



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/05489/2011

THE IMMIGRATION ACTS

Heard at Field House

On 26 May 2016

**Decision & Reasons
Promulgated
On 1 July 2016**

Before

**Mr H J E LATTER
DEPUTY UPPER TRIBUNAL JUDGE**

Between

**AS
(ANONYMITY DIRECTION MADE)**

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Respondent

Representation:

For the Appellant: Ms S Jegarajah, Counsel

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

DECISION AND REASONS

Introduction and Background

1. This is an appeal remitted to the Upper Tribunal for redetermination by the Court of Appeal following a consent order dated 5 June 2013. It concerns a claim for asylum made by the appellant, a citizen of Sri Lanka born on [] 1985. He made an illegal entry into the UK on 31 January 2011 claiming asylum on arrival. His application was refused on 19 April 2011 and directions were set for his removal.

2. He claimed that he would be at risk on return to Sri Lanka because of his actual or perceived activities and support for the LTTE. In very brief outline the appellant said that he was approached by the LTTE's recruitment team in about 2000. As his father had passed away and he was an only child, he was responsible for looking after his mother. He explained this to the recruitment team and they asked him to work at a newspaper company belonging to the LTTE. The appellant did so. He was also trained to help the LTTE by providing first aid to injured cadres and taking them to hospital when requested to do so. He claims that he was arrested by the Sri Lankan CID in January 2004 when he was travelling to Vavuniya and detained for around six hours in an army camp. During his detention he was questioned and ill-treated as he had failed to disclose at the checkpoint that he was working at an LTTE owned newspaper. He was subsequently released and he returned to Kilinochchi and continued working for the LTTE until March 2009.
3. In 2008 the war between the LTTE and the Sri Lankan Army escalated and he was given basic self-defence training to safeguard himself whilst he was working with the LTTE in the battlefield which he did by digging bunkers and sandbanks for fighters during 2008 and 2009 in addition to helping injured LTTE cadres. In March 2009 he and his mother with other civilians went to a Sri Lankan Army controlled area along with other civilians due to heavy fighting and they were detained at an army camp. They were helped to escape from detention by someone who belonged to a Tamil paramilitary group and they were then able to go to Colombo. They stayed in hiding at Kotahena without registering with the Sri Lankan police because of the appellant's fears arising from his work with the LTTE and his escape from the army detention camp without registering as detainees.
4. The appellant claimed that he was arrested on 10 November 2010 in Colombo. He was taken to Kotahena police station for inquiries and then taken to an unknown place where he was detained for thirteen days. Following initial inquiry he was questioned and tortured about his links with the LTTE and his back was burned using a hot object. He was kicked, beaten with pipes and slapped hard. During his detention he told the army officials about his involvement with the LTTE and the work he had done. He signed a document written in Sinhalese and was also fingerprinted after photos and videos were taken. On 23 November 2010 he was taken from where he was detained, blindfolded and driven to the side of a road where he was dropped off. He was then approached by a Tamil man and taken to his home. His uncle in Canada was mentioned and it was confirmed that he had paid money to the CID to take him out of detention. Arrangements were then made for the appellant to travel to Chennai. He then travelled on to Doha arriving in London on 31 January 2011 when he claimed asylum.

