



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)**

APPEAL NUMBER: AA/11297/2014

THE IMMIGRATION ACTS

**Heard at: Field House
on 24 September 2015**

**Decision and Reasons Promulgated
on 19 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

**MR N N
ANONYMITY DIRECTION CONTINUED**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms A Walker, counsel (instructed by Theva Solicitors)

For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Sri Lanka, born on 17 May 1981. He appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to remove him, having refused his asylum application.
2. On 15 May 2015, Designated Judge of the First-tier Tribunal McClure granted the appellant permission to appeal on the basis that the Judge's approach to the medical evidence was flawed. The Judge had questioned and then rejected parts of the doctor's report. In so doing, Judge McClure found that it was arguable that the Judge

erred in the approach. The same challenge was made against the Judge's approach to the psychiatric evidence, which was also held to amount to an arguable error of law.

3. Ms Walker, who did not represent the appellant at the hearing before the First-tier Tribunal, relied on the grounds of appeal submitted in support of the application for permission.
4. She submitted that the respondent had not challenged the expertise of Dr Martin who prepared the scarring report relating to the appellant. Dr Martin had been provided with copies of the appellant's screening and substantive interviews prior to his assessment of the appellant, which he confirmed in the report.
5. Dr Martin found that the appearance of scars was typical of injuries caused by being beaten with a narrow implement "as described by the claimant." These scars appeared to be mature and were consistent with the time span described by the appellant. Dr Martin ruled out the possibility of self inflicted injury and also found that it was unlikely that the scars and injuries were caused with the appellant's consent. He arrived at the conclusion on account of the numbers of scars and the severity of his injuries.
6. After applying the Istanbul Protocol, Dr Martin stated that he had no doubt that the injuries were caused by being intentionally injured. It was the most likely explanation that he was tortured.
7. Ms Walker submitted that notwithstanding that report, the Judge rejected the appellant's claim of having been tortured and criticised the medical report. In the event, he did not find that the appellant's injuries were consistent with the causation given by the appellant, as if he had been beaten with the frequency and in the manner he described, he would have expected his upper body to have been almost entirely covered with scars. He accepted that it was unlikely that the appellant inflicted those scars himself. However, he did not find it to be proved that they were inflicted by the Sri Lankan army [59].
8. The Judge also noted that Dr Martin did not comment on whether the number of scars is consistent with the appellant's statement that one day he was beaten with wire and pipes and kicked with heavy boots for the whole day. Nor did Dr Martin comment on whether the number of scars he found is consistent with the appellant's being regularly beaten in this fashion for either a period of one and a half months or for a period of a week.
9. She submitted that the Judge erred in rejecting Dr Martin's evidence for the reasons he gave. That is because Dr Martin made it clear in his report that he was fully aware of the appellant's account as set out at page 4 of his report. He had also examined the appellant. His findings in relation to the back and upper limbs are set out in detail at page 4. As far as the injuries to his back are concerned, he referred to numerous hyper-pigmented linear scars. These are set out in his diagram contained at Appendix 1.
10. Dr Martin also identified the scars in the upper limbs, which included linear scars on the left shoulder and upper third of the left upper arm. A photograph was produced of

the injuries. Further, there were two oblique linear scars on the lateral aspect of the right shoulder and upper third of the right upper arm as set out in these diagrams and photographs.

