



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/06824/2018

THE IMMIGRATION ACTS

Heard at Field House
On 12 November 2018

Decision & Reasons Promulgated
On 10 December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

AMW
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Miszkiel, Counsel instructed by L&L Law Solicitors

For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka born in January 1989 of Sinhalese ethnicity. On 7 February 2015 he applied for asylum. He claims to have been detained and subjected to torture and to be at risk on return because of perceived involvement with the LTTE stemming from his relationship with a Tamil girl and the assistance he gave to her brothers in finding accommodation in Colombo.
2. The application was refused by the respondent on 25 February 2018. The respondent did not accept the appellant's account of having been arrested, detained and

subsequently released from prison and it was not accepted that he fell into any of the risk categories identified in the country guidance case *GJ and others (post-civil war: returnees) Sri Lanka* CG [2013] UKUT 00319 (IAC).

3. To support his application the appellant submitted a medico-legal report prepared by Dr Monica Carter, which considered in detail the appellant's claim to have been tortured and suffer from PTSD. This report was prepared in accordance with the Istanbul Protocol. The respondent stated the following in respect of the report in the Reasons for Refusal Letter dated 25 February 2018:
 - "44. Dr Monica Carter ... found the lesions on your body to be consistent and highly consistent with the given attribution.
 45. The report does not offer any evidence that the scars are likely to have happened within a set time period and thus it is not possible to conclude when the scars and the incidents they relate to happened.
 46. Given the consistencies of the Medico Legal Report provided, the evidence is considered credible while assessing material facts, this part of your claim has been given significant weight in the round with all the available evidence.
 47. It is noted that the Upper Tribunal in the case of KV (scarring – medical evidence) Sri Lanka [2014] UKUT 230 (IAC) (23 May 2014) considered scarring and gave guidance on medico-legal reports in such cases and the reaching of conclusions about the causation of scarring. The photographic evidence you have provided does not show when and how the scars were caused, nor that they were caused in the manner you claim, who took the photographs and when they were taken. Having said this, some weight has been given to these photographs when considering the evidence of your claim in the round."

Decision of First-tier Tribunal

4. The appellant appealed to the First-tier Tribunal where his appeal was heard by Designated First-tier Tribunal Judge Manuell. In a decision promulgated on 30 August 2018 the judge dismissed the appeal.
5. The judge did not accept the appellant's account of having been involved with a Tamil girl, of being of interest to the authorities, and of having been detained and tortured. He described several aspects of the appellant's account as lacking plausibility and his claim to have been tortured as "not remotely credible".
6. Amongst other things, the judge found damaging to the appellant's credibility that he did not claim asylum upon arriving in the UK in 2011, that he pursued an appeal against refusal to grant further leave as a student without claiming asylum, and that he claimed to have travelled from the UK to Canada using forged documents in order to apply for asylum in Canada.

7. The judge considered the appellant's claim to have been tortured at paragraphs 22 to 33 of the decision, including the report of Dr Carter.
8. At paragraph 22 the judge stated, "As is frequently the case in Sri Lankan Tamil appeals, medical reports were produced in some volume".
9. At paragraph 23 the judge noted the experience of Dr Carter (whose report is mentioned above at paragraph 3) and that she worked for the Medical Foundation. He highlighted that she had distinguished between older scars, some of which were said to be from a motorcycle accident, and those attributed to the claimed torture, and that she had ruled out self-infliction by proxy.
10. At paragraph 24 the judge stated that Dr Carter, along with other medical professionals involved with the appellant, had accepted the appellant's attribution of the PTSD causation uncritically.
11. At paragraphs 25 and 26 the judge stated the following:-
 - "25. Confronted with the stark evidence of the Appellant's horrific burn scars, it is not surprising that Dr Carter was unable to accept that the scars were anything other than the result of malevolent activity. The possibility that the Appellant had consented to scarring in order to further his international protection claim was not seriously entertained. In the tribunal's view, however, Dr Carter omitted to analyse the story put forward by the Appellant in the necessary depth, and to consider the highly selective supporting evidence he produced.
 26. Purely at the medical level, in the tribunal's view there was insufficient consideration of the history given by the Appellant of his supposed arrest and interrogation in December 2014 in Sri Lanka. That supposedly commenced on 14 December 2014, having been preceded by an earlier period of detention in Martinique following his arrest there, likely to have been several days. The Appellant's claim was that, use of a false French passport aside, he had never done anything wrong in Sri Lanka and had no wish to support the LTTE. He had left Sri Lanka without difficulty, travelling on his own Sri Lankan passport, in 2011. It is almost inconceivable he could have been permitted to do so if he had been of any continuing interest to the Sri Lankan authorities."
12. At paragraph 28 the judge commented that the ill-treatment the appellant claimed to have suffered would likely have caused shock and given rise to the danger of disease and infection.
13. At paragraph 29 the judge stated:-

"In the tribunal's view, the Appellant has put forward a stereotypical account of torture which is not remotely credible. To begin with, he is not Tamil, so sectarian hatred or revenge punishment as a motive for his treatment is improbable. The civil war was long over ... and the LTTE has been dismantled root and branch. If the Appellant as a Sinhalese person was somehow suspected of having LTTE sympathies, then he was a prize catch for the authorities.