5. The respondent accepted that the appellant's identity and nationality were as claimed but it was not accepted that he would be of any adverse interest to the authorities in Sri Lanka. Accordingly his application was refused.
6. His appeal against this decision was dismissed by the First-tier Tribunal in a decision issued on 8 June 2011. The designated judge referred in his decision to the fact that the appellant had admitted that he had lied extensively during his two screening interviews and in the judge's view these were serious distortions of material facts not likely to have been memory lapses. The striking feature of the interview record was that the appellant made no mention of his alleged detention and torture in 2010. He relied on a medical report prepared by Mr Martin but the judge said that it added little probative value. The older scars were reasonably likely to have been caused by shrapnel wounds as the appellant had claimed and the scars on his back were said to be typical of intentional burns but an accidental cause could not be excluded. He commented that Mr Martin was not asked to give his opinion on how readily the appellant could have travelled to India without medical attention and, if the wounds leading to the scars had been inflicted just days before his flight in the context of a terrifying and brutal ordeal during which the appellant claimed he feared for his life, it was not easy to see how he could have been fit to travel at all if his wounds were not treated until he reached India. The judge found that the appellant had failed to prove that it was reasonably likely that the wounds he ascribed to torture by the Sri Lankan authorities were inflicted in the circumstances he described.
7. The appellant was granted permission to appeal against this decision. The Upper Tribunal found that the determination was flawed. The fact that Mr Martin had only had the appellant's account of his circumstances had little probative value and whether he was able to travel to India without medical attention was not a relevant consideration unless the judge had been able to reach a sustainable conclusion that the claim was not credible. In addition, the evidence fell short of establishing that a person suffering from the injuries sustained by the appellant could not have travelled.
8. The appeal was reheard by the Upper Tribunal on 19 April 2012. The judge accepted that the appellant had been arrested in 2004 or 2005 and held for a period of about two days whilst inquiries were made about him. He also accepted the evidence that he had been placed in an army camp and then been able to obtain his release perhaps by the payment of a bribe and make his way with his mother to Colombo. He noted that there was no substantial challenge to the fact that he had spent the next eighteen months or so in Colombo in a relative's house. He identified as the crux of the claim whether the appellant had been arrested on 10 November 2010 as he claimed and then held for a period of thirteen to fifteen days, tortured as a suspected LTTE terrorist, released as a result of arrangements made by an uncle in Canada who found out about the appellant's detention and arranged an agent to meet him in the space of

two days and managed to secure a valid passport thereby permitting the appellant to leave Sri Lanka.

9. During the hearing of the evidence the judge had raised with the Presenting Officer the fact that he had not put to the appellant the challenges to his account made by the respondent in the decision letter and a number of further matters were then put. However, it was not directly put to the appellant that the scarring identified in the report of Mr Martin had been self-inflicted.
10. Having reviewed the evidence the judge found that the appellant had not been arrested in November 2010, was not subjected to torture and he comprehensively disbelieved his account of the circumstances in which he left Sri Lanka. He accepted that Mr Martin's evidence was that the appellant had been subjected to the intentional infliction of injuries with the result that scarring had been caused but, acknowledging that it was no light matter to reach his conclusion, he found that the scars had not been inflicted as described by the appellant.
11. Permission to appeal was granted by the Court of Appeal (Sir Richard Buxton), on the sole ground of whether it was open to the judge to find that the appellant had inflicted the wounds on himself without that allegation having been put to him. The grant comments that it might be said in the context of this case that that would have been only a formal exercise because the appellant could be expected to deny the allegation and the judge to have as much difficulty in believing that denial as he had in believing the rest of the evidence. However, it was not possible to escape from the fact that the allegation involved painful and difficult acts not therefore obviously likely to have occurred and was extremely serious as it alleged active steps to deceive not only the immigration authorities but also the court. It was arguable that as a matter of principle the conclusion as to self-infliction should not have been reached without the applicant having been questioned on it. The appeal did not proceed to a full hearing. The respondent conceded that there was an error of law to the extent outlined in the grant of permission and the appeal was remitted to the Upper Tribunal for reconsideration with the issues of fact already established being preserved (para 5 of the Statement of Reasons).
12. There was a directions hearing on 8 April 2016 at which the issue was raised about the interpretation of para 5 and what facts were preserved. However, at the hearing before me it was accepted by both representatives that the intention was to retain the positive findings of fact up to the events of 2010 and to reconsider in the light of the evidence and submissions the appellant's evidence about his claimed detention and ill-treatment in November 2010 and whether in the light of the evidence as a whole he was able to show a reasonable degree of likelihood or a real risk that he would be subject to persecution or serious harm on return to Sri Lanka.

13. At the hearing before me the appellant relied on a bundle 1A indexed and paginated 1-198 and a supplementary bundle 2A indexed and paginated 1-39. In addition to the appeal papers the respondent produced the Home Office Country Information and Guidance Sri Lanka: Tamil Separatism Version 2.0 May 2016.

