Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number:
PA/09402/2019 (P[1])

THE IMMIGRATION ACTS

Decided under Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 On 12th May 2020	**Decision & Reasons Promulgated On 02nd July 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR BM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Submissions received:
For the Appellant: Mr R Solomon on 16th April 2020
For the Respondent: Mr A McVeety on 27th April 2020

DECISION AND REASONS

[1] The coding in this order is in accordance with the Senior President's Judges' and Members' Administrative Instruction No.2

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 owing to the sensitive matters within the decision. 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.

I have had regard to the Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal 2020 and the Presidential Guidance Note No. 1 2020.

1. The Tribunal may pursuant to Rules 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) ("the Upper Tribunal Procedure Rules") make decisions in appeals without a hearing. The Upper Tribunal gave the provisional direction owing to the Covid-19 pandemic that the decision on the error of law in this matter could be determined on the papers and invited submissions from both parties. I have had regard to the views of both parties pursuant to rule 34(2) of The Upper Tribunal Procedure Rules.

2. Mr Solomon submitted that the matter could be determined on the papers and the matter be remitted to the First-tier Tribunal should the First-tier Tribunal decision be set aside.

3. Mr McVeety noted that owing to the lengthy grounds and that permission had been granted on all points and stated that an oral hearing would be 'preferable' but in the event the Tribunal was minded to proceed without an oral hearing he attached further submissions. In these terms I consider that the Secretary of State consented to the error of law being determined on the papers.

4. Further, I bear in mind the principles established in **Osborn v The Parole Board** [2013] UKSC 61. I have concluded that the matter although complex factually does not require, in the interests of justice and fairness, a hearing to determine the matters. Both parties are legally represented, and issues have been clearly explained and their views on the grounds fully set out. As a result, I find that the legal issues have crystallised and lend themselves to a paper distillation and analysis. Both parties have had a fair opportunity to put their case in advance of the determination on the type of hearing for the error of law determination and I am not persuaded that an oral hearing would make a material difference.

5. The appellant appealed with permission against the decision of First-tier Tribunal Judge Hawden-Beal promulgated on 20th December 2019 which dismissed the appellant's appeal on protection and human rights grounds.

6. The appellant a Sri Lankan national arrived in the UK on a Tier 4 student visa in September 2010 and his asylum claim refused. He claimed that he had been a supporter of the LTTE and was at risk on return. His appeal was dismissed by Designated Immigration Judge Woodcraft in March 2012, who made adverse credibility findings. The appellant made further submissions in 2019 which were refused. He again asserted he had been detained and mistreated by the Sri Lankan authorities and further he had engaged in political activity in support of the Tamil cause since he had been in the UK. In his appeal to the First-tier Tribunal in 2019 he provided extensive further evidence from that considered in 2012, in the form of medical evidence which diagnosed PTSD (Drs Goldwyn and Dhumad), an expert report from Mr Chris Smith dated 25th November 2019, a copy of a complaint made by the appellant's aunt to the Human Rights Commission of Sri Lanka dated 9th June 2017 and country background material including reports by the USSD, UNHCR, Amnesty International, Human Rights Watch and the respondent's most recent Country Policy and Information Notes ("CPIN") on Sri Lanka.

Grounds of Appeal

7. The grounds of appeal submitted that the judge had erred in the following respects.

Ground 1

The judge had misapplied the guidance issued in **Devaseelan v SSHD** [2002] UKIAT 00702 when deciding that the "new evidence" did not include the new medical reports, the country expert report and the new country guidance of **GJ and others (post civil war: returnees) Sri Lanka CG** [2013] UKUT 00319 (IAC).

(i) there was a strong medical evidence to explain the appellant's memory problems and this had an impact on any previous alleged evidential discrepancies. The medical evidence found the appellant with "significant cognitive impairment" PTSD, severe depression and memory loss which were not feigned or exaggerated. The judge had not engaged with this evidence adequately or at all.

(ii) the country expert Chris Smith found that the payment of a bribe and ability to leave on the appellant's passport did not undermine his case and was plausible and that approach was confirmed in the country guidance of **GJ**.