Offering him financial reward and cajoling information from him would surely have been a more productive approach than immediate recourse to brutality, especially as his family connections could easily have been checked. He would also have been a prime candidate to be put on public trial for terrorist offences.”

14. The judge at paragraph 30 stated that given the severity of the torture the appellant claimed to have suffered, it was difficult to understand how he was able to undertake a long international flight almost immediately having only received first aid treatment from his father.
15. The judge at paragraphs 31 to 32 comments on the appellant’s medical records and in particular noted that his blood pressure readings “excite no comment”. The judge commented that the records “suggest that he was surprisingly healthy despite his claimed torture”.
16. The judge at paragraph 33 stated that the medical evidence fails to discuss the pattern of the burn marks and their broad symmetry and that:

“There was nothing identified in any of the specialist literature as to why a torturer would seek symmetry, nor why repeated applications of a hot iron would be needed to secure compliance”.
17. Having rejected the appellant’s account in its entirety, the judge considered the country background evidence and found, applying *GJ and others (post-civil war: returnees) Sri Lanka* CG [2013] UKUT 00319 (IAC), that there were no material factors which would place the appellant at real risk on return as he would not be of interest to the authorities.
18. The judge also assessed the appellant’s human rights claim under Article 8 ECHR and concluded that removal would not be disproportionate.

Grounds of Appeal and Submissions

19. The grounds of appeal assert that the judge adopted a “hostile attitude towards the appellant at the outset” and suggest (but without saying so explicitly) that the appellant was treated unfairly as a consequence.
20. Noting the absence of a witness statement from Mr Lingajothy (who represented the appellant in the First-tier Tribunal), I asked Ms Miszkiel if a procedural unfairness argument was being pursued as a distinct ground of appeal. Her response was that it was not. However, she contended that the language used by the judge in the decision (for example, describing the account of torture as “stereotypical” and introducing the medical evidence at paragraph 22 with the words, “as is frequently the case ...”) was indicative of the judge having a dismissive attitude towards the appellant’s evidence.
21. The first ground of appeal argues that it was not open to the judge to be “so readily dismissive” of the appellant’s case, given that his evidence, including the medical evidence, came from “a number of highly trustworthy sources”. It is asserted that

the appellant was clearly the victim of torture, based on the report of Dr Carter, and that the judge failed to “properly appreciate the valuable role of expert medical (sic) plays in immigration appeals” and that the expert has “not whimsically reached her conclusions.” The grounds go on to say that this is an example of a judge being dismissive of a medical report because he was unhappy with it.

22. The second ground of appeal contends that the judge erred by the “wholesale dismissal of the appellant’s highly meritorious claim.” It is stated that the judge overlooked that the Sri Lankan authorities are “mortally worried about the resuscitation of the [LTTE] movement” and that the judge has not appreciated that as an ethnic Sinhalese the appellant stands no chance of getting any sympathy from the Sri Lankan authorities.
23. This ground also takes issue with the judge’s approach to *GJ and others* and submits that “the salient principles enunciated in *GJ* are appropriately met by the appellant.”
24. The third ground of appeal argues that the judge did not properly consider the best interests of the appellant’s children, who should not be removed from the UK. It is contended that the best interests of the children were not treated as a primary consideration.
25. Permission to appeal was granted by Designated Judge of the First-tier Tribunal MacDonald on the basis that it is arguable that further reasoning was required for discounting the view of Dr Carter, given the nature of the injuries and that self infliction by proxy was ruled out.
26. Before me, Ms Miszkziel focused on the medical evidence, contending that the judge adopted a flawed approach. Her key arguments were that:
 - (a) It was an error of law for the judge to raise self-infliction by proxy when the medical evidence was clear that this had not taken place.
 - (b) The judge treated the medical evidence as “plugging a gap” rather than as evidence to be considered in the round as part of the assessment of credibility. This, she argued, was contrary to *SA(Somalia) [2006] EWCA Civ1302*.
 - (c) The judge erred by failing to have regard to the respondent accepting in the Refusal Letter that weight should be given to Dr Carter’s report.
 - (d) The judge had been too quick to dismiss Dr Carter’s report given that she had explicitly stated her awareness of her duty to the court and had written a comprehensive and thorough report in accordance with the Istanbul protocol.
 - (e) Some of the language used by the judge, for example, describing the account of torture as being stereotypical, indicated that the judge formed a view on credibility without having proper regard to the medical evidence.
 - (f) The judge had speculated about the mind of the torturer where, at paragraph 29, he stated that because the appellant was not Tamil sectarian hatred or revenge would not be a motive for the torture.