The Oral Evidence of the Appellant

14. The appellant gave oral evidence through a Tamil interpreter. He confirmed that his statements of 1 April 2016 1A 1-6 and of 24 May 2016 2A 1-8 were correct. He said that he did not know why the CID wanted to interview him in 2010. They had not told him anything and he had been very scared. He was taken away in a vehicle and was blindfolded. He was questioned initially in Sinhalese and then in a bit of Tamil. He was asked how he got to Colombo, why he had not reported and why he was in hiding. He thought someone must have given some information about him to the authorities. He said they suspected that he might be a suicide bomber or seeking to put a bomb somewhere. His mother had been arrested at the same time and he had not seen her after that. He accepted that none of his family members had otherwise had to leave Sri Lanka because of helping him. He confirmed that his uncle in Canada had helped him but he did not know how this had happened.
15. In cross-examination he accepted that he had gone to Colombo with his mother on about 23 March 2009. They had been able to get out of the camp because his mother had some jewellery and used it to bribe people. He accepted he had been in Colombo for more than a year. He said that he had not left the house very much and his mother had sorted everything out. He said again that the authorities might have thought that he was a suicide bomber. They told him that he was lying. He was beaten and had sustained injuries. They came when they felt like it. He said that he was beaten and tortured and did not want to be reminded of the ill-treatment. His uncle had paid a bribe for him to be released and he had left on a passport in his own name. His uncle had arranged everything. After he came here he learnt that his neighbours in Colombo had told his uncle. The appellant was directly asked how the scars on his back were inflicted. He said that as he told the doctor he was beaten with sticks and iron bars. It had been by the CID when he had been detained. It was put to him that this account was not accepted by the respondent on the basis that there was no reason why he should have been detained in 2010 and that the injuries must have been inflicted by a third party. The appellant replied that he had told the truth and had no reason to lie. He did not want to go back to Sri Lanka and be tortured but would rather die here. He said that he still did not know what had happened to his mother. He was asked whether his uncle had been able to locate her but he said that his uncle had not given him any information and that he was not talking to him.

Submissions

16. Mr Kandola maintained his reliance on the original refusal letter. There was no longer any challenge to the appellant's previous detention but that was a historic event which by itself would not give rise to any risk of persecution on return. He submitted that the appellant had failed to give any reason why he had been picked up six years after his previous arrest or after staying for about eighteen months trouble free in Colombo. He argued that the appellant had sought to embellish his claim by saying that he was thought to be a suicide bomber. No mention had been made of this before. It was not credible that his uncle would have been able to track him down as described and then secure his release and arrange for his travel to the UK via India. The appellant had left on his own passport: this was indicative that he was not on a stop list. It was not credible that he did not know the whereabouts of his mother or that his uncle would not be able to locate her.
17. Mr Kandola accepted that there was some support for the appellant's account in the medical evidence. The scarring was consistent with the incidents described but this did not exclude injuries being inflicted by a third party. A recent psychiatric medical report from Dr Dhumad again provided some corroboration. However, when the evidence was looked at in the round the appellant had failed to substantiate that he was arrested and detained as claimed. He further submitted that even if the appellant had been detained in 2010 he had been released and not formally charged. He was someone with a very low profile and very unlikely now to be on a watch list. There was nothing in his profile that brought him within the categories in GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319. He referred to the CIG Report and in particulars paras 3.1.1-9 which set out the Secretary of State's position as to those likely to be at risk. In summary the appellant was unable to bring himself within the risk categories set out in GJ.
18. Ms Jegarajah submitted that the appellant should be regarded as a vulnerable person within the Presidential Guidance Note of 2010 and in these circumstances greater weight should be given to the objective evidence. The psychiatric evidence confirmed a diagnosis of PTSD which taken with the medical evidence now provided a strong case for the appellant's claim to have been tortured in 2010. In the light of the appellant's evidence and his answers at interview and in particular Q73, 80-81 and 102 it was not surprising that the appellant was arrested in Colombo. The country guidance cases referred to the Sri Lankan authorities relying on sophisticated and targeted intelligence but that did not mean that their intelligence was necessarily correct and, in any event, would be based on the perception of the authorities.
19. Ms Jegarajah argued that the appellant would be subject to suspicion as someone who had escaped from internment but who had not left the country. The authorities would be interested in what he was doing, particularly as he had not registered. It was reasonably likely that he

would have been tortured in an attempt to obtain evidence from him. The authorities would have hoped for a signed confession. She referred to the most recent COIS Report noting that it showed continuing reports of torture and also that those returning could be at risk of torture. The appellant would be at real risk on return, so she argued, because of the perception that he was an escapee. She submitted that, in the light of the evidence as a whole, the appellant was someone who would still be at real risk from the authorities on return.

