Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05697/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd June 2016	**On 1st July 2016**

Before

Mr H J E LATTER
(DEPUTY UPPER TRIBUNAL JUDGE)

Between

TN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Jegarajah, Counsel
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal (Judge Freer) dismissing an appeal by the appellant against the respondent's decision made on 12 March 2015 refusing the appellant's application for asylum.

Permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal.

Background

2. The appellant is a citizen of Sri Lanka born on [ ] 1989. He arrived in the UK with leave to enter as a student in September 2011 to study for a Diploma in Business Management at Westminster Academy. On 22 August 2012 he left the UK to attend his grandmother's funeral in Sri Lanka. It is his claim that on arrival at Katunayake Airport on 23 August 2012 he was stopped and questioned on suspicion of being a member of the LTTE. However, he was not detained but allowed to pass through. He went directly to his uncle's home for the funeral due to be held on 25 August 2012.

3. The appellant claimed that later in that day and after his grandmother's funeral the authorities came to his uncle's home and he was detained. He claimed that whilst in detention he was seriously ill-treated. He was suspended upside down, a bag soaked in petrol was placed over his head, he was urinated on and he collapsed. The following day he was questioned and confessed that in 2005 he had come under the influence of an LTTE member, E, and was persuaded to conceal a handgun in his school bag and deliver it to a particular individual on the basis that it was unlikely that a young student would be checked at the various checkpoints. He was then burnt with cigarettes and he agreed to sign a document in Sinhalese which he did under duress.

4. He was kept in detention for seven days and released as his uncle paid a bribe to achieve this. He then stayed with a person identified as Mohammed who arranged for his departure from Sri Lanka on 23 September 2012. The appellant claimed asylum on 13 December 2012 and in support of his claim produced an internet report dated 25 August 2012 showing his picture from Facebook and reporting that he was detained at BIA on arrival from London. Similar reports appeared on a number of websites and are copied at pages 35-69 of the appellant's bundle of documents.

5. For the reasons set out in the respondent's detailed reasons for refusal attached to the decision letter, she was not satisfied that the appellant had been arrested, detained or tortured in Sri Lanka or that he would be at real risk of persecution or serious harm on return.

The Hearing before the First-tier Tribunal

6. The First-tier Tribunal Judge reached the same conclusion. The appellant relied on a medical report following an examination on 10 August 2015 by Dr Martin. He recorded that the appellant had scarring on his abdomen which was consistent with unwillingly and intentionally caused injuries with a hot object such as cigarette burns. The judge commented at [51] that

whilst the report was favourable to the appellant it was not determinative without more having regard to the following:

> "(i) There was a significant delay in seeking medical evidence, which creates a window of opportunity for delayed small scale self-inflicted injury to bolster a case. The appellant has had two firms of solicitors advising him in succession.
>
> (ii) There are no major scars but in recent years the authorities are becoming more cunning in regard to the traces of torture. This absence is possibly (but not certainly) indicative of no major interest in him."

7. The judge said that there was no evidence of any mental harm but a very small amount of minor and undatable scarring and that was a very slender basis on which to suggest that there was significant medical corroboration, not that the law required corroboration [51(iii)]. There was no independent evidence that E had ever existed or behaved as described and that without that being established, no reason was shown for the alleged questioning and torture to have occurred. He then said at [51(iv)]:

> "…so to establish it, I have to be persuaded that more likely than not it is a truthful recollection. It is one of the factors I have to weigh in seeking to resolve that very question."

The judge went on to deal with the internet evidence saying that it was easily created and appeared to be both self-serving and exaggerated and at [51(v)]:

> "It has not been shown that it was not controlled by the appellant. Suspicions that he did control it must be raised by (a) the speed with which it occurred and (b) the use of his own (still currently on Facebook by his own admission) Facebook page. Alternatively it could have been created for political propaganda purposes by some person and would be unreliable for that reason. I find that the respondent is justified in referring me to Tanveer Ahmed in all the circumstances and minimal weight at best should be given to that evidence."

8. The judge was not satisfied that there had been any reason for the appellant's claimed detention at the airport and there was nothing in the account really showing a likely rational cause for it. He said that randomness was not a satisfactory alternative explanation when the intelligence-led nature of enquiries by the authorities was so strongly established in the case law. He gave little weight to the statements from the appellant's father and mother on the basis that on the relevant issues, it must have been based on what they were told rather than had seen for themselves.