(iii) there was clear medical evidence of physical and psychological injuries sustained during detention and it is noteworthy that the judge accepted at paragraph 38 that the appellant may well have been detained during a roundup.

The new evidence affected the findings of the Judge Woodcraft and the starting point principle was not a legal straitjacket but permitted judicial fact finders to depart from earlier judicial decisions. The judge had not followed the guidance.

Ground 2

At paragraph 39 the judge erred in treating the new expert evidence regarding paying a bribe and being able to leave on a passport as neutral. This was a not a neutral matter.

Ground 3

The judge failed to give anxious scrutiny and proper weight consideration to the medical evidence and stated at paragraph 38 “he may well have been detained, but there is no new evidence before me to indicate that he was tortured or released upon payment of a bribe”.

(i) the judge failed to address the very clear finding that the scarring and mental health evidence was new evidence and overall typical of the account of torture and failed to give clear reasons for doing so in line with **BN (psychiatric evidence-discrepancies) Albania** [2010] UKUT 279(IAC). The judge further erred in considering the scars separately without considering the evidence overall. The reports should have been dealt with as an integral part of the findings on credibility as per **Mibanga** [2005] EWCA Civ 367.

Ground 4

The judge erred in her assessment of scar evidence which extended to 8 scars not to two and **KP (Sri Lanka) v SSHD** [2007] EWCA Civ 62 identified that physical scarring was consistent with the type of treatment meted out in Sri Lankan cases involving ill-treatment in detention.

Ground 5

The judge failed to assess the new evidence particularly the CID book and complaint by the aunt to the Human rights Commission of Sri Lanka in the context of country information and expert evidence, ignoring in particular, at paragraph 22 the respondent’s CPIN at 13.1.2 which identified that in several cases witnesses mentioned that members of their family had been questioned about their participation in anti-government activities abroad and had been shown photographs. This indicated the Sri Lankan security forces were monitoring gatherings outside the country and the judge had country evidence which explained why the authorities would be interested in the appellant but failed to give this consideration or explain why the evidence was rejected.

Ground 6

The judge failed to consider the medical evidence and failed to address the impact of the severity of the appellant’s mental health and his ability to deal with questioning on arrival regarding his history. This point was raised by the expert Mr C Smith and relevant to risk on return but was not addressed at paragraph 48 of the decision under challenge.

Ground 7

The judge failed to assess the expert evidence of Mr C Smith who provided detailed report which supported the appellant's history was plausible in the context of the country evidence. That failure was contrary to **Detamu v SSHD** [2006] EWCA Civ 604 and **FS (treatment of expert evidence) Somalia** [2009} UKAIT 00004.

Ground 8

In the light of the above, the judge failed to properly evaluate the evidence from the appellant and failed to engage with the letter and copy ID card from the aunt when recording the attendance of the authorities at her home, failed to engage with the 'diagnosis card' and birth certificate and failed to engage with the letter and copy ID card from the advocate saying he contacted the local police where the book extract was taken. The letter was discounted because the attorney speculated that the appellant was still on the "watch" list without any evidence to support that belief but that approach was contrary to **RS (Sri Lanka) v SSHD** [2019] EWCA Civ 1796.

Ground 9

The judge accepted the appellant had attended several demonstrations that refused to depart from the earlier decision and thus rejected any risk arising of his sur place activities.

Ground 10

Given the judge found the appellant had not been detained and tortured and any risk of self-harm was not caused by the action of Sri Lankan authorities the conclusions on suicide at paragraph 59 and 61 could not be maintained and was contrary to **AXB** (article 3 health: obligations: suicide).

Written Submissions

8. Mr Solomon in his written submissions emphasised that the appellant was from the North of Sri Lanka where the authorities had a history of rounding up Tamils. There was no medical evidence before First-tier Tribunal Judge Woodcraft to address the appellant's mental condition and his ability to recall events and Judge Woodcraft found the appellant's claim to have been released on payment of a bribe and having left on his own passport not credible. He rejected the claim to have been detained because there was no medical evidence of any physical injuries or ailments.

