Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number:**
AA/08235/2013

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision and Reasons Promulgated**
On 20th February 2019	**On 13th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

R V
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Khan (Counsel, instructed by IAS)
For the Respondent: Mr C Bates (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This appeal has a lengthy history which has involved a number of appeals. For these purposes the relevant decision is that of First-tier Tribunal Judge Cruthers promulgated on the 27th of February 2018 following a hearing on the 9th of January 2018 in Manchester. In a lengthy decision running to 126 paragraphs over 36 pages the Judge set out the basis of the Appellant's claim, the evidence received and discussed the issues before dismissing the appeal on all grounds.

2. The Appellant's application for permission to appeal to the Upper Tribunal made to the First-tier Tribunal was refused but granted on a renewed application to the Upper Tribunal. That explains the delay in the case coming to a hearing before the Upper Tribunal.

3. The grounds argue that the First-tier Tribunal acted procedurally unfairly in paragraph 57 as the suggestion that the cigarette burns could have been self-inflicted had not been put to the Appellant. Secondly it is argued that the Judge erred in in failing to take account of the

Appellant's vulnerability in assessing the Appellant's account, referring to the guidance in AM (Afghanistan) [2017] EWCA Civ 1123. Thirdly it is argued that the Judge erred in the assessment of the risk the Appellant would face in the event of return to Sri Lanka.

4. Deputy Upper Tribunal Judge Murray granted permission on the 13th of August 2018. The principal basis for the grant of permission was that it was arguable that the Judge had not directed himself in accordance with AM (Afghanistan) and the appropriate guidance. It was observed that the other grounds had less merit.

THE HEARING

5. The oral submissions were made in line with the parties' respective positions. These are set out in full in the Record of Proceedings and summarised here. With regard to the first ground self-infliction had not featured in the Refusal Letter and the Appellant had not been cross-examined on that basis. I asked how it was central, it was submitted that this went to the claim he had been tortured and detained. With regard to the Appellant's vulnerability this was dealt with in paragraph 10 of the grounds. Referring to the findings made and a number of authorities and the Appellant's mental health difficulties the Judge should have considered the Appellant's vulnerability, the case law was not in the mind of the Judge. So far as his risk of return was concerned the evidence of the Appellant's involvement was sufficient to meet the guidance in GJ.

6. For the Home Office it was submitted that the observations in paragraph 57 were an observation and not a finding that he had self-inflicted the injuries on his lower legs. Reference was made to paragraph 66, the Home Office maintained that the evidence had been assessed in the round. The report could not say who had caused the injuries and this was not material. On vulnerability reference was made to paragraph 44, at paragraph 45 the guidance was borne in mind and the Judge was aware of the approach, paragraphs 59 and 60 the Appellant's PTSD and medication was noted, in paragraph 63 there was no evidence from the psychiatrist regarding ideation. There was late disclosure of the claims of ill-treatment and in paragraph 78 the Judge set out what was accepted and did give the Appellant the benefit of the doubt.

7. Devaseelan was the starting point and credibility had been properly assessed. The Appellant's account had changed and at its highest there had been a fundamental shift which was not explained by his mental health difficulties, the non-disclosure had not been explained and it was not the Appellant's case that he had not raised it because of his mental health. The explanations given had been considered. In short the Judge assessed the evidence and was mindful of the Appellant's mental health and considered the explanations given.

8. So far as the Appellant's sur place activities were concerned the grounds were a simple disagreement with the decision, the Judge had considered the extent of the Appellant's involvement. It was submitted that the Appellant had attended 15 demonstrations between 2009 and 2014 and had been little more than a participant, the Judge was entitled to find that the Appellant did not have a high profile.

DISCUSSION AND FINDINGS

9. Burnett LJ in EA v SSHD [2017] EWCA Civ 10 at paragraph 10 made the following observations: "Decisions of tribunals should not become formulaic and rarely benefit from copious citation of authority. Arguments that reduce to the proposition that the F-tT has failed to mention *dicta* from a series of cases in the Court of Appeal or elsewhere will rarely prosper. Similarly, as Lord Hoffmann said in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372, "reasons

should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account". He added that an "appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself". Moreover, some principles are so firmly embedded in judicial thinking that they do not need to be recited. For example, it would be surprising to see in every civil judgment a paragraph dealing with the burden and standard of proof; or in every running down action a treatise, however short, on the law of negligence. That said, the reader of any judicial decision must be reassured from its content that the court or tribunal has applied the correct legal test to any question it is deciding."

10. In Re M-W (Care proceedings: Expert evidence) [2010] EWCA Civ 12 at paragraph 39 Wall LJ stated: "I regard the following as trite propositions of law:- (1) Experts do not decide cases. Judges do. The expert's function is to advise the judge; (2) The judge is fully entitled to accept or reject expert opinion; (3) If the judge decides to reject an expert's advice, he or she; (a) must have a sound basis upon which to do so; and (b) must explain why the advice is being rejected. (4) Similar considerations arise when a judge prefers one expert's evidence to that of another. Judges must explain why they prefer the evidence of A to that of B."