9. He went on to consider the inferences that could properly be drawn from the fact that the internet articles had been put on the web on 25 August

2012, the day of the funeral. The appellant had said in his evidence that he did not know who put these reports out but the judge said he was very doubtful of his honesty on that issue. He and his immediately family would be the only ones at first to know or care about what had happened at the airport and he questioned why any of them would be putting a report on the internet when they had a family funeral on the same day. He questioned whether he was meant to believe that the authorities read those articles very quickly, were concerned presumably by the complaining or propagandist nature of them and then came looking for the appellant on the same day at his address.

10. In summary, the judge did not accept the appellant's account that some unknown person had put the reports on the internet saying that it was done by somebody who was very familiar with his Facebook account and for that reason its owner would be the most likely person to have done so. The judge found that, given the very limited and wholly ambiguous physical evidence, the complete lack of evidence as to the appellant's mental health, the limited supporting documentation of his account, taken all in the round, he was almost certainly never tortured or beaten against his will in any country [65] and that there was no material part of the core account which he accepted as factually correct to the low threshold other than the likelihood of a visit from the authorities [70]. He had been photographed at events organised by the TGTE in the UK but it would not enough to make him of interest to the authorities. The judge found that the appellant had not given credible evidence and would not be at real risk of serious harm on return to Sri Lanka.

Grounds and Submissions

11. The grounds argue firstly that the judge was wrong to find that the scarring could have been inflicted by third parties and not as a result of torture. A consideration of self-inflicted injuries would only arise if there were identified presenting factors, referring to the decision in KV (Scarring – Medical Evidence) Sri Lanka v Secretary of State [2014] UKUT 230. As neither the respondent nor the judge identified a presenting factor it was not lawfully open to the Tribunal, so it is argued, to suggest self-infliction and reject the torture claim by third parties. Secondly, it is argued that the judge erred at [51(iii)] by the suggestion that medical evidence needed to be significant to be probative. Medical evidence was not required to be determinative but was a factor to provide context to a credibility assessment. Thirdly, it is argued that at [51(iv)] the judge was saying that unless there was independent evidence it could not be accepted that E existed and that it had to be established as more likely than not. This indicated two errors, the absence of corroboration did not mean that a fact was not true and "more likely than not" implied the imposition of a standard of proof higher than the asylum standard. Further, the judge was wrong to attach little or no weight to the internet evidence on the basis that it was self-serving and to presume that the reports were inserted by the appellant because of the speed of their

occurrence and the use of his own Facebook image. The fourth ground argues that the judge made a reference to Azerbaijan which would suggest a lack of care consistent with anxious scrutiny but permission was not granted on this ground and rightly so. It is accepted that the references to Azerbaijan where the appellant's father works were correct. Finally, it is argued that the judge was wrong to refer to membership of the TGTE as it does not have members because it is a government in exile. It is a proscribed organisation and risk must be assessed on the basis of the proscription.

12. Ms Jegarajah adopted her grounds arguing that it showed that the judge had in fact applied a higher standard of proof thereby giving the impression that he had approached the evidence with a closed mind. She argued that his assessment of the evidence was flawed by his references to the opportunity for delayed small scale self-inflicted injury to bolster a case and to whether it was more likely than not that E ever existed or behaved as described. She submitted that the judge's reasoning at [61] about the internet article were in substance the working out of a hypothesis rather than an analysis of the evidence. These issues had not been adequately explored or put to the appellant at the hearing.

13. Mr Tarlow submitted that in substance the grounds were simply a disagreement with findings which were properly open to the judge. The appellant's credibility had been comprehensively challenged in the decision letter and the judge was entitled to draw inferences from evidence that the Sri Lankan authorities had a sophisticated intelligence-led system and to conclude that they would have had no interest in the appellant and would still have no such interest in him.

Assessment of the Issues

14. The primary submission made by Ms Jegarajah is that when the judge's decision is read as a whole there are real concerns as to whether he in fact applied the lower standard of proof when assessing the credibility of the appellant's account and whether he would be at real risk of serious harm on return. It is correct that the judge properly directed himself on the burden and standard of proof in [9]-[10], also referring to the categories of evidence that may be taken into account in a risk assessment as identified in Karanakaran [2000] Imm AR 282. Against this must be set the fact that in 51(iv) the judge said that no independent evidence was produced that E ever existed and without that being established, there was no reason shown for the alleged questioning and torture to have occurred and so to establish it he had to be persuaded that "more likely than not" it was a truthful recollection.

