Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/05235/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 February 2016	**On 22 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

KANAGARATNAM THIVAKARAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Nathan (counsel) instructed by Kanaga, solicitors.
For the Respondent: Mr L Tarlow, Senior Home Office presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2, This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Abebrese promulgated on 1st October 2015, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 22 November 1992 and is a national of Sri Lanka.

4. On 12 March 2015 the Secretary of State refused the Appellant's application for asylum.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Abebrese ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 26 November 2015 Designated Judge Garratt gave permission to appeal stating inter alia

> *"The grounds are arguable on the basis that the appellant's responses in asylum interview, particularly to questions 146 and 185, claim that the hooded man was present on only one occasion at the point of arrest of the appellant. Paragraph 33 of the decision suggests that the Judge has misunderstood the evidence in this respect. It is also arguable that the Judge's erroneous conclusion is material to other findings."*

The Hearing

7. (a) Mr Nathan, for the appellant, told me that the Judge had taken an incorrect approach to the assessment of credibility. He told me that it is trite law that credibility should be assessed in the round, but the Judge had based his findings on credibility entirely on the asylum interview record which, he told me, was flawed. He reminded me that the respondent's bundle contains a psychiatric report confirming that the appellant has a diagnosis of PTSD, and that there is an expert report. He told me that there were corroborating witnesses, but that at [42] the Judge failed to make any reference to the corroborating account of membership of a family with LTTE connections, and to corroborated evidence of attending LTTE demonstrations in the UK.

(b) Mr Nathan told me that the Judge had disregarded the evidence of the appellants corroborating witnesses, and rejected the expert evidence and the psychiatric report solely because the Judge found that the appellant's performance at asylum interview undermined his overall credibility.

(c) He told me that the decision was tainted by a material error of fact because the Judge confused the evidence about the presence of a threatening hooded man at the Joseph internment camp. He urged me to set the determination aside and to remit this case to the first-tier to determine of new.

8. Mr Tarlow for the respondent told me that if there is an error in this decision in relation to the account of intervention by the hooded man, it is

not a material error of law. He told me that the tribunal made adverse credibility findings on the evidence of the appellant and referred me to [35] to [43] of the decision, telling me that there the Judge sets out a careful analysis of the evidence before making findings of fact which were open to the Judge, and then taking country guidance in the case of GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). Mr Tarlow told me that in light of the case of GJ, the Judge's conclusion that the appellant will not be at risk on return to Sri Lanka was a finding of fact which was available for the Judge to make. He asked me to dismiss the appeal and to allow the decision to stand.

Analysis

9. Between [20] and [27] the Judge rehearses the evidence; he commences his credibility findings at [28]. The Judge's starting point is that the account the appellant gives of arrest and detention is inconsistent & not credible. Between [29] & [34] the Judge tries to resolve conflicts in the evidence almost entirely by reference to the record of asylum interview.

10. Only after rejecting the appellant's evidence as lacking in credibility does the Judge move on to consider the report prepared by Andres Martin ([36] of the decision). Mr Martin offers the opinion that the appellant has injuries consistent with torture and caused by a narrow hot instrument; but the Judge summarily dismisses Mr Martin's conclusions and finds *"... that the evidence in relation to the scarring is rejected by the tribunal as not being credible."*

11. In M(DRC) 2003 UKIAT 00054 the Tribunal said that it was wrong to make adverse findings of credibility first and then dismiss the report. Similarly, in Ex parte Virjon B [2002] EWHC 1469**,** Forbes J found that an Adjudicator had been wrong to use adverse credibility findings as a basis for rejecting medical evidence without first considering the medical evidence itself. In HE (2004) UKIAT 00321 the Tribunal said that "*where the report is specifically relied on as a factor relevant to credibility, the adjudicator should deal with it as an integral part of the findings on credibility, rather than just as an add on, which does not undermine the conclusions to which he would otherwise come*". However, the Tribunal also said that where the report simply recounts a history which the Adjudicator is minded to reject and contains nothing which does not depend on the truthfulness of the appellant, the part which it can play in the assessment of credibility is negligible.

12. In Mazrae (2004) EWCA Civ 1235 the Court of Appeal said that the Adjudicator's approach to credibility was flawed in that she appeared to have reached an adverse finding on credibility based solely on the appellant's own account, a finding which she went on to say was not shaken by the background material and an expert report, having considered them separately. Although the application was refused for various reasons Lord Justice Sedley admitted to having grave doubts about the Adjudicator's reasoning in this respect and said that the

Adjudicator should have considered and evaluated all the evidence together - the appellant's account, the medical report and expert report, rather than dismissing each in isolation from each other.

13. At [38] the Judge finds that the appellant's diagnosis of PTSD has got nothing to do with his account of events in Sri Lanka. In the last sentence of [38], the Judge specifically states "…. *The tribunal does not find it credible that the appellant was indeed arrested and subsequently detained and tortured as claimed*."

14. Although the Judge correctly takes guidance in the case of GJ and others at [43], he does so after taking an incorrect approach to the psychiatric and expert evidence. The Judge should have considered each strand of evidence before reaching conclusions as to credibility. The Judge does not adequately explain why he rejects both the psychiatric report and the expert evidence. I find that that is not just an error of law, it is a material error of law. If the evidence in this case had been considered in the round, a different conclusion may have been reached. It is realistically possible that if the evidence of Dr Martin and the psychiatric report has been considered correctly, then the appellant may have been found to be a credible and reliable witness.

15. I must find that the decision is tainted by a material error of law. I therefore set the decision aside

16. The Judge's decision cannot stand and must be set aside in its entirety. All matters must be determined of new.

REMITTAL TO FT

17. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of 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*.

18. I find that this case should be remitted because of the nature and extent of the judicial fact finding which will be necessary to make a just decision in this case. In this case none of the findings of fact are to stand.

19. I remit the matter back to the First-tier Tribunal sitting at Taylor House, before any First-tier Judge other than Judge Abebrese.

CONCLUSION

Decision

20. The decision of the First-tier tribunal is tainted by material errors of law.

21. I set aside the decision. The appeal is remitted to the First Tier Tribunal to be determined of new.

Signed Date 12 February 2016

Deputy Upper Tribunal Judge Doyle