Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07744/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 September 2015	**On 30 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MK (SRI LANKA)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Alison Pickup, Counsel, instructed by Birnberg Peirce & Partners
For the Respondent: Ms Ashika Vijiwala, Specialist Appeals Team

DECISION AND REASONS

1. The appellant has been granted permission to appeal to the Upper Tribunal from the decision of the First-tier Tribunal taken under the detention fast track procedure ("DFT") whereby the First-tier Tribunal dismissed the appellant's appeal against the decision of the Secretary of State to refuse to recognise him as a refugee, or otherwise requiring international protection. The First-tier Tribunal did not make an anonymity direction, but I consider that the appellant should be accorded anonymity as he is a vulnerable adult and his case is that he has a well-founded fear of persecution at the hand of state agents in the country of return.

2. The appellant is a national of Sri Lanka and his date of birth is 29 December 1994. He claims to have left Sri Lanka by plane on 7 February 2014, and to have arrived in Denmark on 9 February 2014. He said he made his way to Italy and then travelled to Belgium, before arriving in the United Kingdom hidden in the boot of a car on 5 September 2014. On 9 September 2014 he contacted the AIU and on 15 September 2014 he claimed asylum, and was inducted into the fast track process. The screening interview took place on 15 September 2014, and his asylum interview at Harmondsworth took place on 30 September 2014. The Reasons for Refusal Letter was issued to him the next day on 1 October 2014. His appeal was initially due to be heard at Harmondsworth on 10 October 2014, but on the day of the hearing his representative applied successfully for an adjournment. The adjournment was granted so as to enable his representatives to commission a medical report to support his allegation that he had been subjected to anal rape on the occasion of his third alleged detention by the army, which he said had taken place in December 2013.

3. The appellant's appeal came before Judge Chana for a hearing at Harmondsworth on 24 October 2014. At the outset of the hearing, Mr Lingajorthy made an application for the case to be taken out of fast track. They had obtained a psychiatric report from Medical Justice dated 30 September 2014 (following an interview with the patient on 26 September 2014) which stated that the appellant had not been offered a medical examination or treatment with regards to his rape history. The appellant reported symptoms which were consistent with his account of torture and sexual assault. He needed to have a further substantial medical examination to verify fully his history of torture and sexual assault. He also required a psychologist to give him treatment.

4. Mr Lingajorthy further submitted that he had not been able to communicate with the appellant, and he could not get a coherent answer from him earlier in the day when he was trying to take instructions from him. He said an appointment had been made for the appellant on 9 November 2014 for an internal medical examination to see if he had been raped. He also wanted to commission a second psychiatric report. The previous psychiatric report did not say that the appellant was unfit to give evidence, but a further report would elaborate on that. Both reports would be available by the end of November 2014. Mr Lingajorthy reminded the judge that the Rule 35 report on the appellant said that he might have been a victim of torture.

5. Mr Maine on behalf of the Home Office opposed the application to take the appeal out of fast track. The last hearing had been adjourned for a medical report on his allegations of anal rape, and this was supposed to have been completed within ten days. There was no explanation as to why this had not been done. The appellant had given evidence at his screening interview and asylum interview where he had answered some 400 questions. He was therefore able to give evidence. The healthcare centre had indicated no concerns about the appellant, and had not said

that he was not suitable for detention or that he was not fit to give evidence.

6. Judge Chana refused to take the case out of fast track, or to adjourn the hearing, as she was not satisfied there were exceptional circumstances that demonstrated the appeal could not be justly determined in accordance with paragraph 30 of the Asylum and Immigration Tribunal (Fast Track Procedure) Rules. She took into account that the Rule 35 report was based on what the appellant had told the doctor, and that the report was brief and only indicated that he might have been a victim of torture. She took into account that the body map in the report did not indicate that the appellant had any scars on his body. She took into account that the appellant claimed to have been raped about one and a half years ago (in fact it was ten months ago) but had not asked for any treatment at the health centre even though he claimed to be in acute pain.