15. In 51(v) in respect of the internet evidence the judge commented that this was easily created and it had not been shown that it was not controlled by the appellant. He then referred to suspicions that he did control it being

raised by the speed with which it was put online and the use of his own Facebook image.

16. When considering the medical evidence the judge commented that the report was favourable to the appellant but to the very low threshold of proof applicable in asylum claims it was not determinative without more having regard to the fact that there was a significant delay in seeking medical advice which created a window of opportunity for delayed small scale self-inflicted injury to bolster a case and that there were no major scars, in recent years the authorities becoming more cunning in regard to the traces of torture but this absence was possibly but not certainly indicative of no major interest in him. However, this comment appears to have left out of account the point noted in [30] that Dr Martin had expressed the view that it was unlikely that the injuries were self-inflicted.

17. When considering alternative causes for the scarring in para 5.5.1 of his report Dr Martin said that apart from torture other possible intentional causes were

> "Self-inflicted injuries – it is a possible cause although self-inflicted injuries tend to be more superficial and the larger scar was caused by a deep burn.
>
> Caused by a third party – from inspection of the scars it is scientifically impossible to differentiate self-inflicted injuries by proxy (SIBP) from injuries caused by torture. Although SIBP as a possible cause cannot be discarded, I considered that there were not presenting facts to make it more than another possibility. …."

18. When considering the evidence of the internet articles the judge did not accept the appellant's account that some unknown person must have done this but that it was done by somebody very familiar with his Facebook account and for that reason its owner would be the most likely person. The judge went on to say at [62] that if the appellant had been questioned at the airport, staying in Sri Lanka in order to put a protest on the internet was the very last step he would have taken and that surely he would have waited until he had left the country [62]. He further commented that he was surrounded by family including his mother and she would never have encouraged this to be done under her own roof and such publication put his own family at risk and indeed she says that they have had many such visits since then.

19. However, the judge does not seem to have considered why, even if the appellant had not been questioned at the airport, he would have put a report online. If the intention was to manufacture evidence to support a wrongful claim for asylum, he would arguably at least have put the report online after he left Sri Lanka unless he was prepared to take a chance on the report not coming to the notice of the authorities until after he had left despite their sophisticated intelligence or on it not being of any interest to them. So far as these reports are concerned the judge found that they were easily concocted by the appellant [64] and that there was no

evidence of verification checks prior to publication. The likelihood of such verification checks for internet articles particularly if there is a possibility of their being used for political propaganda purposes may well be unlikely.

20. When dealing with the issue of whether the appellant would be at risk from membership of the TGTE the judge said that given his other credibility findings he considered the possibility that he was unreliable on the question to be far more probable than not. This wording is again more consistent with weighing the evidence on the balance of probabilities rather than on the reasonable degree of likelihood.

21. On the issue of injuries inflicted by proxy there appear to be no clinical or non-clinical presenting features which would justify a further consideration of the likelihood or otherwise of such a cause and this is not obviously a case where there is a clear mismatch between the appellant's account of when and where and how he was tortured and the facts as established. Whilst not determinative, these are relevant factors to be taken into account.

22. In summary, drawing these concerns together I am satisfied that when the decision is read as a whole there must be real concern as to whether the judge approached the evidence on the basis of assessing whether there was a reasonable degree of likelihood that the appellant's evidence was credible. I am also satisfied that a number of aspects of the evidence were not fully explored such as the fact that the possession of the appellant's image does not necessarily mean that he inserted it but, even if he did, whether it would lead to a real risk. The judge accepted that potentially at least the medical evidence was favourable to the appellant but has minimised its significance by saying that there was only a very slender basis on which to suggest that there was significant medical corroboration. Accordingly, I am satisfied that the judge erred in law such that his decision should be set aside.

23. At the hearing it was agreed that if the decision was set aside, the appeal should be remitted to the First-tier Tribunal for a full re-hearing. I agree with this submission and accordingly the appeal will be remitted to the First-tier Tribunal. The anonymity order made by the First-tier Tribunal remains in force until further order.

Decision

24. The First-tier Tribunal erred in law such that the decision should be set aside. The appeal is remitted to the First-tier Tribunal for reconsideration by way of a full re-hearing by a different First-tier Tribunal Judge.

Signed H J E Latter Date: 30 June 2016

Deputy Upper Tribunal Judge Latter