IAC-FH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/05290/2015
AA/05295/2015
AA/05296/2015
AA/05304/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 June 2017	**On 29 June 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

GT (FIRST APPELLANT)
LT (SECOND APPELLANT)
MMG (THIRD APPELLANT)
REFUGEE (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Miss Bronwen Jones of Counsel instructed by The Tamil Welfare Association
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The first two appellants are husband and wife born in July 1986 and November 1989 respectively. The third and fourth appellants are their daughter and son born in 2011 and 2014 respectively. They are citizens of Sri Lanka. The first three appellants entered the United Kingdom on 28 June 2013 as visitors. The first appellant claimed asylum on 23 November 2013 with the second and third appellants as his dependants. The fourth appellant was born in the UK in March 2014. The appellants appeal the determination of a First-tier Judge following a hearing on 6 February 2017. The summary of the claim made by the first appellant is set out in paragraphs 4 and 5 of the decision of the First-tier Judge as follows:

> "4. In brief the first appellant claims that he has a well-founded fear of persecution in Sri Lanka by reason of his political opinion as a supporter of the LTTE. The appellant claims that he worked as a medical representative and because of this work he provided LTTE with medicines and medical equipment from 2006 to 2008. The appellant speaks Sinhala and because of this he also carried out translation work for the LTTE on three occasions in 2008.
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> 5. In 2011 the appellant claims he was arrested and detained for 11 days. He was kept in detention where the conditions were bad and he was denied food. He was tortured twice and was beaten and kicked in the groin. He was released on reporting conditions because a lawyer intervened on his behalf. The appellant has some scarring from the torture and has medical treatment in the UK to correct a narrowing of his urethra which the appellant believes occurred due to the kicking in that area during his detention."

2. There had been a previous hearing before First-tier Judge Hembrough in July 2016 where the judge had reservations about the first appellant's account in the light of numerous inconsistencies in it However he had gone on to resolve his concerns on matters such as the appellant's claimed ill-treatment in detention in favour of the appellant and had allowed the appeal. However, the respondent appealed to the Upper Tribunal and a Deputy Upper Tribunal Judge found the determination to have been inadequately reasoned and set the decision aside in its entirety and a de novo hearing was directed.

3. The First-tier Judge heard oral evidence from the first appellant and his wife. Like Judge Hembrough, the judge accepted the first appellant had worked for pharmaceutical companies and was able to name the drugs that he supplied to the LTTE and displayed appropriate knowledge of these drugs. He further accepted that the first appellant would have been approached by the LTTE for assistance. He had initially provided medicines and equipment for money but later supplied medicines from the free samples he had received during the course of his employment. The judge accepted that the first appellant had travelled in the course of his occupation as a medical representative. He had travelled between

Government controlled areas and the LTTE controlled areas in the north of Sri Lanka. He accepted that the first appellant had been stopped once in 2009 when he showed is work credentials and he was released at the checkpoint.

4. However, the judge did not accept the first appellant's claimed arrest and detention in 2011.

5. The principle arguments in this case revolved around the judge's treatment of the medical evidence. There was before the judge a report by Dr Saleh Dhumad, a consultant psychiatrist. There was also a medico-legal report prepared by Dr E Clark in 2015.

6. In paragraph 36 of her decision the judge states as follows:

> "In relation to the appellant's claim that he was arrested in January 2011 and detained and tortured I find it unbelievable. The dates for this incident varied as between the appellant's different witness statements. The appellant had problems with dates. I am persuaded by Ms Jones' arguments today that his inability to recall dates correctly is credible. Dr Durmah (sic) has also referred to the effect of PTSD on the appellant's ability to recall events with precision. Dr Clark has also confirmed this diagnosis of PTSD in the socio medical report prepared by the Helen Bamber Foundation. Notwithstanding the discrepancies in the dates of the appellant's detention, I do not find it credible that the authorities suddenly expressed an interest in the appellant and detained him in 2011."

7. The judge notes that the war in Sri Lanka had ended in 2009 and the first appellant's account was discrepant. The judge further rejected the claim that the police had visited his parents' house in 2013.

8. In paragraph 39 the judge noted that the first appellant had claimed in his asylum interview that his wife had come to secure his release after detention, but at the hearing he claimed that it was his sister who came to release him. This undermined his claim that he was detained "as he is not even able to say who released him. His memory should have no impact on this as I would expect him to know if it was his wife or his sister". There was an issue whether the first appellant was beaten in detention or only pushed by the police.

