Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA027692016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given following hearing On 20 July 2017	**On 31 July 2017**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

AA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms B Jones, Counsel instructed by Krisinth Solicitors
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a citizen of Sri Lanka of Tamil ethnicity. He was born in 1992. He arrived in the UK in October 2015 and claimed asylum on 17 November that year. This application was refused by the respondent on 6 March 2016. The appellant appealed against this decision and his appeal was heard before First-tier Tribunal Judge Greasley

in August 2016 and his appeal was dismissed in a determination which was promulgated on 1 September of that year. This decision was set aside by Upper Tribunal Judge Latter on 16 November 2016 and remitted for re-hearing at Taylor House.

2. Because Taylor House was undergoing refurbishment at that time the appeal was heard at Harmondsworth. It came before Upper Tribunal Judge Widdup on 19 January 2017 but in a relatively short decision promulgated on 25 January 2017 the appeal was dismissed. The appellant now appeals again to the Upper Tribunal permission having been granted by Designated First-tier Tribunal Judge Murray.

3. There are a number of grounds and I have been assisted by a relatively lengthy skeleton argument which had been produced for the hearing before Judge Widdup. I have also looked at the grounds, which were not settled by Ms Jones, who appeared for the appellant both before Judge Widdup and before this Tribunal and which set out all the arguments which could possibly be made. Happily at the hearing before this Tribunal Ms Jones concentrated on the more obviously arguable grounds which were contained within the grounds themselves and which are for the reasons I will give below sufficient to persuade me that Judge Widdup's decision is not sustainable.

4. The appellant's case was supported by expert evidence provided by Dr Martin in respect of the appellant's scarring and Dr Lawrence who referred to his psychiatric condition and found that he was deeply traumatised and had severe mental health problems. It was accepted by Judge Widdup on the basis of Dr Lawrence's evidence that it would be right to treat the appellant as a vulnerable person and therefore subject to guidance which has been given with regard to the treatment of evidence of such persons. In particular it is acknowledged by this Tribunal that someone who has experienced trauma whether in the form of combat or ill-treatment or torture in detention (as rightly set out by Judge Widdup at paragraph 49) "is unlikely to have a complete recall of all events". Judge Widdup stated at the conclusion of paragraph 49, that "I have also taken into account the need for sensitive treatment of a vulnerable individual". At paragraph 12 he states further that "in due course I will consider whether any inconsistencies in the Appellant's case are or may be attributable to trauma experienced by him".

5. The case as advanced on behalf of the respondent both by Ms Pal but more particularly in the Rule 24 response on which she placed reliance, was that the judge did consider the inconsistencies properly in this way and gave sustainable reasons for finding that those inconsistencies were such that they could not be attributable to trauma experienced by him. On behalf of the appellant however Ms Jones submitted that it was quite clear from the decision itself that the judge had not properly made the allowances he should have made for the appellant's vulnerability and that he had not adequately explained why the relatively minor inconsistencies

which he set out within the decision were sufficiently strong to outweigh the medical evidence which he had also claimed to have had regard to.

6. The most important medical evidence was that of Dr Martin who as acknowledged by Judge Widdup had stated clearly (see paragraph 46 of the decision) that "he found the scars are either typical or consistent with the appellant's account", the judge going on to say that "Dr Martin considered whether the scars might be the result of self-infliction by proxy but he discounted this because there were no presenting facts to make it more than a possibility and the overall pattern was not consistent with self-infliction".

7. In this paragraph the judge also noted that Dr Martin's "expertise is such that he is well able to express an expert opinion on the possible causes of scars and the degree of consistency with the account given to him" as well as that "he has also considered possible alternative causes of the marks he observed" and that "he found the scars are either typical or consistent with the appellant's account".

8. For reasons which are not clear the judge then went on to state at paragraph 47 that "in passing I find that it is highly improbable that someone in the appellant's position would inform a clinician of facts suggestive of self-infliction". That may or may not be correct but it is a very odd observation to make in circumstances where what the judge should have done is rule out as a serious possibility (applying the lower standard of proof) that the injuries were self-inflicted. Dr Martin had considered this and had ruled it out; there was no basis upon which the judge could have had in mind at all that this was a serious possibility, and accordingly the finding that was made at [47] is at best irrelevant and at worst suggests that the judge may have started from a position which could be said to be prejudicial of the appellant's case.

