



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

Appeal Number: PA/01159/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 19 October 2017**

**Decision & Reasons
Promulgated
On 13 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR TA
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Ms S Jegarajah, Counsel instructed by Linga & Co

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Davidson promulgated on 20 March 2017 to allow the respondent's appeal against refusal to grant him asylum.
2. The Secretary of State appealed on the basis that the judge had not considered the Istanbul Protocol in relation to the medical report within

this appeal and even though he found the respondent's claim lacked credibility, he relied on the medical evidence alone to allow the appeal. The Secretary of State also argued that the judge failed to take into account relevant case law such as **Mibanga v SSHD [2005] EWCA Civ 367**.

3. The respondent will from now on be referred to as the applicant for ease of reference.
4. The applicant is a national of Sri Lanka born on [] 1975.
5. The applicant's evidence is that in April 2007, he left Sri Lanka and went to India because the leader of the LTTE ordered everybody to go to India and seek refuge. He lived in Mandavan Camp in Rameswaram. He was given papers and returned to Sri Lanka illegally in September 2010. He went back because the LTTE had been destroyed. He worked in the fishing industry in Sri Lanka until 2012 when he was arrested and detained for a week in Valvettithay Camp. He was then moved to Palaly Camp for three months. He was released in September 2012 and taken for an operation. He was arrested again on 2 May 2013 by the Sri Lankan army and detained until October 2015. He was released unofficially because his father paid a bribe. On 13 January 2015 he went to Ureluva Camp, showed his pass and was beaten. He left Sri Lanka on 21 October 2015 after his father arranged for a visa. He arrived in the UK on 23 October 2015 and claimed asylum at the port. He did not enter using his own passport. His asylum application was refused in a letter dated 26 January 2016.
6. Having heard the evidence of the applicant and following cross-examination, the judge made the following findings:

"34. Taking all the above inconsistencies and contradictions into account, allied to s.8(3)(a) of the 2004 Act, I find that the Appellant lacks credibility. Based on that evidence I do not accept that he was a member of the LTTE, or did anything to help the LTTE. If he did work on boats involved in some way with the LTTE it was a very low level which would not have attracted the interest of the authorities, let alone in 2015. It is simply not credible.

35. Nevertheless, while there are inconsistencies revealed in the account given by the Appellant to Dr. Hayward in his Medico-Legal Report as compared to the accounts given in his interview, his witness statement, and in cross-examination, Dr. Hayward expresses the professional opinion that the Appellant has been ill-treated and tortured. He diagnoses his mental health problems as attributable to the effects being kept in solitary confinement for a prolonged period as claimed by the Appellant. Dr. Hayward states that the Appellant is severely depressed and

has significant PTSD. He says that his current psychiatric conditions are likely to affect his ability to be coherent. Furthermore, in paragraph 125, Dr. Hayward states that, 'There is no physical or psychological evidence to support any possibility of a false allegation of torture'.

36. *In paragraph 107 of his Report Dr. Hayward opines that the Appellant's mental health reflects the effects of prolonged solitary confinement, and in paragraph 108 says that, 'Solitary confinement often leads to confusion, disorientation, and memory loss, as well as to depression'.*
37. *It is clear to me that while the Appellant's accounts do not always hang comfortably together, Dr. Hayward is persuaded that his injuries and mental state are highly likely to be the result of torture, and solitary confinement over a prolonged period. That being the case, then there is a ready explanation for the incoherence of the Appellant's accounts and his failure to remember crucial events at various times during his Asylum Interview, cross-examination, etc.*
38. *I noted the Appellant's demeanour during his time in court to be that of a person who was wary and highly suspicious of his surroundings and the people in court. He looked severely depressed, and did not make eye contact with anyone, as far as I could see. He looked distinctly uncomfortable.*
39. *Therefore while I have to admit that his various accounts led me to decide that I found his accounts incredible, I am persuaded by the Doctor's medical evidence that he probably has been tortured and kept in solitary confinement for a prolonged period and that this could account for his loss of memory, and the consequent inconsistencies and contradictions. I find, on the lower standard of proof, that it is reasonably likely that he was tortured as he claims, and that therefore there is a real risk that he could be tortured on return.*
40. *Therefore, taking all the evidence in the round, although I find that the Appellant's account of his involvement with the LTTE is not credible in itself, I am persuaded by Dr. Hayward's evidence that the Appellant has been tortured as he claims. This is pure speculation, but it may be that he was not of much importance in the LTTE, but was associated in some way, and in the insanity of wars and their aftermath, came to the attention of the authorities in some way, who then over-estimated his importance, or even just sought some sort of revenge on a Tamil. In any event, because I am persuaded that he was tortured, then I find that his claim to asylum is well-founded and grant this appeal accordingly.*