9. Mr McVeety asserted that the grounds in effect stated that because the appellant had been diagnosed with a medical condition which may result in confused recollection. The judge however was not bound to adopt that conclusion. The fact that the appellant may have been diagnosed with PTSD did not mean that the judge was bound to conclude he was telling the truth. The respondent relied on **JL (medical reports-credibility)**

China [2013] UKUT 00145 (IAC) such that whether an appellant's account of the underlying events was credible or not, was a question of legal appraisal and a matter for the judge, and further, where medical experts relied heavily on the account given by a person concerned that might reduce very considerably the weight could be attached to them. This appeal the appellant was not called upon to give oral evidence and the judge was denied the opportunity of assessing the credibility of his evidence. The medical reports here relied heavily on the appellant's own testimony and should have been given limited weight and the judge was entitled to find that the further evidence produced was not sufficient for her to depart from the findings of the previous tribunal.

10. In respect of ground 5, it was self-evident at paragraph 41 of the decision why the judge rejected the appellant's evidence regarding the alleged interest in the appellant's family in Sri Lanka. In the context of the appellant's account that he was not an LTTE member and had low-level attendance of demonstrations in the UK, the security services were unlikely to draw on to the government's attention the fact they released him on a bribe when he was of such low-level in terms of his opposition activities.

11. The respondent further submitted that ground 10 was evidently misplaced and confused as the judge did find the appellant had not been tortured or abused in the manner claimed and therefore the decision appeared to be entirely correct in the context of **AXB** and the high standard applied in article 3 cases where the appellant was not at risk of hostile actions from the state.

12. In terms of the appellant's sur place activities the judge had correctly relied upon the country guidance case of **GJ** finding that low-level attendance that UK demonstrations was insufficient to establish a risk of adverse attention from the Sri Lankan authorities and country guidance should be followed unless strong reasons were put forward for not doing so. In this case, the expert report offered a differing opinion as to the risk of attendances at demonstrations but the judge was entitled to rely on country guidance case of **GJ** and reject the expert evidence that appeared to contradict the Upper Tribunal's findings in that case.

Analysis

13. The judge at paragraph 36 recorded when referring to **Devaseelan** placed heavy emphasis on the decision of Judge Woodcraft [my underlining]

> *"36. … in other words, if the appellant is relying upon the same evidence to support his claim to be at risk upon return from the authorities as was considered by designated Judge Woodcraft in his asylum claim, those issues have already been dismissed by designated Judge Woodcraft and cannot be looked at again. What I can look at is any new evidence which has come to light since the promulgation of that determination and that is what Miss Mensah submits has been produced before me today by*

way of the report from Dr Dhumad as to the appellant's worsening mental health, his sur plus activities and the fact that, since the previous decision was made, GJ has been promulgated which puts a different complexion on the matters placed before Designated Judge Woodcraft.

37. Designated Judge Woodcraft did not find the appellant to be either credible or consistent in his claim to have been detained and tortured by the Sri Lankan authorities and did not accept that he had been a member or a sympathiser of the LTTE and nor did he accept that he had been released from detention upon payment of a bribe. Miss Mensah seeks to persuade me that, in the light of the evidence accepted in GJ which was promulgated after the appellant's appeal, I should revisit that evidence and reconsider it in the light of GJ. Having read the determination of designated Judge Woodcraft and GJ, there is nothing which persuades me to depart from the conclusions of designated Judge Woodcraft in relation to the appellant's claim to have been detained, tortured and released on a payment of a bribe.