The Medical Evidence

20. In addition to the report of Mr Martin of 31 May 2011 (1A 124-138) a further medical-legal report has been obtained from Dr Arnold following an examination on 20 January 2016. He confirms that the appellant has six scars on his back and left flank (identified as S6-S10) which are hyperpigmented and slightly mottled. In his opinion S6-11 have the precise appearance to be expected after contact thermal burns sustained by the application of a hot object. Their appearance and location accord with the examination findings of Mr Martin allowing for reduction in pigmentation to be expected in the years between that examination and the present one. The self similarity of the lesions strongly suggested that all were inflicted with the same or a similar object such as a hot metal rod and very probably at around the same time. His view is that their location on the back is not consistent with self infliction. He noted that the issue of self infliction by proxy (SIBP) was raised in the earlier legal proceedings but not put to the appellant. He refers to the fact that he gave expert evidence in KV (Scarring – medical evidence) Sri Lanka [2014] UKUT 00230 explaining what medical expertise could and could not add to the totality of the information available to the courts.
21. Where there was gross discordance between the given ages of scars or wounds and their actual appearances, medical expertise could support the contention that the lesions were not inflicted at the time the subject claimed but this was not the case so far as the appellant was concerned as the quiescent nature of the appellant's scars meant that the causative injuries had occurred more than six to twelve months before the examination. There was no other characteristic of the scars which could serve to distinguish between torture and SIBP. In the present case the appellant was careful to distinguish the injuries arising from other causes scars, S1-4 and S12-15, and made no attempt to pass them off as caused by torture.
22. It was Mr Arnold's view that scars S6-11 were diagnostic of torture by branding. The appellant had attributed scars S1 to 12 and 13 to shrapnel wounds and injuries sustained while digging bunkers for the LTTE, S5 to vaccination and S3, 4 and 14-15 to accidental injuries. These scars were consistent with those causes and S5 was diagnostic of vaccination. The appellant had also reported low back pain and physical signs in the lumbar region and limitation of straight leg raising which were consistent with the

results of blows to the lower back. It was also his opinion that the appellant was suffering from post traumatic stress disorder and the medical evidence as a whole made it more probable than otherwise that he had been tortured in the ways he described and has scarring and psychological damage as a result.

23. The appellant was seen by a consultant psychiatrist on 19 May 2016 and the report by Dr Saleh Dhumad is dated 23 March 2016. He recorded the appellant denied any psychological difficulties or mental health problems prior to his alleged torture and detention in 2010. He reported a deterioration of his mental health after the events of 2010. He did not sleep due to nightmares saying that he saw army officers blindfolding him and he could hear them speaking in Sinhalese. He went to see his GP within a couple of days after arrival in the UK and was prescribed antidepressant medication and referred to the mental health team. He was assessed by mental health services but he could not engage with them as he was too scared to talk about his experiences. He reported strong thoughts of suicide saying that he feels helpless about his safety in Sri Lanka, that he would be killed there and would rather end his life.
24. In his opinion Dr Dhumad says that the appellant's presentation is consistent with a diagnosis of moderate depressive episode with somatic systems. He also suffers from post traumatic symptoms such as avoidance, flashbacks and nightmare. His symptoms meet the criteria defined in the International Classification of Diseases 10th Edition, Mental and Behavioural Disorder. He describes the appellant as depressed, hopeless and his concentration is poor and unlikely to be worse if he were to be cross-examined but otherwise he is fit to attend court to give oral evidence. Dr Dhumad considered the possibility that the appellant might be feigning or exaggerating his mental illness. He has not taken his story at face value but carefully examined his symptomatology and his emotional reactions during the interview. It is his clinical opinion that his clinical presentation is consistent with a diagnosis of depression and post traumatic stress disorder. In his experience it is extremely difficult to feign a full blown mental illness as opposed to individual symptoms. So far as whether the appellant might have requested someone to create the injuries causing scarring it is his view there is no presenting evidence to suggest that the scars were caused with his consent and the nature and details of his symptoms are consistent with a psychological reaction to a traumatic experience such as torture. Injuries inflicted with the individual's permission by a proxy are not perceived as life threatening and therefore they lack the essential criteria for PTSD.