41. *Dealing with his claim to Humanitarian Protection under Rule 339C of the Immigration Rules HC 395 (as amended) and Article 15(c) of the EU Qualification Directive, the Appellant has demonstrated a real risk of persecution, death unlawful or inhuman or degrading treatment if returned to Sri Lanka, for the reasons given above, therefore UK would be in breach of its obligations, and therefore the Appellant does qualify for Humanitarian Protection under Rule 339C of the Immigration Rules*
43. *While the Appellant would not appear, prima facie, to be comprised in any of the categories listed, he clearly was considered to be a threat to the state in some way, which resulted in his arrest and torture. I therefore find that, irrespective of the categories adumbrated, he is at risk on return.*
44. *Taking all the evidence in the round, I find that the Appellant was tortured by the authorities in Sri Lanka and therefore has a genuine fear of persecution, degrading or inhuman treatment on return to Sri Lanka, and therefore satisfies the requirements of the Refugee Convention. I therefore find that he has persuaded me that he has a well-founded fear, and that he is at risk on return, and grant this appeal accordingly.”*
45. *For all the reasons given above, I grant this appeal on asylum grounds because the Appellant has persuaded me that he was tortured as he claims. I grant his appeal for Humanitarian Protection for the same reasons. I also grant this appeal on Human Rights grounds under Articles 2 & 3 for the same reasons. He will clearly be at risk on return because of his previous treatment.”*
7. Mr Tarlow submitted that the judge at paragraph 34 did not find the applicant credible. He added that the judge then went on to deal with the medical evidence in isolation. The judge did not consider the case of **Mibanga**. Mr Tarlow relied on paragraph 21 of **HH (medical evidence; effect of Mibanga) Ethiopia [2005] UKAIT 00164** where the Tribunal considered that there was a danger of **Mibanga** being misunderstood. The Tribunal held that the judgments in that case were not intended to place judicial fact-finders in a form of forensic straightjacket. In particular, the Court of Appeal was not to be regarded as laying down any rule of law as to the order in which judicial fact-finders were to approach the evidential materials before them. “To take Wilson J’s “cake” analogy, all its ingredients cannot be thrown together into the ball simultaneously. One has to start somewhere. There was nothing illogical about the process by which the Immigration Judge in the present case chose to approach his analytical task.” Mr Tarlow submitted that **Mibanga** reinforced what the Court of Appeal said in **HH**.