38. Miss Mensah submits that given the roundup of those in the north of Sri Lanka at the end of the war it is highly unlikely that the appellant, living in Vavuniya was not caught up in them and was thus detained and re-educated. He may well have been detained, but there is no new evidence before me to indicate that he was tortured or released on payment of a bribe. Designated Judge Woodcraft notes that he claims to have scarring, including a large one on his head but notes that he made no mention of this to any of the doctors who saw him in 2012. The report from Dr Goldwyn from March 2017, which was submitted to the respondent with the further submission, notes that the 5 cm scar on his head is typical of a blow to the head. She considers that it could have been caused by someone hitting him on the head but that there is also a distinct possibility that it could have been caused by a road traffic or industrial accident. There is also a scar to the knee which is diagnostic of a knife wound. She considers that these wounds are consistent with his claim to have suffered torture. I do not consider that this report of his scars takes his claim any further than that which was before Designated Immigration Judge Woodcraft because the skull wound could have been caused by other things and the fact that he has a knife wound scar on his knee is not determinative of him having suffered torture."

14. In relation to ground 1 the judge considers the psychological medical evidence predominantly in categorising the appellant as a vulnerable witness. The underlined sections of the decision under challenge indicate that the judge effectively considered at the outset that there was no new evidence to justify a departure from the previous decision. The findings fail to engage with the mental health aspect of the medical reports including that of Dr Goldwyn in terms of new evidence or explain

adequately why this did not permit a departure from Judge Woodcraft's decision. The effect of Dr Dhumad's (Psychiatrist) and Dr Goldwyn's reports on the discrepancies and thus credibility findings was a fundamental part of the submissions made by Ms Mensah and as described by the decision but effectively ignored and not properly addressed by the judge.

15. The evidence of the scars is addressed piecemeal and without a holistic assessment. The assessment of the scars was undertaken by Dr Charmian Goldwyn in her report dated January 2017 at paragraphs 70 to 81 with reference to the Istanbul Protocol. The judge appears to adhere to the findings of Judge Woodcraft on the basis that the appellant had made no mention of his scars in 2012. Once again this does not take into account the possible impact of the mental health of the appellant and his ability to recall as explained by the medical reports. It may be dismissed by legal analysis but needs to be addressed.

16. As indicated the judge appeared to accept that the appellant had been detained. **KV v SSHD** [2019] UKSC 10 held that the conclusion about credibility always rests with the decision maker following a survey of the critical evidence but nonetheless it incumbent upon the decision maker to weigh the evidence. As pleaded in the grounds the judge addressed two scars out of eight and just because the scars could have been caused by other methods did not mean that they were inconsistent with appellant's account or not supportive. As Lord Wilson opined at paragraph 21 onwards

> *'21. … It is clear that in the protocol the word also covers the wider circumstances in which the injury is said to have been sustained. Paragraph 188 of the protocol, set out in para 16 above, which Sales LJ had himself quoted in para 31 of his judgment, guides the expert towards the type of evaluation which is important in assessing "the torture story". Paragraph 105 of the protocol recommends that, in formulating a clinical impression for the purpose of reporting evidence of torture, experts should ask themselves six questions, including whether their findings are consistent with the alleged report of torture and whether the clinical picture suggests a false allegation of torture. Paragraph 122 says:*
>
> > *"The purpose of the written or oral testimony of the physician is to provide expert opinion on the degree to which medical findings correlate with the patient's allegations of abuse …"*
>
> *22. In another case of alleged torture, namely SA (Somalia) v Secretary of State for the Home Department [2006] EWCA Civ 1302; [2007] Imm AR 1 236, the Court of Appeal, by the judgment of Sir Mark Potter, President of the Family Division, held in paras 27 and 28 that the task for which an asylum-seeker tendered a medical report was to provide "a clear statement as*

> *to the consistency of old scars found with the history given …, directed to the particular injuries said to have occurred as a result of the torture or other ill treatment relied on as evidence of persecution". In paras 29 and 30 Sir Mark quoted paras 186 and 187 of the Istanbul Protocol and commended them as particularly instructive for those requested to supply medical reports in relation to alleged torture. In RT (medical reports - causation of scarring) Sri Lanka [2008] UKAIT 00009 the Asylum and Immigration Tribunal in para 37 described the SA (Somalia) case as a landmark authority in the identification of the purpose of a medical report in relation to alleged torture and in the indorsement of the Istanbul Protocol'.*

17. The judge failed to give any weight to the medical report that the scars were consistent with torture and merely dismissed the new evidence.

