Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01833/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Sent**
On 20 August 2013	**On 23 September 2013**
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Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

SRIBRAVEEKARAH SIVAKUMAR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muquit, instructed by K Ravi Solicitors
For the Respondent: Mr J Wardle, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Sribraveekarah Sivakumar, was born on 6 December 1988 and is a male citizen of Sri Lanka. The appellant entered the United Kingdom as a student in December 2010. He returned to Sri Lanka in October 2012 and, when he subsequently returned to the United Kingdom on 1 November 2012, he claimed asylum. On 12 February 2013, the respondent decided to refuse to grant the

appellant asylum and refused him leave to enter the United Kingdom. The appellant appealed against that decision to the First-tier Tribunal (Judge Birkby) which, in a determination which is dated 14 April 2013, dismissed the appeal on all grounds. The appellant now appeals, with permission, to the Upper Tribunal.

2. There are two grounds of appeal. The second ground deals with challenges to the factual findings of the judge at [34]. I shall deal with that ground subsequently. The first ground challenges the handling of the medical evidence by the judge. There are medical reports by Dr Lord and also Dr Nutt, a general practitioner. Both doctors dealt with the possibility that the appellant was suffering from post-traumatic stress disorder (PTSD) and dealt also with scarring marks on the appellant's back. Dr Lord at [29] noted:

> "The scars on his back are diagnostic of healed burns made by a long straight hot object held against the skin. In the upright position one would expect a gap over the hollow over the spine but if he was lying face down with his hands pulled tight under the bench then the hollow would be smoothed out and the appearance of the burn would be seen as in the photographs. These are not in a position where he could have inflicted them himself. It would have been extremely painful at the time and he must have been restrained in some way for so many symmetrical burns to be made."

3. In his report, Dr Nutt concluded:

> "Because of the manner in which Mr Sribraveekarah was interviewed by myself I believe it highly unlikely that he would have the knowledge or the wit to fabricate some of his symptoms such as the symptoms of hypervigilance and flashbacks. In summary, I found that Mr Sribraveekarah to be quite a plausible young man with some clear cut, corroborative evidence of physical torture as I cannot perceive of any other means by which the scarring on his back could have occurred. I also find his mental health symptoms fit the diagnosis of post-traumatic stress disorder."

4. The judge found that the evidence viewed as a whole indicated that the appellant was not a witness of truth [36]. Dealing with the medical evidence at [39], he wrote:

> "Clearly prior to coming to any of my conclusions as to the appellant's credibility I carefully considered all the medical evidence, but I note that much of what Dr Lord and Dr Nutt concluded was based on the appellant's own account. There is no evidence that they have in any way attempted to question the credibility of what the appellant has told them. I do not accept the appellant suffers from PTSD for the reasons stated or at all."

5. Mr Muquit submitted that that paragraph provided an inadequate analysis of the medical evidence. Further, Dr Nutt in his report had expressly dealt with the possibility that the appellant was malingering (as quoted above, the doctor considered it unlikely that the appellant would be able to fabricate the symptoms of PTSD). Mr Wardle, for the respondent, submitted that the judge had adequately considered the medical evidence; the quotations which I have set out above from the reports appear *verbatim* in the text of Judge Birkby's determination. The judge also made detailed findings on other parts of the evidence [at 34] which Mr Muquit

acknowledged were "problematic" from the point of view of the appellant's credibility.

6. All the evidence should be considered as a totality before a judge makes any findings of fact or assessment of credibility (**Mibanga (2005) EWCA Civ 367)** I find that the judge was aware of the need to do so at [38] ("*clearly prior to coming to any of my conclusions as to the appellant's credibility and where I carefully considered all the medical evidence …*"). The grounds assert that, notwithstanding what the judge said at [38], he had already concluded that the appellant was not a credible witness before turning to the medical evidence. I disagree with that submission. I see no reason to go behind the judge's clear statement. In any event, the judge's analysis was not flawed simply because he dealt with the medical reports after his consideration of the other evidence; a judge must start his analysis of the evidence somewhere and it is clear that the judgment in **Mibanga** is "not intended to place judicial fact finders in a form of forensic straightjacket" (see **HH (Medical evidence; effect of Mibanga) Ethiopia [2005] UKAIT 00164**).

7. The question remains whether the judge's analysis of the medical evidence was sufficient in the circumstances. It is undeniably brief. I accept that, certainly so far as PTSD was concerned, Dr Nutt had considered the possibility that the appellant was malingering arguably thereby lending his evidence greater weight. However, the judge's findings of fact in relation to the other evidence at [34] are extremely detailed and well-reasoned and, as Mr Muquit acknowledged, present severe problems as regards the credibility of the appellant. Further, I consider it significant that the judge has been careful to deal with (and to quote from) those parts of the medical reports which most firmly support the appellant's case; his analysis would have been weakened had he not done so. In addition, the judge has not left hanging in the air the question as to how the scars were inflicted upon the appellant; without descending into speculation, he observed at [35]:

> "I do not accept that he was ever arrested or tortured. His vagueness and inconsistency as to what happened in order for him to be released have seriously undermined his claim to have been in detention to have escaped through the payment of a bribe. I do not accept as reasonably likely his explanation for the scars on his back namely that they were inflicted by the Sri Lankan authorities. I think there must be a serious possibility in this case that the appellant returned to Sri Lanka in October 2010 and arranged for someone to inflict the scarring on him in order that his subsequent asylum claim would be more credible. Whatever the explanation I reject the whole of the appellant's assertions about being tortured in custody and that the scarring was perpetrated by the Sri Lankan authorities."

