Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02999/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 September 2017	**On 21 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

[D K]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Mozham, of Counsel, instructed Liyon Legal Ltd
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Plumptre (hereafter "the FtTJ") promulgated on 9 March 2017 dismissing the Appellant's appeal against a refusal of a protection claim, the protection claim having been refused by the Respondent for reasons set out in a decision letter dated 13 November 2015.

2. The Appellant is a citizen of Sri Lanka, born on [ ] 1967. He is of Singhalese ethnicity. He has been living in the United Kingdom since his entry as a visitor on 19 May 2006. He claimed asylum on 10 July 2015 on the basis that he was arrested by the Sri

Lankan authorities on 14 April 2006 as he was suspected of assisting the LTTE and claimed that he would be subjected to ill-treatment on return to Sri Lanka.

3. Prior to the hearing of the appeal before the FtTJ, the appeal was listed before Judge Graves on 5 September 2016. The Appellant was then represented by Counsel (Mr Jafar) and his attendance note contained in the body of an email gave details of how the Appellant had disclosed details of his detention and ill-treatment during a conversation prior to the commencement of the hearing. Accordingly, Counsel applied for and was granted an adjournment to obtain expert medical evidence and to permit the Respondent to serve a document verification report in relation to an arrest warrant produced by the Appellant from a magistrates' court in Sri Lanka.

4. The matter then came before the FtTJ. A medico-legal report dated 25 January 2017 had been obtained from Mr Mason who examined the Appellant's scarring. The Respondent had also filed a document verification report relating to the arrest warrant stating that it was not genuine.

5. The FtTJ heard evidence from the Appellant. A summary of his claim is set out at [12] to [27]. The FtTJ then summarised the findings of Mr Mason at [29] to [31] and noted his conclusion that: *"It is in my opinion not possible that these scars could result from injuries that were self-inflicted or were inflicted on [the appellant] with his consent (self-inflicted injuries by proxy) although it is recognised that these possibilities cannot be entirely eliminated on the basis of the scars characteristics alone."*

6. The FtTJ disbelieved the Appellant's account in its entirety and her findings are comprehensively set out at [35] to [76]. The FtTJ noted various inconsistencies in the evidence and identified elements of the account that she considered were inherently unlikely. The FtTJ did not accept that the Appellant travelled to Sri Lanka in 2006 and rejected his evidence that he was assisted by an agent through the airport in Sri Lanka in view of the fact that he had a valid UK visa.

7. In reaching her conclusions the FtTJ took into account inter alia the report of Mr Mason at [34] and at [46], and [47] referred to the guidance given in JL (medical reports-credibility) China [2013] UKUT 00145 (IAC) and KV (scarring – medical evidence) Sri Lanka [2014] UKUT 00230 (IAC). At [48] to [51] the FtTJ analysed the Appellant's account of ill-treatment. At [48] the FtTJ stated thus:

> "I find it significant that the appellant has never claimed to have been tortured by an iron metal rod either in his witness statement or in his asylum interview and hence the only evidence that he suffered such torture is what is set out at paragraph 5.2 of Mr Mason's report. It is unclear what statement of the appellant Mr Mason was sent because the only witness statement I have from the appellant makes no mention of any torture and in particular no mention of any iron rod."

8. And at [49]:

> "Although the appellant allegedly told Mr Mason that he was hung with chains by his wrists and beaten and was also held on the floor and beaten and burned with a hot metal rod and suffered other forms of torture including having his

> head placed in a plastic bag containing chilli powder, I give weight to the fact that the appellant never made any such allegation in his asylum interview and simply stated that he was locked up in a small room [Q62 AIR] and was not given food during the first day at all nor even water and that he was taken the following day to another room with a table and questioned (Q63 AIR)."

9. The FtTJ took into account the Appellant's conduct following his arrival in the United Kingdom and concluded that his going to ground and not contacting the Home Office for some nine years was not the behaviour of someone genuinely in fear of persecution.

10. At [52] the FtTJ referred to the conclusions of Mr Mason and considered that his reasons for finding that the scars could not have been self-inflicted were "cursory" and did not comply with the dicta in KV. The FtTJ noted the regularity of the scars on the Appellant's back which she found were not *"indicative of random strokes such as would be administered by an official torturing a suspect from whom he was trying to obtain information."*

11. At [53] to [54] the FtTJ gave weight to the fact that there was no supporting evidence from the Appellant's wife and thus she disbelieved his claim that his wife had been reporting every month to the police since May 2006, and further noted that there was no letter from the attorney from whom she obtained the arrest warrant and other court documents. The FtTJ was critical of the evidence from another attorney in Sri Lanka who claimed that he personally visited the magistrates' court to verify the documents and considered that they called for *"little or no weight"* as no investigating officer and report would refer to the LTTE diaspora in 2006 [57].