9. In paragraphs 42 to 47 of her decision the judge makes the following observations in relation to the medical evidence:

> "42. I accept that Dr Clark is a recognised expert in the assessment of physical, psychological and psychiatric and social effects of torture. Dr Clark, in the detailed and well researched report, notes that the appellant had 14 lesions of which he attributed 5

to ill treatment whilst in detention. The remainder were attributed to childhood injuries, operations scars etc.

43. What is of significance is that in each case attributed to ill treatment of the appellant the appellant was not able to identify the precise mechanism of injury and Dr Clark was unable to demonstrate a degree of consistency with the Istanbul protocol. Dr Clark's assessment, I find engaged in speculation as to the possible cause and Dr Clark did not rule of accidental injury. Dr Clark has assumed that the appellant's inability to describe how the injuries were caused as an indicator of truth. The alternative that the appellant may be lying or does not wish to be exposed to inconsistencies has not been explored by Dr Clark.

44. The doctor did not examine the appellant's penis and so she is not in a position to make any findings on this injury. Despite this she accepts at paragraph 56 that the injuries are highly consistent with a blunt trauma injury to his groin. This aspect of the finding leads me to place little weight on Dr Clark's report. One of the appellant's hobbies earlier on was martial arts but Dr Clark gives no opinion on whether the injuries might be caused during those activities.

45. Dr Clark has not considered the appellant's lifestyle since his claimed attack in 2011 whereby he was able to switch jobs … and that he did not seek any psychological or psychiatric help in Sri Lanka.

46. Dr Clark has made no mention of cigarette burn injuries in her report. More significantly, the appellant claimed that he has lost interest in sex and yet he has gone on to have two children. Dr Clark's report is silent on this. Dr Clark has given no opinion on the age of the scars. My overall impression therefore of Dr Clark's report is that it lacks objectivity.

47. Dr Dhumad's report also does not deal with the loss of interest in sex and the fact that the appellant did in fact go on to have two children. Dr Dhumad records the appellant suffering from nightmares but the appellant made no mention of this in is AI or SI. Dr Dhumad saw the appellant three times and has missed vital matters from his report. Despite Dr Clark's prognosis Dr Dhumad does not prescribe any medication to the appellant. There is very little detail to demonstrate why the appellant could not be malingering. In particular, as outlined in **BN (psychiatrist) 2010 UKUT 279**, paragraphs 31, 41 and 54 the psychiatrist is charged with providing such details."

10. The judge found that the first appellant was speculating that the authorities were interested in him. She also found that the first

appellant's account was inconsistent with the country guidance in **GJ (Sri Lanka) CG [2013] UKUT 00319 (IAC)**. It was argued that the categories in **GJ** were not exhaustive which the judge accepted in paragraph 50 of her decision. However, she did not find that the first appellant was or is perceived to be a threat to the integrity of Sri Lanka as a single state and at its highest the first appellant was a low-level supporter of the LTTE. There was no reason for his name to appear on a stop list and there was no arrest or court order against the first appellant. He had managed to travel safely out of the airport on his journey to the UK and there was no reason to suspect he would not be able to return to Sri Lanka safely on his own national passport. The judge dismissed the appeal on all grounds.

11. There was an application for permission to appeal which was rejected by the First-tier Tribunal on 21 March 2017. The First-tier Judge observed that the grounds were unnecessarily long and ran to nineteen pages – longer than the judge's decision. The judge correctly observed that grounds should be succinct and to the point.

12. The renewed grounds of appeal were happily shorter and settled by Miss Jones. She had appeared as Counsel before the First-tier Judge. Permission to appeal was granted by Judge Kekić who found it was arguable that the judge had erred in her approach to, and findings on, the medical evidence adduced by the first appellant. All the grounds were found to be arguable. Dealing with the renewed grounds it was argued that the judge had not made an explicit finding on vulnerability despite being invited to do so in the first appellant's skeleton argument before her. Reference in the original grounds had been made to the Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance. The judge had unreasonably failed to apply the guidance in the Guidance Note when assessing credibility.

13. Miss Jones referred to this point and accepted that issues of vulnerability should ideally be dealt with at the case management stage.

14. Both the doctors had agreed that the first appellant had post-traumatic stress disorder. This would make him an unreliable witness and it would not be limited to the issue of recall of dates.

