Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12926/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 5 August 2019	**On 20 August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SUTHERLAND WILLIAMS

Between

THUPEESAN [K]
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Pall, Home Office Presenting Officer
For the Respondent: Mr S Muquit, Counsel, instructed by A&P Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Lawrence ('the judge'), dismissing the appellant's appeal against the respondent's decision to refuse his asylum, humanitarian protection and human rights applications.

2. The appellant is a citizen of Sri Lanka. On 8 November 2018 he appealed against the decision of the respondent to refuse him asylum, based on:

   i. his suggested well-founded fear of persecution as a result of political opinion;

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ii. case law in terms of country guidance;

iii. there being substantial grounds for believing he would face a real risk of suffering serious harm on return from the UK; and

iv. Article 8 being engaged in terms of his family and private life.

3. The judge refused the appeal on all grounds following a hearing on 18 April 2019. A lengthy exposition of the judge's reasons was promulgated on 1 May 2019.

4. In granting permission to appeal from that decision, Deputy Upper Tribunal Judge Alis indicated that the grounds of onwards appeal disclosed arguable errors of law, in that:

   i. The renewed grounds argued that the First-tier Tribunal judge erred in relation to the approach he took to the medical evidence, by making mistakes of fact and in carrying out the risk assessment.

   ii. The recent decision of *KV (Sri Lanka) v Secretary of State for Home Department [2019] UKSC 10* reinforced the weight to be attached to scarring expert reports and this combined with the absence of any acknowledgement that the appellant may be a vulnerable witness and treated as such, amounted to an error of law.

   iii. The fact the First-tier Tribunal judge made adverse findings on the medical evidence affected the judge's approach to the account provided.

5. It is against this background that the appeal is listed before me.

6. Relevant to the outcome of this onward appeal was a concession made by the parties at the outset of the hearing. Mr Muquit and Ms Pall indicated that, having discussed the First-tier Tribunal judge's decision, they were satisfied that the judge had erred in 3 respects, namely that:

   i. the judge in approaching credibility had not sufficiently factored in the medical evidence in the round;

   ii. the judge had not addressed whether the appellant was a vulnerable witness;

   iii. the judge had made various mistakes of fact, including the basis of the appellant's detention, his Liberation Tigers of Tamil Eelam (LTTE) activities in Sri Lanka, and the scarring and medical evidence.

7. Both parties were in agreement that this matter should be remitted back to the tribunal below to start again.

8. Notwithstanding the parties being in agreement, and although persuasive, it is still necessary for me to apply my own mind to

whether the decision should be set aside and the matter sent back to the First-tier Tribunal.

9. I bear in mind that this Upper Tribunal should be slow to interfere with findings of fact made by a judge at first instance. An appeal may only proceed on a material error of law, not a disagreement over the facts.

10. Nonetheless, as part of the fact-finding exercise, it is necessary for the judge to demonstrate that he or she has carried out a balancing exercise, weighing the evidence before reaching a reasoned conclusion.

11. Having reviewed the determination, I am concerned about the way in which the judge approaches credibility. This ties in with the scarring report. The judge's conclusion on the medical report is largely based on his finding that the appellant had not been arrested in 2018 (as the appellant had not demonstrated to the lower standard he was arrested 'in January or February 2018').

12. That finding was in turn based upon paragraph 46 of the determination, which deals with the appellant's claim he was arrested, tortured and interrogated in 2018. The judge identifies that in his first interview the appellant claimed this was on 15 February 2018, but in a later statement changes this to 15 January 2018. This led the judge to conclude that: '*It is not credible that the appellant should be confused about the date he was arrested'*. That may be so, the events were relatively recent, and the appellant is not a minor, but 25 years of age by this time.

13. However, the issue is whether the judge should have looked beyond 'the date' evidence before reaching his conclusion on how credible the account was. The concern being that the judge does not appear to balance his finding in this regard with other factors that may have been relevant to credibility. The appellant had suggested the discrepancy was down to a note-taking error.

