Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05966/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 May 2016	**On 18 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

J S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muquat, Counsel, instructed by Kanaga Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge J C Hamilton, promulgated on 15 February 2016, in which he dismissed the appeal on all grounds. The appeal to the First-tier Tribunal had been against the Respondent's decision of 20 March 2015 refusing to grant the Appellant asylum.

2. The basis of the Appellant's claim was essentially as follows. He stated that he had assisted the LTTE in Sri Lanka for some three years between 2004 and 2007 it was said that he had been detained in 2007 and 2009. Upon his release in September 2012 the Appellant eventually left Sri Lanka and came to the United Kingdom.

The judge's decision

3. In a lengthy and generally well-structured decision the judge sets out the evidence, the positions of both parties, relevant legal provisions and then goes on to state his findings and reasons from paragraph 60 onwards. A number of adverse points are taken against the Appellant and it is fair to say that the judge regarded some of them as being more significant than others. Indeed, in paragraphs 64 and 65 for example, the judge expressly states that the adverse findings contained therein would not of themselves have led to the dismissal of the Appellant's account.

4. For the purposes of this appeal the core passages in the decision are at paragraphs 89 to 91. Therein, the judge considers the medical report of Dr A Martin prepared in respect of scarring apparent on the Appellant's body. The judge makes a number of criticisms of Dr Martin's report and as a result places "very little weight" on the conclusions reached. The judge stated that he did not believe that the report was prepared in an adequately professional manner. One reason for this is said to be that Dr Martin failed to use the terminology set out in the Istanbul Protocol, part of which is cited at paragraph 89. It is also said that no reasons were given for why Dr Martin thought it "extremely likely" that the scars were caused by torture rather than by some other deliberate act by a third party. It is said that, "the Appellant's injuries are consistent with his account but they could also be consistent with an attempt to create the false impression that he has been tortured" (paragraph 90). A final criticism is set out in paragraph 91 in which the judge says that Dr Martin failed to give adequate reasons purporting to date the scarring on the Appellant's body as being over two years old. After dealing with this medical report the judge goes on and considers a psychiatric report from Dr Dhumad. He had a number of criticisms of this medical evidence as well (see paragraphs 92 to 98).

5. At paragraph 99 the judge states that he has considered the evidence as a whole. At paragraph 100 he states as follows:

> "For the reasons set out in some detail above I do not find the Appellant to be a credible or reliable witness. Almost every part of his account contains significant inconsistencies and implausible aspects that cannot be explained away by misunderstanding poor communication or faulty recollection."

6. At paragraph 101 he states, “In particular I do not accept his account of detention, torture or how he left Sri Lanka.”

7. As a result of this the appeal was dismissed.

The grounds of appeal and grant of permission

8. The grounds focus almost entirely upon the judge’s assessment of Dr Martin’s report. It is said that the judge has misapprehended the contents of that report, attributing criticisms to the author which were not justified on the evidence. In respect of the possibility of the injuries having been caused as a result of what is termed self-infliction by proxy (SIBP), it is said that this matter had not been raised at the hearing, nor by the Respondent in her initial rejection of the protection claim. In granting permission to appeal on 21st March 2016, First-tier Tribunal Judge Shimmin deemed it to be arguable that the judge had indeed misapprehended the contents of the scarring report.

The hearing before me

9. Mr Muquat relied on the grounds. He submitted that the judge had been factually wrong in his first criticism of Dr Martin. Dr Martin had in fact applied the correct terminology from the Istanbul Protocol. In addition, he reiterated the fact that the possibility of SIBP had not been raised at any stage at the hearing before the judge. In any event Dr Martin had adequately addressed this point in his report. It was submitted that the errors in respect of Dr Martin’s report were material to the outcome of the appeal as a whole because the scars were part and parcel of the judge’s consideration of the Appellant’s account, and a core element of that account was that the Appellant had been detained and tortured. Therefore if an error had been committed in respect of Dr Martin’s report it potentially contaminated the rest of the decision and on that basis it was submitted that the appeal should be remitted to the First-tier Tribunal for a compete rehearing.