- (g) The judge took into account the appellant's blood pressure readings being normal as an indicator he had not been tortured, which was mere speculation.
27. Ms Miszkiewski also commented on other aspects of the decision. She argued that the judge had made findings of implausibility where it was not appropriate. For example, the judge considered it implausible that a relationship would have formed between the appellant and a Tamil girl, but there is no reason why this could not have happened and it was not correct to describe this aspect of the appellant's account as lacking in plausibility.
28. She also argued that the judge's analysis was not consistent with *GJ*.
29. Mr Whitwell submitted that much of the argument advanced by Ms Miszkiewski was not in the grounds of appeal.
30. With regard to the judge's approach to the medical report, Mr Whitwell argued that the judge correctly directed himself and dealt with the evidence in detail and before considering other evidence. This was, in his view, clearly not a case where the judge treated the medical evidence in isolation (or as an "add-on") and it was clear that the judge properly considered the medical evidence in the context of considering credibility. He submitted that the judge was not bound by Dr Carter's report and the weight to attribute to it was a matter for the judge.
31. Mr Whitwell also submitted that there were numerous strong reasons for the judge to question the appellant's credibility, including in particular the factors set out above at paragraph 6.

Analysis

32. Dr Carter, an experienced doctor working with the Medical Foundation, prepared a thorough and detailed report which followed the guidance in the Istanbul Protocol and the Directions in paragraph 10 of the Practice Direction of the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal.
33. Dr Carter considered the appellant's numerous scars and lesions and identified several that she considered were either "highly consistent" with or "consistent" with his account.
34. She considered whether the appellant's wounds arising from the burns could be self-inflicted and concluded, in respect of certain of the wounds, that because of their angle and distribution this would not be possible.
35. With regard to self-infliction by proxy, Dr Carter stated at paragraph 77 of her report:
- "I considered the possibility of fabrication by self-infliction by proxy (SIBP) and assessed it in the light of what is known in forensic medical practice about such injuries for secondary gain, and could find no evidence for it in this case. There was no lapse of consciousness until after the burns were inflicted."*

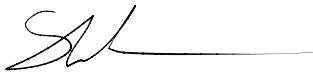
36. Although the judge gave clear and cogent reasons why he found aspects of the appellant's account to lack plausibility, in my view he did not adequately explain how, in light of Dr Carter's independent and comprehensive evidence which ruled out self-infliction by proxy and found several lesions to be highly consistent with the claimed torture, he reached the conclusion that the appellant's account of being tortured was "not remotely credible" (paragraph 29 of the decision).
37. Moreover, several of the reasons given by the judge for not finding the account of torture credible are problematic. These are:
- (a) At paragraph 32 of the decision, the judge commented that the appellant's blood pressure excited no comment and that he was surprisingly healthy despite his claimed torture. However, the judge has not explained why he would expect the appellant, who is a young man (under 30), to have high blood pressure or to exhibit other physical symptoms because of the torture experienced several years earlier. The judge also failed to address in this context that the view of Dr Carter is that the appellant does in fact suffer from ongoing physical symptoms in the form of severe headaches, shoulder pain and impotence.
 - (b) At paragraph 33 the judge criticised the medical evidence for not discussing the broad symmetry of the burn marks. However, the body diagrams appended to Dr Carter's report do not show symmetrical patterns of lesions and scarring.
 - (c) At paragraph 30 the judge found as undermining to the appellant's account that he claimed to have undertaken a long international flight almost immediately after his release with only medical treatment from his father. However, it is not clear why the judge has reached the view that the appellant would have been unable to travel by plane without first receiving medical treatment.
 - d) At paragraph 25 the judge stated that the possibility of self-infliction by proxy was not seriously entertained by Dr Carter. However, Dr Carter addressed this issue explicitly at paragraph 77 of the report (as quoted above), where she explained that, in her opinion, there was no lapse of consciousness until after the burns were inflicted and the evidence did not point to self-infliction by proxy occurring in this case.
38. Given the opinion of Dr Carter which, on any legitimate view, indicates that torture may have taken place, and that some of the reasons given by the judge for rejecting the appellant's claim to have suffered torture are unclear (as set out above at paragraph 37), having regard to the lower standard of proof applicable in asylum cases I am of the view that the judge materially erred in law by failing to give adequate reasons to explain how he reached the conclusion that the appellant's account of torture was "not remotely credible".

39. As the expert medical evidence is integral to the overall assessment of credibility, the decision will need to be re-made without any findings of fact preserved. The extent of further fact-finding required is likely to be extensive, such that in accordance with Section 7.2(b) of the Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal, the appeal should be remitted to the First-tier Tribunal to be heard afresh.

Notice of Decision

- A The decision of the First-tier Tribunal contains a material error of law and is set aside.
- B The appeal is remitted to the First-tier Tribunal to be considered afresh by a different judge.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 5 December 2018