15. Counsel criticised the reference to Dr Clark's assessment being based on an assumption in paragraph 43. The judge had accepted that Dr Clark was a recognised expert. She had found that her report was detailed and well-researched, so it was difficult to identify why it was said that she had speculated. Reference was made to the skeleton argument before the First-tier Judge. The first appellant's arguments had been set out in paragraphs 16 to 21 of the skeleton argument before the judge. In relation to the findings in paragraph 44 the point had been made in the initial grounds of appeal. It was submitted that Dr Clark was adhering to the Istanbul Protocol in not examining the genital area.

16. The statement in paragraph 46 that Dr Clark had made no mention of cigarette burn injuries in her report was wrong. Dr Clark had dealt with this in paragraph 49 of her report. The reference to the first appellant claiming to have lost interest in sex and yet "he has gone on to have two children" could not be reconciled with the dates of birth of the children. As noted in paragraph 15 of the renewed grounds, it had been pointed out that the respondent had made the point in closing submissions at the hearing, but the argument had been made to the judge that both children had been conceived before the first appellant came to the UK and begun to experience acute symptoms. The first child had been conceived before the first appellant had even been detained – his wife had been pregnant during his detention. The second child was conceived in Sri Lanka and born in the UK. It was submitted that the judge had adopted the respondent's position uncritically. The respondent had relied on **BN (psychiatric evidence – discrepancies) Albania [2010] UKUT 279** and had not noted the submissions made on behalf of the first appellant which were summarised in paragraphs 19 to 22 of the renewed grounds. Dr Dhumad had plainly dealt with the issue of malingering in paragraph 17.8 of the report set out on page 7 of the renewed grounds. There was no basis for saying there was a lack of objectivity in the medical evidence. In relation to the age of scars reference was made to paragraph (g) on page 12 of the original grounds. In paragraph 36 the judge had accepted that the first appellant had problems with dates. In relation to the authorities renewed interest in him in January 2011 it had been argued in the original grounds that there had been improved intelligence gathering in January 2011.

17. Mr Avery submitted that the issue of whether the first appellant was a vulnerable witness did not add much to the issues raised by the medical evidence. The judge recorded what she had accepted in paragraph 36 of her determination. She had referred to the first appellant's memory issues. She had properly considered the evidence in the light of his medical condition. She had taken the medical evidence into account. She had not accepted all the medical evidence. She had identified discrepancies in several areas. He accepted the point made about the cigarette burns. However, she had had to look back to the first appellant's SEF. Dr Clark had noted inconsistencies in the first appellant's account. She had said that his difficulty in giving a consistent account was "clinically plausible" but Mr Avery submitted that the first appellant might alternatively be lying. It had been open to the judge to find as she did on the issue of the first appellant's injury being caused by martial arts. The grounds expressed disagreement with the findings of the judge who had comprehensively disbelieved his account of detention and ill-treatment. The reference by the judge to Section 8 in paragraph 32 of her decision did not take matters any further. He acknowledged he could say nothing about the point made in relation to the findings in paragraphs 46 and 47 of the decision about the first appellant having gone to have two children.

18. In reply Counsel submitted that the medical expert had properly taken into account the first appellant's lesions and scarring. Dr Clark had not found the first appellant likely to be lying. Dr Dhumad had dealt with the issue of malingering properly. If there was a material error of law a fresh hearing was required.

19. At the conclusion of the submissions I reserved my decision.

20. I have carefully considered all the material before me. I remind myself that I can only interfere with the decision of the First-tier Judge if it was materially flawed in law.

21. The determination of this case was not facilitated by the prolixity of the initial grounds of appeal. Although Counsel helpfully reduced these grounds by ten pages it was still felt necessary to refer to the original grounds as well as the skeleton argument that had been placed before the First-tier Judge. Standard directions had been issued for the hearing and a short bundle would have greatly facilitated the disposal of this appeal.

22. That said, I have to examine whether the grounds disclose a material error of law. The particular point raised was the approach of the judge to the medical evidence. The particular focus of the challenge is centred on paragraphs 42 to 47 of the determination.