10. Mr Bramble referred me to the Presenting Officer’s note of the hearing before the judge in which it states that the issue of SIBP was raised both in submissions and questioning. The case of KV (scarring - medical evidence) Sri Lanka [2014] UKUT 00230 (IAC) was before the judge. Mr Bramble accepted that Dr Martin had used the terminology of the Istanbul Protocol in his report, but if one were to view the judge’s decision as a whole any errors were not material.

11. In reply Mr Muquat submitted that it would be artificial to try and sever the detention torture issue from all of the other issues in particular when the judge himself had said that he had considered credibility on the evidence as a whole.

Decision on error of law

12. In my view, and with some hesitation given the other adverse findings, there are material errors of law in the judge's decision in respect of the assessment of Dr Martin's report.

13. The judge was factually wrong to have stated that Dr Martin failed to use appropriate terminology in his report. In fact it is clear from a proper reading of the report that the term "typical" is employed on a number of occasions in respect of causation of the scars and that term is of course second only to a diagnostic indicator within the structure of the Istanbul Protocol as that relates to scarring. That factual error it seems to me must be material for two reasons: first, the judge's criticism of Mr Martin's report was wrong in this respect and that a reduction in weight placed upon the report was therefore erroneous; second, whilst the judge appears to say that Dr Martin thought the scars were "consistent" with the Appellant's account of torture, Dr Martin had in fact stated that they were "typical" of being caused in a way described by the Appellant and there is a clear and material difference between "consistent" and "typical" within the terms of the Istanbul Protocol.

14. It is unclear to me that the issue of SIBP was properly canvassed at the hearing or dealt with by the judge in his decision. It is unclear from paragraph 90 as to whether the judge is in fact making a finding that the injuries were caused by SIBP. Furthermore the judge has made no reference to the fact that Dr Martin himself addressed the SIBP issue, albeit briefly, in his report. If the judge was implicitly rejecting this part of the report he has not given specific reasons for doing so, and as I have already found other criticisms of Dr Martin's report were not well-founded. There is a material error here.

15. In respect of the age of the scars once again the judge appears in my view to have misapprehended Dr Martin's report. He was not as I read it purporting to state with any accuracy the age of the scars: he was giving an opinion which is in line with the general observations of the Upper Tribunal in the case of KV. The judge has misapprehended the report.

16. A central element of the Appellant's account was that he was detained and tortured. If this issue has not been properly considered (due to the erroneous consideration of Dr Martin's report) there is a real danger that this infects other findings within the decision itself. This is particularly so given the judge's own perfectly correct statement that he had considered the evidence as a whole.

17. Mr Bramble urged me to, as it were, sever certain adverse findings from the issue of Dr Martin's report. In my view that would be something of an artificial exercise. It would involve attempting to work through all the other findings one by one and assess to what extent, if at all, they were connected to the core issue of the detention and torture. Whilst that might possibly be acceptable in respect of one or two of the other findings,

in my view it is not the appropriate way forward, particularly in a protection claim.

18. Thus, despite the conscientious effort made by the judge to provide a detailed and thorough decision on the Appellant's case, given the errors I have identified and their materiality, I set the decision aside.

Disposal

19. Given the nature of the judge's findings and the errors of law above in my view the appeal needs to be remitted to the First-tier Tribunal for a complete rehearing with no findings preserved. In so concluding, I have had regard to paragraph 7 of the relevant Practice Statement. I issue directions below.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I remit the case to the First-tier Tribunal.

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.

Directions to the Parties:

(1) **This appeal is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact;**

(2) If the Respondent wishes to rely on the SIBP issue she must state her case in writing, with particular reference to the Appellant's evidence, no later than 16 June 2016;

(3) If the SIBP issue is indeed raised by the Respondent, the Appellant is then at liberty to adduce whatever additional evidence he wishes in rebuttal. Any such evidence must be served on the Respondent and filed with the First-tier Tribunal no later than 4 August 2016;

(4) Both parties are to comply with any further directions issued by the First-tier Tribunal.

Directions to Administration

(**1**) **This appeal is remitted to the Hatton Cross Hearing Centre to be heard at 10am on 1 September 2016;**

(2) The remitted hearing shall not involve First-tier Tribunal Judge J C Hamilton;

(3) There is a three-hour time estimate for the remitted hearing;

(4) A Tamil interpreter is required.

Signed Date: 16 May 2016

Deputy Upper Tribunal Judge Norton-Taylor