Conclusions

25. I am satisfied that this further medical evidence not previously before the Tribunal casts a different light on whether the appellant's injuries were caused as he describes. Mr Arnold has described the injuries as diagnostic which under the hierarchy of degrees of consistency set out in the Istanbul

Protocol is an indication that the injuries could not have been caused in any way other than as described. The further evidence about the appellant's mental condition in relation to his depression and post traumatic stress provides a different context in which to assess what weight should be given to the many inconsistencies in the appellant's evidence identified in the respondent's decision letter and the previous Tribunal decisions. In the appellant's oral evidence before me he was asked directly about the infliction of the injuries and whether they had been conflicted by a third party. He said that he had told the truth and had no need to lie. He did not want to go back and be tortured and would rather die here. It seems to me that that answer is consistent with what the appellant had said to Dr Dhumad. Having heard the appellant give evidence and assessing it in the light of the evidence as a whole and in particular the recent medical and psychiatric evaluations, I find that to the lower standard of proof he has shown there is a reasonable degree of likelihood that his injuries occurred as he described and were not received in some other way or self-inflicted by proxy.

26. This leads to consideration of whether in the light of those findings the appellant would have a well-founded fear of persecution on return to Sri Lanka. When the matter was reconsidered by the Upper Tribunal in April 2012 it was accepted by the Presenting Officer that if the appellant's account were true, he was entitled to succeed. However, events have moved on in Sri Lanka and it is Mr Kandola's submission that in the light of the passage of time and the further documentary evidence that the appellant's profile is such that he will no longer be of any interest to the authorities. GJ issued in July 2013 held that the focus of the Sri Lankan Government's concern had changed since the civil war ended and that the government's objective was to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. However, if a person was detained by the Sri Lankan security services there remained a real risk of ill-treatment or harm requiring international protection. The Tribunal identified four risk categories. The only two relevant to the appellant are:

- (i) individuals who are or are perceived to be a threat to the integrity of Sri Lanka as a single state because they are or are perceived to have a significant role in relation to post conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka; or
- (iv) a person whose name appears on a computerised "stop" list accessible at the airport comprising a list of those against whom there is an extant court order or arrest warrant.

The CIG confirms at 3.1.4 that if a person is detained, there remains a real risk of ill-treatment or harm requiring international protection if falling within category 1 of GJ.

27. In respect of evidence arising since the country guidance in GJ, para 6.4.1 of the CIG refers to an Amnesty International Report 2015/16 of Tamils suspected of links to the LTTE being arrested and detained under the Prevention of Terrorism Act and 6.5.3 to a report in May 2015 that at least sixteen Tamil men from the Batticola district had been arrested at Katunayake International Airport over a period of a hundred days after returning from working abroad in Middle Eastern countries. The International Crisis Group (6.5.5) noted in August 2015 that Tamils returning from abroad continued to be arrested under the PTA on suspicion of old LTTE involvement. According to some reports many were sent to military run rehabilitation programmes although officials denied this.
28. At 6.6.1 there is a reference to the US State Department's Country Report on Human Rights 2015 referring to credible reports that police and military forces abducted, tortured, raped and sexually abused citizens and the Prevention of Terrorism Act allowed courts to admit as evidence confessions extracted by torture. There is reference at 6.6.3 to the International Truth and Justice Project which includes reports of human rights violations and that Tamils with tenuous links to the LTTE or low level cadres continue to be targeted along with their families.
29. In the light firstly, of the evidence that the appellant was of interest to the authorities in 2010 and there was concern about what he had been doing in Colombo and whether he might be a suicide bomber and secondly, the further evidence of continuing human rights violations in Sri Lanka and the attitude towards those perceived to be still active in support of the LTTE, I am satisfied to the lower standard of proof that the appellant would still be at real risk of serious harm on return to Sri Lanka from the authorities and accordingly, that the appeal should be allowed on asylum grounds.

Decision

30. The decision of the First-tier Tribunal was set aside as erroneous in law. Remaking the decision in the light of the further evidence, I am satisfied to the lower standard of proof that the appellant is entitled to asylum. The anonymity order made by the First-tier Tribunal remains in force until further order.

Signed H J E Latter

Date: 30 June 2016

Deputy Upper Tribunal Judge Latter