8. Ms Jegarajah started off by looking at the grounds submitted by the Secretary of State. In her first ground, the Secretary of State said that the judge did not consider the Istanbul Protocol in relation to the medical report nor did he apply the relevant case law, **KV** in relation to scarring. Ms Jegarajah submitted that Mr Tarlow has not made any submissions on either of these issues. Mr Tarlow in response submitted that this ground was not their strongest point but in any event he was relying on it.
9. Ms Jegarajah then went on to look at paragraph 3 of the Secretary of State's grounds. This said that the judge allowed the appeal on the basis of the medical report and evidence by Dr Hayward [40]. However, the report itself was not consistent with the Istanbul Protocol. Neither has the judge considered any case law relevant to the alleged burning and torture [29, 30] with case law **Mibanga v SSHD [2005] EWCA Civ 367** not being considered. It was argued that the judge has considered the medical evidence in isolation and not in the round.
10. Ms Jegarajah went through Dr Hayward's medico-legal report. She said that the report is from a leading medical charity which the Secretary of State treats with great care. She cited numerous instances throughout the report where Dr Hayward referred to the Istanbul Protocol. She submitted that the errors of law raised by the Secretary of State were wrong in fact.
11. Ms Jegarajah submitted that the Secretary of State referred to **KV** in her grounds but did not identify which **KV** she was relying on. She said that in **KV (Sri Lanka) [2017] EWCA Civ 119**, the Court of Appeal disavowed the entirety of the Upper Tribunal's findings. The Court of Appeal held that where scarring is diagnostic, there have to be strong reasons to dislodge the obvious inference that the torture claim is true.
12. Ms Jegarajah submitted that all the judge has done is to conduct a fair balancing exercise. He gave excessive deference to the Secretary of State. From paragraphs 19 to 21 the judge summarised the Secretary of State's Reasons for Refusal Letter. From paragraphs 23 to 32 the judge summarised at length the cross-examination. At paragraph 32 he identified the inconsistencies between the applicant's claim and the medical report. At paragraph 34 he found that the appellant's claim lacked credibility. Throughout those paragraphs the judge considered the respondent's case.
13. Ms Jegarajah said that at paragraph 35 the judge reviewed the credibility of the applicant's claim in the context of the medical report. This was consistent with **Mibanga**. The judge attached considerable weight to Dr Hayward's medical analysis. At paragraph 37, being fair to the Secretary of State, the judge applied the benefit of the doubt. He took account of the presidential guidance on a vulnerable witness. At paragraph 38 the judge formed his own view of the applicant's evidence. He found that it

was consistent with the clinical opinion. At paragraph 39 he resolved the tension in the evidence.

14. Ms Jegarajah submitted that the medical report was compelling. The Secretary of State has not made out her case that the judge's decision was irrational.
15. She submitted that the Secretary of State has not made out her second ground which is that even if the torture claim is accepted, the judge was wrong to find that the applicant met the risk categories in **GJ (post civil war: returnees) Sri Lanka [2013] UKUT 319 (IAC)**.
16. In reply Mr Tarlow relied on the grounds and repeated that the judge dealt separately with the credibility findings and the medical evidence.
17. Ms Jegarajah submitted that the effect of the judge's decision is that the appellant's claim is based on a perceived political opinion by the authorities in Sri Lanka.
18. Following consideration of the submissions made by the parties, I found that the judge did not err in law for the reasons given by Ms Jegarajah.
19. Mr Tarlow abandoned the argument that the medical report was not consistent with the Istanbul Protocol. He acknowledged that it was not their strongest point.
20. I do not accept the argument that the judge considered the medical evidence in isolation and not in the round. It was apparent from the decision that the judge did not find the applicant's account credible. Nevertheless, the judge considered the credibility of the applicant in the context of Dr Hayward's medico-legal report and whilst finding that there were inconsistencies in the accounts, went on to find that the applicant had been tortured as concluded by Dr Hayward. It was not the judge's own opinion that the applicant had been tortured. The judge's decision was based solely on Dr Hayward's medico-legal report which the judge found to be very compelling. I find that the judge's decision cannot be said to be irrational.
21. As also identified by Ms Jegarajah, the Secretary of State has not argued that even if the torture claim is not accepted, the judge was wrong to find that the applicant met the risk categories in **GJ**.
22. Accordingly, I find that the judge's decision does not disclose an error of law. The judge's decision allowing the appeal of the applicant shall stand.

Notice of Decision

The Secretary of State's appeal is dismissed.

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.

Signed

Date: 10 November 2017

Deputy Upper Tribunal Judge Eshun