7. The judge also noted that, during his solicitor's submissions, the appellant interjected and said that the nurses at the detention centre had promised him some cream but they had not given it to him. The judge said that this interjection by the appellant demonstrated to her that the appellant understood the proceedings and was able to get his point across.

8. Even if after a physical examination of his rectum, it was found that the appellant had some old scars, that in itself would not, the judge reflected, show that they were incurred in the manner stated by the appellant.

9. The appellant proceeded to give oral evidence through a Tamil interpreter, and he adopted his witness statement which he signed in court. The appellant was cross-examined by the Presenting Officer. In her subsequent determination, Judge Chana said that she was confident that the appellant had understood all the questions put to him, as he answered all the questions adequately.

10. The judge's findings of fact were set at paragraphs [38] onwards. She said she had considered all the evidence in the appeal, including evidence to which she had not specifically referred. She had looked at the appellant's evidence and had attempted to decide whether it was consistent and coherent. She had also considered the claim in the light of the background evidence on Sri Lanka. The judge went on to find that neither the appellant nor his family had ever had anything to do with the LTTE at all, and that his entire story was a fabrication. She found that the appellant was an economic migrant.

The Application for Permission to Appeal

11. The appellant's representatives applied on his behalf for permission to appeal to the Upper Tribunal. Ground 1 was that a consultant psychiatrist of high professional standing and good repute, namely Dr Pook, had examined the appellant and had prepared a medico-legal report on his behalf (the Medical Justice report dated 30 September 2014) which had been made available to the First-tier Tribunal prior to the hearing on 24

October 2014. The report supported the appellant's account that he had been a victim of torture, and it was central to the appellant's credibility. The First-tier Tribunal Judge had not even mentioned its existence in her determination, which showed that she had not considered it.

12. Ground 2 was that the judge had been wrong not to grant an adjournment. She ought to have accepted Mr Lingajorthy's submission that by inducting his case into the fast track process, the Home Office had done a grave injustice to the appellant. She ought to have accepted Mr Lingajorthy's submission that ten days was too short a period for the appellant to obtain a further medical report, and to have taken proper account of his submissions that he had been unable to take proper instructions from the appellant that day, which he attributed to the appellant's precarious mental health condition.

The Initial Refusal of Permission

13. On 30 October 2014 First-tier Tribunal Judge Blandy refused permission to appeal, holding that it was not arguable that there had been a procedural impropriety in the judge refusing the application to remove the case from fast track.

The Eventual Grant of Permission following a JR challenge

14. A renewed application for permission to appeal was made to Upper Tribunal, and and permission was apparently refused. I say "apparently" because the relevant refusal notice is not in the file or in the core bundle. Instead there is a notice of decision dated 6 November 2014 issued by Upper Tribunal Judge Warr in respect of another appellant in a different appeal.

15. The appellant successfully applied for judicial review of the decision to refuse him permission to appeal. On 20 April 2015 Deputy Master Knapman made an order quashing the decision of the Upper Tribunal to refuse permission to appeal.

16. On 11 May 2015 Vice President Ockelton granted the appellant permission to appeal in the light of the decision of the High Court. He reminded the parties that the Upper Tribunal's task was that set out in Section 12 of the 2007 Act.

The Rule 24 Response

17. On 21 May 2015 Karen Pal of the Specialist Appeals Team settled a Rule 24 response on behalf of the Secretary of State opposing the appellant's appeal. She submitted that the Judge of the First-tier Tribunal had directed herself appropriately. She had made adequate findings of fact and given cogent reasons for those findings. The judge properly found the appellant would not be at risk on return to Sri Lanka, applying the country guidance case of **GJ**.