9. Ms Jones has taken the Tribunal through the various inconsistencies referred to by the judge in his decision and has argued that these were sufficiently insignificant as not to outweigh the medical evidence which was before him or at the very least to render the position unclear. She submitted that where matters were unclear, the appellant should have been given the benefit of the doubt. This may or may not be a good argument (and no doubt this will be argued later) but this would not of its own, in my judgment constitute a proper reason for setting aside the decision. Matters of weight are as is well-known, a matter for the fact-finder and there were some inconsistencies within the account. Provided the judge has shown that he has given due allowance for the possible effects of trauma and has taken into account that the appellant should be treated as a vulnerable person, he is not obliged to take everything that a vulnerable person says at face value. If this were not so, then it would be very difficult ever to disbelieve an account given by a vulnerable person. However, it is Ms Jones' case that because the inconsistencies are relatively small, and to some extent misstated within the decision, the inference should be drawn that the wrong standard of proof was applied. I

do not make any finding on that because it is not necessary for me to do so, because I think there is a more serious fault within this decision which can be seen from the way in which Dr Martin's report was considered at paragraph 59.

10. Although at paragraph 59 the judge says that he has taken Dr Martin's report into account, having set out that Dr Martin has said and that the judge accepts "that the appellant is scarred and that these scars are typical of or consistent with ill-treatment" the judge goes on to say that "Dr Martin does not say, and he cannot say, that the scars must have been caused by Sri Lankan authorities in the way described by the appellant". He then states as follows:

> "Having regard to the adverse credibility findings I have made I find that Dr Martin's report adds little to the overall weight of the appellant's claim".

11. Although the judge had said at paragraph 44 that he has considered all the evidence in the round, what is said at paragraph 59 is wholly inconsistent with that. Even Ms Pal, trying to defend this aspect of the decision was obliged to concede, and I quote, that "[this sentence] is a bit awkward and clumsy, the way he expresses himself" before then submitting that it did not materially affect the overall credibility findings. She noted that "thankfully he has not gone on to speculate how [the appellant] got the injury". I appreciate that although evidence has to be considered in the round, a decision has to be given chronologically, and so some matters will be referred to before others and I would be very hesitant indeed to make a finding of an error of law merely on the basis of semantics. However, on any view, the statement that "Dr Martin's report adds little to the overall weight of the appellant's claim" cannot be said to show that the judge had given fair and proper consideration to the appellant's claim. While it may very well have been open to the judge (and may be open to another judge hearing this appeal) to find for reasons such as material inconsistencies in the evidence that notwithstanding Dr Martin's report the appellant's claim should still be rejected, in my judgement his claim has to be regarded as significantly stronger with the benefit of Dr Martin's evidence than without it. I asked Ms Pal if she accepted that this must be the case and she fairly accepted that that was so. Accordingly and reluctantly the conclusion I am forced to draw from the judge's statement as already set out above in the final sentence of paragraph 59 is that the judge had made up his mind as to the appellant's lack of credibility and that it was because of this finding that he did not consider that the medical report added very much to his claim. What he should have done was demonstrate within the decision that the finding had indeed been made in the round, which he does not. Accordingly the findings with regard to the inconsistencies in the appellant's account were not made having factored into that consideration Dr Martin's report (without which the claim would have been much weaker) and accordingly this must be a material error of law, because it cannot be said with any

certainty that the decision must have been the same had Dr Martin's report been factored in appropriately.

12. Both parties are agreed that in the event that I find a material error of law the appropriate course is to remit this appeal (reluctantly, yet again) back to the First-tier Tribunal for yet another judge to be faced with the responsibility of re-hearing this appeal and I will so order.

Decision

I set aside the decision of First-tier Tribunal Judge Widdup as containing a material error of law and remit this appeal back to the First-tier Tribunal at Taylor House for rehearing before any judge other than Judge Widdup or Judge Greasley.

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 his 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:

Upper Tribunal Judge Craig Date: 25 July 2017