14. Counsel for the appellant had made an application at the outset of the first hearing (in his skeleton argument) for the appellant to be treated as a vulnerable witness. The judge does not appear to address this at all. In my view he should have done, if only to dismiss the proposition.

15. This point is borne out by the Joint Presidential Guidance Note 2 of 2010, Child, Vulnerable Adult and Sensitive Appellant Guidance:

> "The Decision should record whether the tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive individual, the effect the tribunal considering the identified vulnerability had in assessing the evidence before it and thus whether the tribunal was satisfied whether the appellant has established his or her case to the relevant standard of proof. In

> asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind."

16. The scarring evidence was central to the appellant's claim he had been subjected to torture. The examining doctor appears to conclude that the scarring on the appellant's body was typical of torture. I make no finding in that regard, save to say that on one level that might have been consistent with the appellant's claims.

17. Therefore, before concluding that the appellant had not been tortured in January 2018 or February 2018 because he got the date wrong in interview, the judge should also have considered the scarring report as one of the ingredients that may have gone to support the appellant's case, together with the other aspects of his account, if only to assess whether the lower standard was met (and *then* if not, dismiss the appellant's claim on interrogation and torture).

18. If the judge had done so, but concluded the pendulum had swung sufficiently towards the appellant's account (and I repeat, I make no finding in that regard) that may then have been a relevant factor in determining whether the appellant was vulnerable, which in turn may have provided another explanation for the error with the date in interview.

19. My concern is that in relation to the assertion of interrogation and torture, the judge has in effect put the cart before the horse. There are a number of cases that suggest the judge took the wrong approach: *Mibanga* [2005] EWCA Civ 367and most *recently KV (Sri Lanka) v Secretary of State for the Home Department* [2019] UKSC 10. In *SA (Somalia) v Secretary of State for the Department* [2006] EWCA Civ 1302, the Court of Appeal affirmed the reasoning of *Mibanga*, namely that all evidence including medical evidence, had to be considered before findings of credibility or fact could be made. The court held that the purpose of medical evidence was to "corroborate and/or lend weight to the account of the asylum seeker by a clear statement as to the consistency of old scars found with the history given."

20. Paragraph 14 of the Joint President's guidance, which deals with the assessment of evidence, states:

> "14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and the appellant compared to those who are not vulnerable, in the context of evidence from others associated with the appellant and background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity."

21. While in my view the judge makes reasoned findings about certain aspects of the evidence, I am not persuaded that he has considered the appellant’s claim in the round, the cumulative effect of the evidence and then looked to assess the credibility of the appellant’s claims in light of all that has been said. His dismissal of the expert report based in part on his previous finding that the appellant had not been detained and tortured in 2018 renders the decision susceptible to challenge. The purpose of obtaining the report was to assist with the difficult task of analysing whether the scars were the result of torture. The role of the medical expert is to offer an opinion about the consistency of their findings with the asylum-seeker’s account about the circumstances in which the scarring was sustained. The judge should have considered this more fully.

22. In my judgement, the tribunal’s failure to consider *all* evidence including medical evidence *before* findings of credibility or fact were made amounts to an error of law.

23. For the above reasons, including the concession, I set aside the decision of the First-tier Tribunal and remit this appeal to the First-tier Tribunal to begin again. Neither party were in a position to proceed before me to substantive hearing and it would have been unfair for me to have expected them to do so.

24. As a result, this matter will need to be re-listed in the tribunal below.

<u>Notice of Decision</u>

The decision of the First-tier Tribunal sitting in Hatton Cross on 18 April 2019 under reference PA/12926/2018 is set aside.

AND

The matter is remitted to the First-tier Tribunal to begin again.

No application was made for anonymity in this appeal. The general rule is that hearings are held in public and judicial decisions are published (*A v BBC* [2014] UKSC 25) and I saw no reason to depart from the general rule in this case.

Signed

Date 18 August 2019

Deputy Upper Tribunal Judge Sutherland Williams