Further Representations from the Appellant's Solicitors

18. On 27 August 2015 the appellant's solicitors wrote to the President of the Upper Tribunal inviting the court of its own motion to allow the appeal on the papers, to set aside the decision of the First-tier Tribunal and to remit the appeal to the First-tier Tribunal for a de novo hearing. The solicitors relied on the outcome of **Detention Action v First-tier Tribunal (IAC) & Others [2015] EWHC 1689** in which it was declared that the fast track Rules governing asylum appeals were ultra vires. This decision had been upheld by Master of the Rolls in **Lord Chancellor v Detention Action [2015] EWCA Civ 849**. In DA/02456/2013 the President of the First-tier Tribunal had pronounced himself satisfied that there was a procedural irregularity in the proceedings under Rule 32(2)(d) as it was common ground between the parties that the fast track Procedure Rules were ultra vires following the decision of the Court of Appeal in **Detention Action**. Further, it was in the interests of justice for the decisions to be set aside.

19. In response, Upper Tribunal Judge Dawson, Principal Resident Judge of the Upper Tribunal (IAC), said the first step was to suggest to the President of the First-tier Tribunal that he should aside the decision under appeal in the Upper Tribunal. If he chose to do so, no doubt the solicitors would notify the Upper Tribunal.

The Hearing in the Upper Tribunal

20. At the hearing before me, Ms Vijiwala conceded at the outset that the decision of the First-tier Tribunal should be set aside, and that the appeal should be remitted to the First-tier Tribunal for a de novo hearing.

21. Miss Pickup acknowledged that this was an acceptable outcome, but she invited me to go further. She submitted that I should allow the appellant's appeal on the ground that the decision appealed against was not in accordance with the law. She relied on concessions made by the respondent at the hearing in **R (JM and Others) v SSHD** on 3 July 2015.

22. The appellant was a vulnerable applicant and this was or ought to have been obvious to the respondent from the outset. Her failure to identify him as potentially vulnerable at any stage, including following the receipt of a Rule 35 report, and/or to allow further time for clinical investigation of his case, was characteristic of the systemic failings in the DFT procedure which had led to its suspension on 2 July 2015 and the Secretary of State's concessions at the hearing in **R (JM and Others)** on 3 July 2015. While the respondent may only have conceded that there was a systemic problem with the operation of the DFT in 2015, the specific failings which led to her to agree that she should reconsider the asylum decisions in the claimant's cases in **R (JM and Others)** also arose in this case. There was no material difference. Subjecting the appellant to an unlawful and inherently unfair procedure for deciding his asylum claim resulted in a decision that was itself unlawful. So the appeal should be allowed on that basis.

Reasons for Finding an Error of Law

23. In the light of Ms Vijiwala's concession and the stance taken by the President of the First-tier Tribunal in respect of DFT appeals generally, the reasons for finding a material error of law can be set out very briefly.

24. Firstly, the appellant was deprived of a fair hearing of his appeal in the First-tier Tribunal on account of his appeal being dealt with under the DFT procedure; and, in particular, on account of the appellant not being given sufficient time to marshal all the evidence which he required to present his case effectively.

25. Secondly, Judge Chana failed to acknowledge the independent probative value of the psychiatric report from Dr Pook of Medical Justice. She opined that the appellant was displaying symptoms of PTSD consistent with his account of ill treatment in detention. As a result of Judge Chana not engaging with this expert evidence, her findings on the appellant's account of past persecution were fatally flawed, rendering her findings on future risk potentially unsafe.

Future Disposal

26. The more difficult question is whether the appeal should be allowed on the ground that the decision was not in accordance with the law or whether the appeal should be simply remitted to the First-tier Tribunal for a de novo hearing. Having carefully considered Miss Pickup's submissions, and the evidence upon which she relies, I resolve this question in favour of the Secretary of State, for a combination of reasons, both merits based and procedural.

27. On the merits, I accept that the case advanced by Miss Pickup is arguable, but the case for this appellant is not as strong as the cases for the successful claimants in **JM and Others**.

