Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03528/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 June 2019	**On 13 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR M I M I
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr V P Lingajothy of Immigration Barrister Services
For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Sri Lanka, appealed to the First-tier Tribunal against a decision of the respondent, dated 27 February 2018, to refuse the appellant's application for protection. Judge of the First-tier Tribunal Hussain, in a Decision and Reasons promulgated on 13 February 2019, dismissed the appellant's appeal. The appellant now appeals to the Upper Tribunal with permission, granted by the Upper Tribunal.

2. The appellant, born on 5 September 1991, is a Tamil speaking Sri Lankan Muslim. As highlighted in the appellant's skeleton argument to the First-

tier Tribunal his case had "one primary dimension to it", namely his claimed fear of the Sri Lankan authorities premised on his claimed LTTE connections. The appellant claims he was held in captivity and tortured in Sri Lanka. He further claims that he is at risk in Sri Lanka's increasingly dangerous environment which is becoming virulently anti-Muslim.

3. The appellant appeals to the Upper Tribunal on the grounds that the judge failed to address material aspects of his claim and asserted, in the narrative grounds, that the appellant's case was meritorious due to the fact that the Sri Lankan authorities had information about his LTTE links; his fears were genuine and based on cogent evidence including expert evidence; and his precarious mental and other conditions made him highly vulnerable. The narrative grounds, which appeared to rehearse the arguments that were before the First-tier Tribunal, also mentioned that the appellant comes from an Islamic background which, it was asserted, further aggravates his security situation and asserted that the judge's findings in relation to the medical evidence was legally unsound.

4. Judge McGeachy granted permission on the basis that there were two matters of concern to him, namely the appellant's scarring and the fact that he was a Muslim and had lived in Britain for some time.

Error of Law Discussion

5. It was Mr Lingajorthy's primary submission that the judge's findings were flawed and that the judge had failed to factor in the appellant's Muslim faith which was mentioned in the appellant's witness statements and in his skeleton argument. Mr Lingajorthy also drew attention to additional bundle 1, which Ms Jones did not dispute was before the First-tier Tribunal, including a Guardian report dated March 2018 and a BBC report also dated March 2018 in relation to attacks against Muslims. This was, initially, Mr Lingajorthy's only submission. When pressed on the remaining grounds Mr Lingajorthy submitted that the judge was wrong not to accept the opinion of the expert in relation to the scarring and the judge was not a medical expert. However, he accepted that the judge had pointed out at [58] that the expert at paragraph 5.5.4 had provided confusing evidence when he had stated that the appellant:-

> "said that was burnt (sic) with boiling water during his detention. The scar is consistent with deliberate injury caused by a flame, as described by the claimant. I assume there is a difference between flame and hot water! (my emphasis)".

6. Mr Lingajorthy speculated that the expert had made a mistake between flame and boiling water; however he accepted there was no evidence nor any application made, for example to produce further evidence, that might support such an argument. He submitted that such a mistake was not fundamental.

7. Ms Jones for the respondent submitted that the judge was right to point out the inconsistencies in the expert report and was entitled to reach the

conclusions he did in relation to the appellant's evidence, concluding that it had not been demonstrated that he was of adverse interest to the Sri Lankan authorities. In relation to the point in the appellant's grounds (not pursued by Mr Lingajorthy) she further submitted that the judge's findings in relation to the appellant's risk of suicide were also open to him and there had been no mention of suicide attempts prior to this.

8. In relation to the arguments which were now being relied on almost exclusively, that the judge had not addressed that the appellant was Muslim, it was Ms Jones' submission that although this had been mentioned it had not been particularised and the thrust of the appellant's case was his LTTE involvement including as highlighted in his witness statements and interview.

9. In reply Mr Lingajorthy submitted that the failure to adequately address the fact that the appellant was Muslim and the evidence produced including of anti-Muslim sentiment which was worsening (including in the advent of the Easter bombings, although it was accepted that this post-dated the appeal) was fundamental to the case.

Error of Law Conclusions

10. I am not satisfied that the grounds, which in effect amount to a disagreement with the findings of the First-tier Tribunal, are made out. The judge considered all of the evidence in the round as identified in the Decision and Reasons (including at [59]). Primarily the judge did not find the appellant to be credible for the evidence-based reasons given. For example at [44] the judge found that:-

> "What makes the appellant's claim entirely devoid of any truth is that according to his interview, his family were visited in August 2014. If that acted as a trigger for the application then he has not explained at all why it was not until April the following year that he applied for asylum."

11. The judge took into consideration that some of the attacks by the Secretary of State on the appellant's credibility appeared rather weak on the face of it; however the judge took into consideration, which was open to him, that the appellant had failed to provide any evidence of his arrest, detention and bail without any reasonable explanation for the absence of such evidence. In view of the absence of evidence of the grant of bail to the appellant the judge found this indicative of the fact that the appellant's story about being arrested and detained was untrue ([48]). Contrary to what was stated in the grounds, the judge made clear that he came to this conclusion considering the totality of the evidence including that the appellant's evidence "unravelled". It was the judge's finding that the appellant's evidence was inconsistent and embellished and those findings were not substantively challenged before me, including that the judge highlighted the inconsistencies in that evidence between the interview and the witness statement.