18. The judge fails to recognise that the conclusions of **GJ**, and which was decided subsequent to the determination of Judge Woodcraft, with regard bribery on release and exit from Sri Lanka would be bound to influence the credibility findings. Once again, those issues needed to be adequately addressed. **GJ** held that the prevalence of bribery made it possible to leave the country legally even when of adverse interest by the authorities, paragraphs 146 and 170. That is not a 'neutral' issue.

19. The judge propounds

> *'GJ now notes that the ability to leave Sri Lanka on one's own passport bears no relation to the seriousness of the charge against you nor does it mean that the authorities are not interested in you because bribery is commonplace in Sri Lanka as confirmed by Dr Smith in his report.*

yet proceeds

> *'This therefore does not assist the appellant because his ability to leave on his own passport can either mean that the authorities were interested in him but let him go because of the bribe or they were not interested in him. In this case designated Judge Woodcraft considered the authorities were not interested in him. The issue of using one's own passport to leave Sri Lanka is now really a neutral issue'.*

20. As can be seen from above the expert report of Mr Smith, attracts one line of consideration at paragraph 39, as detailed below, and is inadequate to explain why it was rejected.

21. The judge appears to accept that the appellant was detained although it is not a clear finding – '*He may well have been detained'* [38]. If it is accepted that the appellant was released by payment of a bribe, in line with **RS (Sri Lanka)** [2019] EWCA Civ 1796 it might be inherently likely

that the authorities would retain interest in the appellant and do so by issuing an arrest warrant. That should have been considered.

22. Paragraph 25 of **RS (Sri Lanka)** states:

> *"I have no reason to doubt that the sequence of events from escape to arrest warrant to stop list was not specifically articulated before the FTT judge. Further, I have already explained that the judge did not have the Country of Origin Information Report because of a failure by the Secretary of State to draw it to the court's attention. It also seems likely that the passages from* GJ *on which* ***RS*** *relies were not specifically brought to the judge's attention either. Notwithstanding these points, I consider that the FTT judge made an error of law. In looking for positive reasons to find that an arrest warrant had been issued, the judge has, in my judgment, completely overlooked the inherent probabilities of the case.* ***RS*** *had been arrested after the end of the war (although I would accept only shortly after) and remained of sufficient interest to the authorities to be detained for some 18 months thereafter during which time he was tortured. This period extended up to and beyond the commencement of the release of LTTE detainees. He had not been released but had escaped from custody with the help of a visiting contractor.* ***It seems to me, based on those facts, to be inherently likely that the authorities would seek to recapture him and do so by issuing an arrest warrant."***

23. Moreover, the judge failed to assess the CID book and complaint to the Human Rights Commission of Sri Lanka in the context of the country information and expert evidence. At paragraphs 40 and 41, the judge dismissed the evidence of the aunt's complaint and the CID book in the following terms '*if her complaint states he is out of the country why would they be interested in him because evincing an interest in him will raise the issue of his release on payment of a bribe'*, but the judge did not refer to the CPIN which confirmed that in several cases witnesses mentioned that their family members had indeed been questioned about their participation in anti- government protests abroad and shown photographs of the same, which indicated that the authorities were monitoring gatherings outside the country.

24. As Mr McVeety rightly observes the judge was not bound to adopt the conclusions of the various reports but she must at least address them adequately and when applying **Devaseelan** assess, adequately, the new evidence particularly the medical evidence and the expert evidence. The new evidence was not considered holistically and without proper explanation as to why the new evidence, which was extensive, was insufficient and rejected, the judge conjured the impression of a strait jacket reliance on Judge Woodcraft's determination which was an error of

law. Further, in that context proper regard was not accorded to **GJ**. Those errors are material.

25. I do not address the remaining grounds because I conclude that my findings above are sufficient to determine errors of law which are fundamental and material and render the determination unsafe. I set aside the decision in its entirety.

Notice of Decision

26. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal for redetermination.

Signed Helen Rimington Date 12th May 2020
Upper Tribunal Judge Rimington