12. The FtTJ next considered the document verification report and the arrest warrant at [58] to [69]. The FtTJ referred to the view of the Sri Lankan attorney that Ralon (the document verification organisation) was a third party and thus had no authority to obtain details of a pending case from the authorities without the permission of the court. The FtTJ further noted the contents of the document verification report which stated inter alia that a redacted copy of the arrest warrant was posted to the registrar of the issuing magistrates' court who in turn confirmed that the arrest warrant was not genuine.

13. The FtTJ noted that she had *"no means of knowing whether Raylon (sic) Colombo is a third party*" or whether or not it was the name of an official at the British High Commission (BHC) Colombo, but noted that the verification came from this organisation. The FtTJ found that the attorney had assumed the document verification organisation was a private organisation/third party that could not obtain details of a pending case. The FtTJ further noted that the attorney did not examine the documents for himself and his testimony was based on hearsay evidence from the registrar who informed him that the documents matched with the court's records [62].

14. The FtTJ went further still and considered but, did not accept, the criticisms made by the Appellant of the document verification process and she noted that a redacted copy of the arrest warrant was sent to the BHC. The FtTJ stated that she had considered the documents *"in the round"* and noted the Appellant's delay in making enquiries as to whether or not there was an arrest warrant. The FtTJ did not find it credible that his wife would have no knowledge of the warrant issued in 2006 if she had been regularly reporting to the police at [66]. Ultimately, the FtTJ concluded that the Appellant had falsely obtained an arrest warrant and investigating report to bolster a false claim.

15. The FtTJ noted that no friends who had supported the Appellant for nine years in the United Kingdom were forthcoming to support his claim and concluded that the delay in claiming asylum undermined his credibility. Having rejected the Appellant's claim the FtTJ applied and found in accordance with extant Country Guidance that the Appellant was not at risk of persecution or serious harm in the event of a return to Sri Lanka, and that, he could return safely to his wife and two children there.

16. Accordingly, the FtTJ dismissed the appeal.

17. The Appellant sought permission to appeal citing five grounds. In summary it was argued that the FtTJ erred in law by making findings on her own assumptions, put herself in the position of an expert and failed to apply anxious scrutiny and provide adequate reasons. It was further argued that the FtTJ erred in her consideration of the letter from the attorney and applied a higher standard of proof.

18. Permission to appeal was granted by First-tier Tribunal Judge Osbourne on 24 July 2017.

19. The Respondent gave notice opposing the appeal for the reasons set out in a rule 24 response dated 18 August 2017.

20. Mr Mohzam relied on the grounds of appeal. He did not directly address each of the grounds but his oral submissions were broadly and generally based upon them. Mr Mohzam submitted that the FtTJ made various assumptions at [35] and her reasons were inadequate. He submitted that the FtTJ's adverse findings were made without reference to the medical evidence and she failed to consider the request for an adjournment and the reason(s) for it. Mr Mozham further contended that at [38] to [40], the FtTJ failed to evaluate the medical evidence and at [34] failed to give reasons for rejecting or accepting the evidence. He submitted that there was insufficient evidence to substantiate a finding that the arrest warrant was false, and that, the FtTJ failed to consider matters in the round.

21. Mr Tufan in his submissions referred to the judgement in Gheisari v Secretary of State for the Home Department [2004] EWCA Civ 1854 at paragraph 20. He submitted that at [34] the FtTJ had considered the medical evidence in accordance

with the guidance in JL which she expressly referred to at [46]. Mr Tufan submitted that the FtTJ was not obliged to accept the conclusions of Mr Mason. He submitted that the FtTJ considered the arrest warrant in the round and that there was nothing irrational in the FtTJ's approach to the evidence.

22. In reply, Mr Mohzam referred to Gheisari at paragraph 21. He submitted that the FtTJ's assumptions were tainted by the fact that she did not provide reasons. Mr Mohzam maintained that from [35] onwards the FtTJ had not properly dealt with the evidence.

Consideration and Conclusions

23. I have considered the submissions made by the representatives at the hearing. I consider that the central submissions made on behalf of the Appellant do not demonstrate that a material error of law was committed by the FtTJ. On the contrary, I find that the FtTJ's decision is a comprehensive well-reasoned decision based on the evidence from which various adverse conclusions were drawn that cannot be categorised as perverse or irrational and were findings that were entirely open to her.

24. The grounds of appeal are not entirely easy to follow as many paragraphs that make up the grounds allude to assertions rather than errors of law, but insofar as I have understood them I address each in turn below.