28. By an agreed order made by Master Gidden on 19 March 2014 the four claimants were selected as representative lead cases in which to decide, inter alia, whether since 5 January 2015 the DFT had been and was being operated lawfully and fairly in identifying and ensuring release of cases unsuitable for fair determination and detention in the DFT process.

29. In a subsequent agreed order, the Secretary of State accepted that each of the lead claimants was vulnerable but that the DFT systems operated by her had failed to identify them as such and/or as consequentially unsuitable for a fair and quick determination in the DFT in accordance with the DFT policy. She accepted that each of their cases could not have been fairly determined in the DFT because each required further clinical investigation into their claims of torture, ill-treatment, or other vulnerability which could not be obtained in the DFT process; and it was accepted in each of their cases that this should have been apparent at screening. The Secretary of State also accepted that in each of the cases, the Rule 35 report should have resulted in release from the DFT because it was clear that a quick decision could not be taken fairly and the claimants required an opportunity for further investigations into their claims for

torture, ill-treatment or other vulnerability. Each claim was, therefore, wrongly processed in the DFT.

30. In the case of **RE** and **MY**, the Secretary of State agreed to withdraw the refusals of asylum under the DFT and to reconsider their claims. With respect to the case of **KW**, the Secretary of State agreed to reconsider her case, if she was requested to do so. The outcome for the fourth claimant, **RE**, is not specified.

31. As I explored with Miss Pickup in oral argument, the cases of **RE**, **MY** and **KW** are objectively stronger than the appellant's case. This is because the Rule 35 reports for these three claimants had attached body maps showing scarring and/or other visible injuries. The probable reason for the differential treatment of **KW**'s case as against the case of **JM** and **MW** is that the Rule 35 report in **KW**'s case noted self-harm scars to **KW**'s arms and a burn from a stick on her leg. In short, the Rule 35 report was more consistent with self-harm than it was with her account of being tortured in detention. As for **RE**, the Rule 35 report set out the forms of torture which it was said that **RE** had experienced, including having two toes broken by prison officers. The report noted he had a deformity of the toes of the right foot, which was indicated on the body map attached to the report. So, looking at the matter objectively, the body map in his case was not strongly supportive of his account of torture, but was at best equivocal. This may explain why the Secretary of State is not recorded as agreeing to withdraw the decision on his asylum claim, or to give him the option of asking for his asylum claim to be reconsidered.

32. On the procedural front, it was not part of the appellant's case before First-tier Tribunal Judge Chana that she should allow the appeal on the ground that the decision was not in accordance with the law.

33. Moreover, I do not consider it is in accordance with the overriding objective to proceed down this route. Firstly, on the topic of future risk, the Secretary of State will continue to maintain that the asylum claim is defeated by **GJ**, which is the position taken in the Rule 24 response. Secondly, a clinical examination of the appellant never took place, and it is not envisaged that such an examination can usefully take place now, so long after the event. Thirdly, in a subsequent psychiatric report, Dr Pook opined that the appellant's mental health had deteriorated sharply since her first assessment, and that he was no longer fit to give evidence. In the light of this evidence, it is not now proposed that the appellant should be re-interviewed about his asylum claim.

Conclusion

34. The decision of the First-tier Tribunal contained a material error of law, such that it shall be set aside.

Directions

35. The appeal is remitted to the First-tier Tribunal at Taylor House for a de novo hearing before any judge apart from Judge Chana.

None of the findings of fact made by the previous Tribunal shall be preserved.

36. **The appellant's solicitors are permitted to serve on the Presenting Officers' Unit and the First-tier Tribunal an expert report on the appellant's current mental health condition, by 31 October 2015.**

37. **A Case Management Review hearing to consider the implications of such a report (if any), and the future progress of the appeal generally, shall be fixed by the appellant's solicitors at Taylor House in November 2015 or as soon thereafter as can be arranged.**

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 their 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

Deputy Upper Tribunal Judge Monson