11. Dr Martin had set out the appellant's account as to how these scars were caused. This was as a result of being repetitively beaten during his detention in 2009. The appearance of the scars is typical of injuries caused by being beaten with a narrow implement as described by him.
12. He stated that it is unlikely that the injuries could have been self inflicted. It was likely to have been caused by other individuals. That was unlikely due to the numerous number of scars and the severity of the injuries. From the inspection of the injuries, he found that it difficult to say if the injuries were caused by friends or foes as the appearance of the scars would have been, for practical purposes, indistinguishable. He found that the scars appeared mature and were consistent with the time span given by the claimant.
13. Ms Walker also submitted that the comment of the Judge at [57] that Dr Martin did not comment on whether the number of scars he found was consistent with the appellant being regularly beaten in this fashion for a period of one and a half months or a period of a week was a material error of fact. From the interview of the appellant (questions 103-105) he did not in fact state whether the ill treatment had stopped once he had confessed.
14. She submitted that the Judge's assumption from his conclusion that beating with boots, wire and pipes would lead to extensive scarring was made without any evidence. That, she submitted, was a conclusion not available to the Judge who was not an expert. The extent of scarring depends on the nature of the beatings sustained, which in turn is dependent on a number of 'variables' including the nature of the implements used, whether the skin was broken, and so on. These were matters which an expert could comment upon but not a lay person.
15. In any event, she submitted that the Judge acted "procedurally unfairly" in that the respondent had not challenged the expertise of Dr Martin nor the contents of his report. Nor did the Judge raise any concerns during the hearing when counsel expressly pointed out to him that the report had not been challenged. In the circumstances, the Judge should have raised his concerns on the report so that the appellant's representative could address them and possibly seek an adjournment to enable Dr Martin to attend and give evidence in response, if required.
16. Before the Upper Tribunal the appellant gave notice as part of his permission to appeal to be permitted to produce evidence from Dr Martin in response to the comment made by the Judge. A copy of Dr Martin's response was in fact attached.
17. During the course of the hearing however, I indicated that I would have no regard to that evidence, as it is not relevant to the error of law hearing.
18. Insofar as the psychiatric report of Dr Dhumad is concerned, Ms Walker submitted that the Judge made material errors in rejecting his diagnosis of PTSD and severe depressive episodes. His evidence of the appellant's mental health was unchallenged

by the respondent. However, the Judge failed to give proper reasons for rejecting and disregarding it, as required by AM v SSHD [2012] EWCA Civ 521.

19. She submitted that the Judge had again acted procedurally unfairly in rejecting the psychiatrist's evidence, particularly as the respondent did not challenge the report or Dr Dhumad's expertise. The Judge did not raise any concerns about the report during submissions. If he had concerns, the opportunity should have been given to the appellant to address them, including the consideration of whether to apply to call Dr Dhumad to give evidence. The Judge behaved procedurally unfairly in the circumstances.
20. In addition, she submitted that the Judge's criticism of the report on the basis that the full medical records were not available was unreasonable. Although Dr Dhumad did not have the benefit of the full medical record, he did have some evidence available to him as set out in the report, including the letter from the GP, prescriptions and the letter from the psychological therapist, which was dated 16 May 2014.
21. Thirdly, the Judge erred in rejecting the diagnosis of PTSD on the basis that as set out in Appendix III of the report, which stated that the onset of PTSD follows the trauma with a latency period which may range from a few weeks to months but rarely exceeds six months.
22. In this respect the Judge found at [69-74] that the failure by the appellant to seek medical help for symptoms of PTSD shortly after his arrival in the UK or until 2012 showed that he was not suffering from PTSD.
23. In that regard, she submitted that the Judge was guilty of flawed reasoning, namely, in assuming that the onset of the appellant's trauma coincided with the time that he sought treatment.
24. Even though he may not have sought treatment within a short period of his arrival in the UK (and within six months of the trauma suffered) it was clear from Dr Dhumad's report that it was the appellant's claim that he was mentally affected by the torture suffered following its occurrence and that he had initially felt safe upon arrival in the UK.
25. The evidence was also that as a result of his mental state, he had been unable to continue with his studies. Some time thereafter, in late 2011, he sought treatment as set out in the screening and substantive interviews.
26. Accordingly, the appellant's case was that the onset of trauma followed the detention and torture. It did not follow that since he had not sought treatment, this meant he was not suffering from PTSD at that time. Moreover, the doctor was aware that the appellant had not sought treatment until late 2011 and despite this, concluded that in his expert opinion he was suffering from PTSD and severe depressive episodes.
27. There are other criticisms of the Judge's findings with regard to Dr Dhumad's report and in particular that the Judge erred in "his complete failure" to have regard to the detailed assessment carried out by Dr Dhumad based upon his clinical assessment and expertise.

