms Solanki complains that this evidence was not included in the credibility assessment, asserting that it was only considered at §26. I do not agree with the submission, and note that it was also considered at§52-54. It is clear from a reading of the determination that the First-tier Tribunal Judge, particularly at §52, considered whether the evidence assists in the assessment of the first appellant's credibility. The judge pointed to some deficiencies in Dr Ghosh's report, particularly the failure to detail current treatment or medication regime, making it difficult to assess whether the evidence assists the first appellant. At 54 the judge also explained why she did not accept the view of Dr Ghosh as to the availability of treatment, predicated as it was on a total uncritical acceptance of the first appellant's account. I do not find it credible that Dr Ghosh can say that she could not be treated in Sri Lanka at all even if treatment is available. I note that the report has a very long account of personal history, followed by a relatively short section on present mental state, which begins by noting that "given the trauma that she has suffered," she was remarkably composed. Nowhere is there any adequate

consideration as to whether the symptoms are being feigned or exaggerated, or any real treatment of other contributing factors. The appellant's account is not challenged in any critical way. On the whole, the report comes across as rather overly sympathetic to the appellant rather than as being objective. I also note that other than the appellants' statements have been considered, none of the other evidence, such as the interview accounts, have been considered. Further, it is not unusual, and perhaps not unsurprising, that many asylum seekers suffer from PTSD, yet there was no causation consideration of the country background circumstances or of the anxiety faced by those having been refused asylum and seeking to remain. In many ways this report left a lot to be desired.

21. In all the circumstances, I find no material error of law in the First-tier Tribunal treatment of this report. I am satisfied that on a fair reading of the determination it is clear that the judge has carefully considered all the evidence and reached findings in the light of all the evidence in the round, including the mental health report.

22. In relation to this report the judge also found that the article 3 threshold was not met and it is difficult to understand how such evidence would render removal an infringement of article 8, particularly if treatment is available in the home country. I am satisfied that the judge approached this evidence correctly both in relation to credibility and in relation to articles 3 and 8. When weighed in the balance with the findings in relation to the second appellant's activity, the extent to which the mental health evidence supports the first appellant's assertions is rather limited. In the circumstances I find no error of law in this regard.

23. I agree with the judge granting permission to appeal that there was no material error of law in the judge's assessment of article 8. Given the factual findings against the appellants, there were no good compelling grounds for consideration of article 8 outside the Immigration Rules. There was no evidence to suggest that adequate medical treatment would not be available to the first appellant in Sri Lanka. Even if the judge had considered article 8 under the Razgar five steps, I am satisfied that it would inevitably have resulted in the conclusion that on the factual findings of the judge the decision of the Secretary of State was entirely proportionate to the appellants' article 8 private and family life.

24. On a consideration of the determination as a whole, I find that the judge gave careful attention to the evidence, highlighting the inconsistencies and inadequacies, reaching findings which were sustainable on the evidence and for which cogent reasons were given.

Conclusion & Decision

25. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeals remain dismissed on all grounds.

Signed: Date: 27 October 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No specific submissions were made on the issue. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I continue the anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable in this case.

Signed: Date: 27 October 2014

Deputy Upper Tribunal Judge Pickup