12. In respect of scarring the judge took into consideration, in the round, a report from Dr Andreas Izquierdo-Martin which included, at 5.5.3 that the:-

> "appearance, distribution and pattern of the scars are highly consistent with unwilling and intentionally caused injuries with a hot object, such as cigarette burns, as described by the appellant".

13. The judge highlighted difficulties with the expert report, including that it was not clear on what basis the expert concluded that the scars were unwilling and it was not clear how the expert could conclude that these had not been inflicted by a third party. In addition, as already indicated the judge also highlighted inconsistencies in the report as to whether the injuries were caused by boiling water or by a flame. The judge went on to conclude, at [59] having looked at the totality of the evidence, that the appellant had failed to demonstrate to the lower standard that he was of adverse interest in Sri Lanka.

14. Although not relied on by the parties before me, and promulgated after the decision of the First-tier Tribunal I have taken into consideration what was said by the Supreme Court in **KV (Sri Lanka) [2019] UKSC 10**. The Supreme Court found concluding as follows:-

> "*31. The third point arises out of the Tribunal's final conclusion that there were only two real possibilities, namely that KV had been tortured and that his wounding was SIBP. The point is that the likelihood of both possibilities had to be compared with each other before either of them could be discounted. And the contention is that, when it came to compile the final section of its determination entitled 'Assessment of the Appellant's Appeal', and in particular the final sub-section, entitled 'Conclusion', in which it discounted the possibility of torture, the Tribunal made no reference to the likelihood, or rather on any view the unlikelihood, that the wounding was SIBP.*
>
> *32. That there was extensive torture by state forces in Sri Lanka in 2009 was well established in the evidence before the Tribunal. For example at para 187 of its determination it quoted an EU report dated October 2009 as follows:*
>
> > *'International reports indicate continual and well-documented allegations of widespread torture and ill-treatment committed by state forces (police and military) particularly in situations of detention. The UN Special Rapporteur on Torture has expressed shock at the severity of the torture employed by the army, which includes burning with soldering irons and suspension of detainees by their thumbs.'*
>
> *33. By contrast, evidence of wounding SIBP on the part of asylum-seekers was almost non-existent. The Tribunal referred at para 11 to just one unreported decision in 2011*

in which it had concluded that the wounding had been SIBP. Dr Zapata-Bravo said that, in the field of immigration, neither he nor any colleague to whom he had spoken had experience of wounding SIBP. He contrasted it with tribal and ritual scarring, administered with social consent, which no one had suggested to account for the scars in question. His and the other medical evidence before the Tribunal indicated that the wounding of a body which that person deliberately achieved by his own hand was slightly less uncommon; but that there were parts of a body which that person could not burn without assistance and that they certainly included the burnt parts of KV's back. Dr Zapata-Bravo said that in the literature he had found only one statement referable to a person's burning of himself by use of a proxy. 'Very rarely', it had said, 'an accomplice might be asked to cause a wound in a place the person cannot reach'.

34. *There is no doubt that, particularly in the light of the serious lack of KV's credibility in several other areas of his evidence, the Tribunal was correct to address the possibility of wounding SIBP. But, in assessing the strength of the possibility, it had to weigh the following:*

    (a) *It is an extreme measure for a person to decide to cause himself to suffer deep injury and severe and protracted pain.*

    (b) *Moreover KV needed someone to help him to do it.*

    (c) *Wounding SIBP is, in the words of Sales LJ at para 93 of his judgment, 'generally so unlikely'.*

    (d) *If KV's wounding was SIBP, the wounds on his back could have been inflicted only under anaesthetic and so he would have needed assistance from a person with medical expertise prepared to act contrary to medical ethics.*

    (e) *If his wounding was SIBP, an explanation had to be found for the difference in both the location and in particular the presentation of the scarring as between the back and the arm.*

    (f) *If his wounding was SIBP, an explanation had to be found for the number of the wounds, namely the three wounds on the back, albeit now represented by five scars, and the two wounds on the arm. As Elias LJ observed in para 99, 'one or two strategically placed scars could equally well have supported a claim of torture'.*

35. *Elias LJ offered a summary in para 101:*

> *'In my view very considerable weight should be given to the fact that injuries which are SIBP are likely to be extremely rare. An individual is highly unlikely to want to suffer the continuing pain and discomfort resulting from self-inflicted harm, even if he is anaesthetised when the harm is inflicted. Moreover, the possibility that the injuries may have been sustained in this way is even less likely in circumstances where the applicant would have needed to be anaesthetised. This would in all probability have required the clandestine co-operation of a qualified doctor who would have had to be willing to act in breach of the most fundamental and ethical standards, and who had access to the relevant medical equipment.'*
>
> *That was his view. It should also, I suggest, be ours."*

15. The Supreme Court's decision in **KV** indicates that the primary issue with the Upper Tribunal's decision was the interpretation of the medical evidence. The Tribunal in that case, in effect, concluded that the scars were inflicted by SIBP, but I am satisfied that the context of this case is distinguishable and fundamentally different including that the appellant at his interview made no mention of his beating when he claimed he was detained in 2013.