28. Moreover, he failed to have regard to Dr Dhumad's opinion at 15(h) that it was extremely difficult to feign a full blown mental illness (as opposed to individual symptoms).
29. As a result of his conclusion that the appellant was not suffering from PTSD, the Judge failed to address the other issues on which Dr Dhumad gave his opinion, including the risk of suicide, deterioration in his mental health in the event of removal, and his inability to stand up to questioning by the authorities on return.
30. The third ground relied on relates to documentary evidence, including the evidence of a reputable attorney at law in Sri Lanka. The Judge erred in attaching no weight to such evidence on the basis that they were from Sri Lanka, and his regard to the ease with which forged documents can be obtained there.
31. However, the appellant relied upon documents demonstrating that his parents complained to the police following his arrest and detention, as well as the detention of his father. This all constituted evidence that was contemporaneous to those events. He also relied on documents setting out his mother's complaint to the Human Rights Commission in Sri Lanka. Those were all verified by a reputable attorney, Mr Anton Punethanayahem.
32. In rejecting the evidence, the Judge found at [113] that he did not find the evidence reliable having regard to the ease with which one can obtain "official" documents in Sri Lanka, either by bribery or forgery.
33. In so doing, the Judge erred in his failure to have regard to the fact that the attorney was a reputable lawyer whose evidence in fact had been accepted by the Upper Tribunal in the country guidance case in GJ (Sri Lanka) and who had been expressly contacted by the appellant's solicitors to verify the documentary evidence produced. She submitted that that rejection puts into question not only the attorney himself but the good faith of the UK lawyers who instructed him.
34. The Judge also found at [94] that the appellant's mother's name in the attorney's letter did not match the name provided by the appellant in his visa application. In fact, the name on the visa application is his mother's family name, whereas the name in the lawyer's letter and other documentation is her husband's name.
35. The Judge knew that the appellant did not complete the visa application form, which was done by his agent. The Judge erred in failing to take into account that there are often differences in spelling of names when they are spelt in the "Roman text" as compared to the original Tamil. These differences in spelling are due to differences in transliteration between the Tamil script and Roman script.
36. Ms Walker submitted that in the light of these errors, the Judge failed to assess the appellant's risk on return to Sri Lanka. The Judge has thus failed to consider the appellant's Article 3 claim. In that respect, Dr Dhumad had expressly considered the issue of risk of suicide in the event of removal, or his ability to face questioning by the Sri Lankan authorities on return and the ability to access palliative care.
37. The Judge did not engage with or deal with any of these issues, notwithstanding the comments of the Upper Tribunal in GJ (Sri Lanka) at [450-456].

38. On behalf of the respondent, Mr Kandola adopted the Rule 24 response. The expert had to consider the credibility of the appellant's account as presented. The Judge has given consideration to the report. The Judge had regard to the inconsistencies in the appellant's evidence. He was entitled to find that the appellant had not discharged the burden of proof regarding the contention that the scars were inflicted by the Sri Lankan army.
39. The Judge also identified the shortfalls in the psychiatric evidence. This he considered in detail. He was entitled to refuse to accept the diagnosis given by the doctor. All the appellant had said was that he had not been sleeping well when coming to the UK. He referred to paragraph 9(b) of Dr Dhumad's report. The report was a few years later and this was accordingly a valid criticism.
40. With regard to Ground 3, he submitted that the applicant's mother's name in the letter did not match the name provided by the appellant in his visa application.
41. He submitted that overall the Judge's determination is properly reasoned and was engaged with the evidence. In making adverse credibility findings against the appellant, he had in mind the appellant's sur place activities.
42. Once the Judge rejected the appellant's credibility, the issues relating to risk on return were irrelevant. Moreover, with regard to the Article 3 claim, the Judge examined the arguments in support of those but found no substance in them. The threshold for Article 3 is very high.