25. Ground 1 contends that the FtTJ's adverse findings at [35] and [38] were based on assumptions and that she failed to consider the Appellant's claim as a whole applying the need for anxious scrutiny. This ground is without merit. The FtTJ directed herself appropriately and clearly set out the Appellant's case and made findings on elements core to that claim. The FtTJ's findings at [35] and [38] were open to her and are adequately reasoned. I consider that this ground amounts to no more than a mere assertion of a failing on the part of the FtTJ and fails to identify an arguable error of law.

26. Ground 2 traverses several paragraphs and relates to the FtTJ's treatment of the medical evidence. Paragraph 5 of the grounds accepts that the Appellant made no reference to torture during the asylum interview and avers that this matter only came to light during a conversation between Counsel (Mr Jafar) and the Appellant at the hearing on 5 September 2016. Mr Jafar's email setting out those events is attached to the grounds to this tribunal, which Mr Mohzam submits was not considered, but he could not confirm whether this evidence was placed before the FtTJ. There is nothing to indicate that it was.

27. The FtTJ was plainly aware of the history of the proceedings and the reasons for the adjournment which she summarised at [10]. While the FtTJ did not expressly refer to the conversation between the Appellant and Mr Jafar she cannot be criticised for failing to take that evidence into account when it was not placed before her. I further note that while Mr Mohzam submitted that the FtTJ failed to take into account the

reasons for the adjournment, it has not been explained how that led to any procedural impropriety on the part of the FtTJ and the grounds do not suggest that unfairness arose in consequence.

28. There is no dispute that the FtTJ correctly referred to the evidence relating to torture at [48] and she was entitled to observe that the "*only evidence that he suffered such torture is what is set out at paragraph 5.2 of Mr Mason's report*". While the FtTJ was entitled to make that observation, she does not appear to have placed any particular emphasis on it, but rather the emphasis was placed on the Appellant's failure to mention any torture in his witness statement and, in particular, that he was tortured by an iron rod. That is a matter of fact that is not disputed and I consider that the FtTJ was entitled to attach weight to that omission.

29. I therefore consider that it has not been demonstrated that the FtTJ considered that the first mention by the Appellant of being tortured was made to Mr Mason and the grounds in fact make no complaint that she did so.

30. The grounds essentially complain that the FtTJ reached her conclusions in isolation of the medical evidence and that her rejection of that evidence was "cursory". While not cited to me I consider that there is no basis upon which I can conclude that the FtTJ failed to treat the medical evidence in accordance with the guidance given in Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367. The FtTJ refers to the salient conclusions of Mr Mason at [29] to [31] and at [34] stated that she had considered the medical report in assessing credibility in the context of all the evidence which she then cited. The FtTJ then referred herself to the tribunal's decision in JL and KV and she considered the guidance therein alongside the medical evidence.

31. While Mr Mason believed that the Appellant's scars were diagnostic of the scars that would arise from burns in the manner described by the Appellant, and could not have possibly been self-inflicted, the FtTJ was entitled to conclude that this conclusion was cursory and did not comply with the reasoning in KV. While it would have been helpful if the FtTJ had set out her reasons more fully in this regard her approach was not materially flawed.

32. In KV the tribunal held:

> "6. Whilst if best practice is followed medico-legal reports will make a critical evaluation of a claimant's account of scarring said to have been caused by torture, such reports cannot be equated with an assessment to be undertaken by decision-makers in a legal context in which the burden of proof rests on the claimant and when one of the purposes of questioning is to test a claimant's evidence so as to decide whether (to the lower standard) it is credible."

33. That is the approach the FtTJ adopted in a nuanced decision that took a balanced approach to the evidence. The FtTJ rightly noted and was entitled to take into account that Mr Mason could not eliminate the possibility of self-infliction by proxy. I agree with Mr Tufan that the medical report was thus not determinate of the claim

and that the FtTJ was entitled in the circumstances to draw upon her own observations, which have not been shown to be irrational at [52]. I find that there is no merit in this ground either.

34. Ground 3 attacks the FtTJ's consideration of the arrest warrant and supporting court documents.

35. First the grounds assert that the FtTJ did not consider the Respondent's failure to produce evidence of her communication with the BHC in Sri Lanka and between the BHC and the registrar of the issuing magistrates' court. This contention is also without merit. The absence of such evidence was raised by the Appellant's representatives in submissions and the FtTJ expressly dealt with it at [63] to [64] and factored this into her assessment.

36. Second, the grounds aver to a mistake of fact in that the FtTJ wrongly stated at [56] that it was the Appellant's solicitors who instructed the attorney in Sri Lanka to attend the magistrates' court when this was not the case. It is thus argued that the FtTJ failed to consider the Appellant's case with anxious scrutiny. While there is an unfortunate error in this regard, I am not satisfied that the error is material. While the FtTJ gave weight to this issue it was not determinative of the Appellant's credibility and the FtTJ gave several other independent reasons for rejecting the Appellant's account. I am thus not satisfied that had the error not been committed that the FtTJ would have reached a different conclusion.