11. The sentence in paragraph 57 that the Appellant could have inflicted cigarette burns on himself was clearly an observation and not a finding. The medical evidence was discussed at length between paragraphs 54 and 66. As an observation it forms a very small part of the discussion and is not remotely central to the discussion or the findings made. A fair reading of the relevant paragraphs shows that the observation had no impact on the overall assessment made by the Judge. To characterise it as a finding is not simply misleading but wrong and to suggest it is central to the reasoning applied is to attach weight to it that has no sense or justification. Given the size of the file as it now is it may be that the observation had not been spotted by the Judge but as it was not held against the Appellant in the findings made the point has no relevance. This is not an error.

12. Turning the Appellant's sur place activities secondly this was dealt with by the Judge at paragraph 75 to 81 with the Appellant's actual involvement and the consequences set out at paragraphs 79 to 81. From paragraph 115 to 125 the Appellant's risk was discussed fully with the guidance in GJ forming the starting point for the Judge's consideration of the Appellant's case. There followed a discussion of each of the relevant risk factors ending with his participation in demonstrations. The underlying findings have not been challenged and there is nothing in the evidence or the grounds to show that the Appellant could be regarded as either prominent or high profile. The grounds are a disagreement with the findings made but do not show that the Judge erred in his approach to the evidence, the factual findings made or the conclusions drawn from them.

13. As Judge Murray observed the most significant ground is that relating to the Judge's treatment of the Appellant's mental health. In paragraph 14 of the grounds it was stated "Even at the very start of the determination the Judge had formed a view that the Appellant's chronic PTSD was not necessarily going to explain the credibility issues that arose in this case." That appears to be a reference to paragraph 44 but as a summary of the approach to be taken it would not be wrong.

14. The fact an individual has PTSD and/or other mental health issues would still require an examination of the claim made and part of that requires a rounded assessment of all issues including differences in any accounts that have been given and the explanations for the discrepancies, if any, identified. An Appellant's mental health issues may explain discrepancies or they might not, that was an issue the Judge had to deal with.

15. In paragraph 6 of the decision the Judge correctly noted that the rejection of some aspects of an Appellant's evidence did not automatically lead to the centrepiece of the Appellant's case being rejected, following Chiver. The Judge's general approach to the Appellant's mental health issues was set out at paragraph 44 where the Judge stated that he had "proceeded with regard to the tribunal's relevant guidance relating to vulnerable witnesses." The lawyers were advised about the need for sensitive and appropriate questions and the Judge stated that he had borne the Appellant's vulnerability when assessing the evidence. That is in accordance with the extract relied on from JL (medical reports – credibility) China [2013] UKUT 145 (IAC) and the assessment of the relevance of an Appellant's vulnerability to inconsistencies relied on by the Secretary of State.

16. The issue is a question of substance not form. AM (Afghanistan) [2017] EWCA Civ 1123 is set out in the grounds at paragraph 12. Paragraph 30 includes "The directions and guidance contained in them are to be followed and for the convenience of practitioners, they are annexed to this judgment. Failure to follow them will most likely be a material error of law." It is not an error of law to not set out the guidance, it is a failure to follow and apply the guidance. So far as the second ground is concerned there is no reference in the grounds, nor in the submissions made, to any specific paragraph in the decision where it is said that the Judge erred in the approach to these issues or the findings made as a result.

17. The Judge considered the medical evidence at paragraphs 54 to 66 of the decision, the reference to the possibility of self-infliction of cigarette burns has been considered above and forms a small and irrelevant observation. The psychiatric evidence was discussed at length in paragraphs 59 to 66. When considering the differences between the Appellant's accounts the Judge clearly had regard to the medical evidence relied on and the Appellant's vulnerability. There was nothing in the medical evidence that explained the differences between the Appellant's replies when first interviewed in 2007 and his evidence to Judge Simpson in 2008 compared to that before Judge Cruthers.

18. The fact that the Appellant has mental health issues was clearly relevant to the conduct of the proceedings and the Judge's consideration of the evidence and the decision clearly shows that it was taken into account in both settings. The fact that an Appellant has PTSD does not by itself lead to the conclusion that the account is to be accepted, the Judge has to analyse the evidence and assess the explanation for the differences, if any, between accounts that an Appellant has given. That is what the Judge did, the medical evidence did not explain why his account had changed so significantly from the evidence before Judge Simpson and there was no other evidence that assisted the Appellant in that regard. The grounds rely on form over substance and do not demonstrate that there was an error in the Judge's approach to the Appellant's vulnerability, the findings made or the final decision.

CONCLUSIONS

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.)

Fee Award

In dismissing this appeal I make no fee award.

Signed:
Deputy Judge of the Upper Tribunal (IAC)

Dated: 12th March 2019