16. In this case Judge Hussain gave sound and sustainable reasons for expressing doubts about the medical evidence including the lack of adequate reasoning provided by the expert for the conclusions he reached and the inconsistencies in the findings at 5.5.4 of the report which found scar 4 to be consistent with a deliberate injury by flame whereas the previous sentence stated that the appellant claimed to have been burnt with boiling water. Although **KV** highlights the fact that injuries caused by SIBP are likely to be extremely rare, that does not obviate the need for expert reports to adequately address all the issues. The Supreme Court in **KV** had significant evidence in relation to the nature of the scars and the possibility of SIBP, whereas Judge Hussain drew attention to the fact that this issue was not adequately dealt with in the expert report in his findings including that it was not clear how the expert had concluded that the scars were "unwilling". It is not the case that Judge Hussain concluded that the injuries were caused by SIBP, rather that the judge found that the totality of the evidence did not discharge to the lower standard of proof that the appellant had been of adverse interest in Sri Lanka and this included taking into consideration the inadequacies of the expert report.

17. On the facts of the appellant's case the findings of Judge Hussain are not undermined by the guidance in **KV** and accordingly I am satisfied that there was no material error in the judge's approach to the medical evidence of scarring.

18. In relation to the appellant's mental health difficulties, although this was not specifically relied on by Mr Lingajorthy in his oral submissions, it was mentioned in the narrative grounds for permission to appeal. However, I agree with Ms Jones that the judge reached findings which were open to him including that it was surprising that although the consultant psychiatrist mentioned the risk of suicide, the appellant's general practitioner in her report on 29 December 2017 made no mention of suicide attempts despite the fact that the consultant psychiatrist mentions that the appellant states that he twice attempted to take his own life by hanging. The judge went on to find, which was open to him, that whilst he had no reason to doubt the appellant suffers from depression and may suffer from the effects of PTSD, this did not assist in corroborating his claimed arrest, detention and ill-treatment. In addition the judge was satisfied that the conditions the appellant suffers can be treated in Sri Lanka. There has been no challenge to that finding, which was adequate and sustainable. It was also open to the judge to highlight and draw the conclusions he did in relation to the inconsistencies in the appellant's evidence. Those findings when considered holistically are sustainable.

19. In relation to the remaining aspect of the appellant's claim and indeed the only aspect initially relied on by Mr Lingajorthy, the appellant's Islamic background, it was not disputed that this was mentioned in the appellant's witness statements and skeleton argument. What was disputed was the focus of the appellant's claim. Although Mr Lingajorthy in effect submitted before me that this was now fundamental to the appellant's claim, in fact the appellant's skeleton argument before the First-tier Tribunal confirmed the "primary dimension" of his claim was his fear of his LTTE connections. It is in that context that the appellant's Islamic background must be considered. The judge was aware of the background of the appellant's claim including that he first arrived in the UK in 2014. Therefore the judge was aware of the length of the appellant's stay in the UK. Although the appellant's Muslim background is not specifically referenced in the Decision and Reasons, that is reflective of the minor role which his Muslim background played in his case as highlighted by Mr Lingajorthy's skeleton argument which indicated the primary dimension of his appeal was his LTTE connections.

20. Whilst that does not obviate the need for the judge to address all the factors, I am satisfied that that is what he did. The judge indicates, including at [59], that he has considered the totality of the evidence and it is implicit in my view, that the appellant's Muslim background, the difficulties experienced by some Muslims in Sri Lanka and the length of time that he has been in the UK formed part of that consideration. I have reminded myself what was said in **MD (Turkey) v SSHD [2017] EWCA Civ 1958** that adequacy meant no more nor less than that. It was not a counsel of perfection. Still less should it provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits. The purpose of the duty to give reasons, is in part, to enable the losing party to know why she has lost and it is also to enable an appellate court or tribunal to see what the

reasons for the decision are so that they can be examined in case there has been an error of approach.

21. It was not the appellant's case, before the First-tier Tribunal, that his Muslim background in itself, or indeed the length of time he spent in the UK would put him at risk. Neither the evidence before the First-tier Tribunal, nor the jurisprudence, would have supported such a finding. The judge took into consideration the factors including **GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)** and **MP & Anor v Secretary of State for the Home Department [2014] EWCA Civ 89** including as highlighted in the respondent's refusal letter. The judge for the adequate, sustainable reasons he gave did not find the appellant to be credible and was not satisfied that he had demonstrated that he had previously come to adverse interest in Sri Lanka and the judge was satisfied that the evidence did not demonstrate that he came within any of the risk categories identified in **GJ**. When read fairly and as a whole, the judge's findings demonstrate no material error.

Notice of Decision

22. The decision of the First-tier Tribunal does not disclose an error of law and shall stand.

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 Date: 12 June 2019

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

As the appeal is dismissed no fee award is made.

Signed Date: 12 June 2019

Deputy Upper Tribunal Judge Hutchinson