37. The grounds further cite an unreported decision of the tribunal in a case concerning an Appellant from Sri Lanka, who relied on an arrest warrant and court documents, to support a contention that the Respondent's enquiries were not sufficient to find an allegation of falsity. This ground is misconceived. First, there has been no compliance with the Tribunal's Practice Direction for the citing of unreported decisions. Second, a full copy of that decision has not been produced and there is no indication that it was before the FtTJ. Third, I note from the extracts quoted in the grounds that it appears that the tribunal's conclusions were fact specific and it is not in any event binding on this tribunal or the FtTJ. I find no error in this regard.

38. Further, while complaint is now being made that the Respondent only sought to verify the arrest warrant this complaint was not raised before the FtTJ. The FtTJ considered and gave many reasons for rejecting the supporting evidence. Those reasons are unassailable.

39. It is further contended that the FtTJ was not entitled to conclude as she did at [57], namely, that the investigation officer and report would not refer to "LTTE diaspora" in 2006 as this was a modern term. It is argued in the grounds that this term was used in the translation which was completed in 2016 but this conveniently ignores the fact that the FtTJ was entitled to assume that the translation was accurate and nor was there any evidence that this was a term used by the translator to reflect the nuances in the report.

40. There is also no merit in grounds 4 and 5. The grounds contend that the FtTJ applied a higher standard of proof at [53] and [54] in finding that it was reasonable to expect there to have been some evidence from the Appellant's wife and the attorney from whom she obtained the court documents. The grounds in this regard are a mere assertion and do not identify or particularise how the FtTJ fell into error in this regard. Mr Mohzam merely repeated that assertion. The paragraphs of the decision to which I have been referred do not show that the FtTJ applied a higher standard of proof. It is clear from the FtTJ's self-direction that she was aware of the lower standard of proof and it is further clear from a holistic reading of the decision that the FtTJ clearly applied that standard throughout. I further consider that it was open to the FtTJ to place weight on the absence of evidence given that such evidence could have been readily obtained by the Appellant.

41. Ground 5 briefly states that the FtTJ erred *"by dismissing the appellant's claim because of his delay in claiming asylum"* and that she failed to conduct a global assessment of credibility. This ground does not identify an arguable error of law. The FtTJ was required to take into account the delay in claiming asylum in her assessment and correctly applied the provisions of section 8 on the evidence.

42. I have considered the refences the representatives referred to in Gheisari. At [20] and [21] LJ Pill stated:

> "20. It is because of Sedley LJ's references to a two stage process that I add a few more words of my own. Fact finding is a skilled task, conducted by those holding judicial office at many levels and in many jurisdictions within the legal system. In the asylum jurisdiction, evidence as to specific events must be considered by adjudicators against the background of the in-country material available to them. They often hear oral evidence, as did this adjudicator, and must assess the truthfulness and reliability of that evidence against that background and having regard to their experience and wisdom. As juries, entrusted with the fact finding role in our criminal courts, are customarily instructed: "You will do that by having regard to the whole of the evidence and forming your own judgment about the witnesses and which evidence is reliable and which is not."
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> 21. There will be cases where the events upon which a judgment has to be made are, in the experience of the decision-maker, inherently likely or inherently unlikely. That must be kept in mind when the assessment of credibility is made. That may be an important factor when making the decision. There will be cases where, on the particular evidence, a two stage process of reasoning is appropriate, an assessment of the background material and then a subsequent assessment of the credibility of the witness. Fact finding is, however, essentially a single process. Judgments are not to be made by rote. I would deplore a situation in which the fact finder must first decide whether the situation is inherently likely or unlikely and only then to address himself to the witness's credibility. The task of fact finding should not be compartmentalised in that way. Parts of the story may be inherently likely and parts inherently unlikely. The degree of likelihood may itself depend on witness assessment. What would be wrong would be to say, -- and I agree with Sedley LJ, -- that because evidence

> is inherently unlikely it inevitably follows that it is wrong. An unlikely description may, upon a consideration of the circumstances as a whole, including the judge's assessment of the witness and any explanations he gives, be a true one.

43. The FtTJ did not fall foul of these principles. I find that the grounds amount to a disagreement with the findings of the FtTJ and do not identify a material error of law.

Notice of Decision

The Decision of the First-tier Tribunal does not contain a material error of law and shall stand. The Appellant's appeal is dismissed.

Signed: Date: 20 January 2018

Deputy Upper Tribunal Judge Bagral