23. In paragraph 43 the judge refers to Dr Clark acting on an assumption and that "The alternative that the appellant may be lying or does not wish to be exposed to inconsistencies has not been explored by Dr Clark." The judge does not refer to what is said at paragraph 71 of the report in relation to whether the first appellant might be feigning or exaggerating his physiological symptoms. She noted that he appeared to understate rather than overstate his distress and that he denied having suicidal ideation, recurrent intrusive memories and exaggerated startle response which he could have claimed had he wished to feign or exaggerate any psychological distress. The doctor concludes "Overall, I found nothing to suggest that he was trying to exaggerate or feign any psychological distress." In relation to the point made by the judge at paragraph 44 of her decision that Dr Clark had given no opinion on whether the first appellant's injuries might be caused by his earlier hobbies such as martial arts, the initial grounds of appeal make the point that the doctor had referred to the first appellant playing rugby and martial arts in paragraph 1 of her report – the first appellant said he had no injuries from participating in these sports. I also note in paragraph 53 she said that it was unlikely that the various scars and lesions that she had observed could have been acquired during his reported activities which include his involvement in sport at school or his work as a medical representative. She noted that the first appellant was careful to identify the majority of his scars as having been due to a childhood accident, surgery or of unknown cause. I appreciate that the judge was dealing with a specific issue in paragraph 44 of injury to his groin.

24. Paragraphs 46 and 47 do raise problems in my view. Dr Clark did indeed deal with the issue of cigarette burn injuries in paragraph 49 of her report. A reference to the first appellant having lost interest in sex but yet has "gone on to have two children" ignores the chronology. The first appellant's first child had been conceived before he had gone to prison. The criticism that Dr Clark had given no opinion on the age of the first appellant's scars appears to overlook what she said at paragraph 42 of her report:

> "The appearance of scars seldom changes significantly after about twelve months and so it is not usually possible to date scars more accurately after this time. All [the first appellant's] scars were quiescent (not inflamed and fully healed) in appearance, and they are therefore in keeping with the chronology of his account."

25. The judge's assessment in paragraph 46 that her overall impression of Dr Clark's report was that it lacked objectivity is in my opinion based on a flawed understanding of it.

26. The point about the dates of birth of the children is of relevance in the judge's assessment of Dr Dhumad's report. In stating that there was very little detail to demonstrate why the first appellant could not be malingering, the judge appears to have overlooked what was said in paragraph 17.8 of Dr Dhmad's report. Dr Dhumad states he has considered the possibility that the first appellant might be feigning or exaggerating his mental illness and that he had not taken the story at face value. He had carefully examined the first appellant's symptoms and emotional reactions during the interview and had reviewed the opinions of other professionals who had seen him such as Dr Clark. He adds:

> "It is my clinical opinion that his clinical presentation is consistent with a diagnosis of a cognitive impairment – likely to be a learning disability, moderate depression and post-traumatic stress disorder. In my experience it is extremely difficult to feign a full-blown mental illness (as opposed to individual symptoms)."

Having referred to the Istanbul Protocol Dr Dhumad continues "My impression is that his clinical presentation is compatible with the experience of intense fear of expected threat to life.

27. The points made in the grounds about the distinguishing features of the case of **BN** referred to by the judge appear to be well-made.

28. Having very carefully considered the various criticism of the judge I find that there are too many apparent mistakes in the assessment of the medical evidence. I appreciate that this is a difficult case, but if a judge is to find that a medical expert's report lacks objectivity or is based on speculation, then it behoves the judge to be especially careful when

considering the medical evidence. In my view there are serious problems with the considerations that the First-tier Judge gave to the medical evidence and that these errors amount to a material error of law.

29. Counsel submitted at the hearing that if I found a material error of law a fresh hearing would be required.

30. I am conscious of the fact that there has already been a previous hearing. However, I can see no alternative in the present case given the errors that I have identified in directing a further fresh hearing as Counsel requested. I agree that the appeal should be a fresh hearing, though it does not now appear to be in dispute that the first appellant had been working as a medical representative in Sri Lanka as recorded in paragraph 33 of the decision of the First-tier Judge – she records that the respondent did not challenge the assertion that he worked for the companies at the hearing. The finding does not appear to be affected by the error of law. Accordingly, apart from this there should be a fresh hearing de novo before a different First-tier Judge.

31. For the reasons I have given I allow the appeal to the extent indicated.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

TO THE RESPONDENT
FEE AWARD

No fee is paid or is payable.

Signed Date 28 June 2017

G Warr, Judge of the Upper Tribunal