Assessment

43. I find that the Judge committed errors of law in rejecting Dr Martin's evidence. Dr Martin had made it clear in his report that he was aware of the appellant's account. The extent and nature of the scarring was in his opinion consistent with the claims made by the appellant including the claim of having been tortured in detention on one occasion and having been beaten for the whole day. The Judge's reasons at [56-59] are, as submitted, based on inferences which he drew with regard to what he would have expected the appellant's upper body to have revealed, namely that it would have almost entirely been covered with scars.
44. However, there was unwarranted speculation in that respect. There were, as submitted by Ms Walker, a number of factors which might have accounted for their absence after a lengthy period. That included the nature of the implements used as well as whether the skin was broken.
45. In the circumstances he ought to have afforded the appellant an opportunity to adduce evidence or make submissions addressing his concerns. This did not happen in the circumstances as these matters had not been raised during the course of the hearing.
46. Further, I find for the reasons already referred to, that the approach to and the consideration of, Dr Dhumad's reports, contained various errors. The finding in particular that the appellant did not seek medical help for symptoms of PTSD shortly after his arrival in the UK showed that he was not suffering from PTSD is to assume that the onset of the disorder coincided with the time when he sought treatment.

47. It was noted in Dr Dhumad's report however that the appellant claimed that he was mentally affected by the torture he suffered. He had initially felt safe upon arrival in the UK but as a result of his mental state, he had been unable to continue with his studies. Some time thereafter, which was in late 2011, he sought treatment. It did not follow therefore that the fact he had not sought treatment shortly after arrival meant he was not suffering from the disorder at the time. Dr Dhumad concluded that despite this, the appellant was suffering from PTSD and a severe depressive episode.
48. Moreover, the Judge erred in failing to attach any weight to the documentary evidence submitted simply because they emanated from Sri Lanka. The documents upon which he relied had been verified by an attorney in Sri Lanka. One of those documents was the appellant's mother's complaint to the Human Rights Commission in Sri Lanka.
49. The letter was in the possession of the respondent. No attempt had been made to verify its authenticity and reliability. These documents emanated from official sources.
50. The documents were retrieved by a lawyer whose integrity had been confirmed by the Upper Tribunal in the country guidance case. I have also had regard to the Court of Appeal's decision in GJ (Sri Lanka) v SSHD [2014] EWCA Civ 1011. In the event potentially significant evidence relevant to the credibility of the appellant had been precluded without good reason.
51. I have also had regard to the failure by the Judge to assess the potential risk that the appellant faced on return to Sri Lanka. In particular, he failed to take into account evidence relating to his pro-Tamil activities in the UK. There were various photographs evidencing this as well as the appellant's own evidence.
52. In that respect, Dr Dhumad had concluded that the exposure to participation in such activities was therapeutic for the appellant. That is because the appellant would suffer from extreme anxiety and distress when exposed to the source of his fear outside the therapeutic setting. Although the Judge stated that he could not understand the logic behind that conclusion, it is consistent with his findings and diagnosis of the appellant as suffering from PTSD.
53. In the circumstances, I find that the decision of the First-tier Tribunal involved the making of material errors on a point of law. I therefore set it aside. It is clear that there will have to be a full re-hearing. None of the findings of fact made by the First-tier Tribunal are preserved. All the live issues identified from the refusal decision are in play.
54. Ms Walker submitted that this was an appropriate case to be remitted to the First-tier Tribunal. Mr Kandola did not make any submissions to the contrary.
55. I have had regard to the Senior President's practice statement regarding the remittal of appeals to the First-tier Tribunal. In giving effect to the approach, I am satisfied that the extent of judicial fact finding which is necessary in order for the decision to be re-made will be extensive. There will be a complete re-hearing with no findings preserved. I have also had regard to the overriding objective and conclude that it would be just and fair to remit the case.

56. In the circumstances, I direct that the appeal be remitted to the First-tier Tribunal (Taylor House) for a fresh decision to be made.

Notice of Decision

The decision of the First-tier Tribunal involved the making of material errors of law and the decision is set aside. The appeal is remitted to Taylor House for the making of a fresh decision

Anonymity direction continued.

Signed
Deputy Upper Tribunal Judge Mailer

Date 16 October 2015