8. That passage of the judge's analysis deals, in my opinion, adequately with the observations of Dr Lord which I have quoted above and the views of Dr Nutt. The appellant's overall credibility was such that it was open to the judge to reject the appellant's claim that the scars had been inflicted by the Sri Lankan authorities. The judge did not seek to contradict Dr Lord by finding that the scars were self-inflicted and the manner in which the judge considered it likely that the scars had been inflicted is consistent with the "evidence of physical torture" observed by Dr Nutt.

To look at the issue from a different angle, it cannot be right that the judge should be compelled by the observations of the medical experts to accept the appellant's claim that he had been tortured by the Sri Lankan authorities when all the remaining evidence in the appeal indicated that the appellant was an unreliable witness. It follows from the judge's rejection of that claim that he should also attach limited weight to the medical evidence at least in part because the accounts of past events given to the doctors by the appellant had been unreliable. In my opinion, the judge's approach is entirely in line with the guidance provided by the Upper Tribunal in **JL (Medical reports – credibility) China [2013] UKUT 145 (IAC)**:

(1) Those writing medical reports for use in immigration and asylum appeals should ensure where possible that, before forming their opinions, they study any assessments that have already been made of the appellant's credibility by the immigration authorities and/or a tribunal judge (SS (Sri Lanka) [2012] EWCA Civ 155 [30]; BN (psychiatric evidence discrepancies) Albania [2010] UKUT 279 (IAC) at [49], [53])). When the materials to which they should have regard include previous determinations by a judge, they should not conduct a running commentary on the reasoning of the judge who has made such findings, but should concentrate on describing and evaluating the medical evidence (IY (Turkey) [2012] EWCA Civ 1560 [37].

(2) They should also bear in mind that when an advocate wishes to rely on their medical report to support the credibility of an appellant's account, they will be expected to identify what about it affords support to what the appellant has said and which is not dependent on what the appellant has said to the doctor (HE (DRC, credibility and psychiatric reports) Democratic Republic of Congo [2004] UKAIT 000321). The more a diagnosis is dependent on assuming that the account given by the appellant was to be believed, the less likely it is that significant weight will be attached to it (HH (Ethiopia) [2007] EWCA Civ 306 [23]).

(3) The authors of such medical reports also need to understand that what is expected of them is a critical and objective analysis of the injuries and/or symptoms displayed. They need to be vigilant that ultimately whether an appellant's account of the underlying events is or is not credible and plausible is a question of legal appraisal and a matter for the tribunal judge, not the expert doctors (IY [47]; see also HH (Ethiopia) [2007] EWCA Civ 306 [17]-[18]).

(4) For their part, judges should be aware that, whilst the overall assessment of credibility is for them, medical reports may well involve assessments of the compatibility of the appellant's account with physical marks or symptoms, or mental condition: (SA (Somalia) [2006] EWCA Civ 1302). If the position were otherwise, the central tenets of the Istanbul Protocol would be misconceived, whenever there was a dispute about claimed causation of scars, and judges could not apply its guidance, contrary to what they are enjoined to do by SA (Somalia). Even where medical experts rely heavily on the account given by the person concerned, that does not mean their reports lack or lose their status as independent evidence, although it may reduce very considerably the weight that can be attached to them.

9. As the Tribunal in **JL** noted, the question of the credibility and plausibility of an appellant's account is a matter for a Tribunal judge, not a doctor. There is no suggestion that the judge has rejected the reports because he did not consider them as "independent evidence" but, as **JL** acknowledges, the reliance of the doctors upon

an unreliable account from the appellant was likely to "reduce very considerably the weight that could be attached to [the reports]".

10. In conclusion, I find that the judge has not erred in law in his approach to or handling of the medical evidence. He has not ignored evidence which was relevant (indeed, he has engaged with it directly) and he has supported his findings by clear reasoning.

11. The remainder of the grounds criticise the judge's findings at [34]. The judge had prefaced his detailed findings of credibility with the words, "[the appellant's] evidence was at times vague implausible evasive and inconsistent. I shall cite some examples although these are not exhaustive". Mr Muquit submitted that the appellant was entitled to know the basis upon which his claim had been rejected and the judge's selective approach had left this in doubt. I do not agree. It is clear from the determination that the judge has dealt with those parts of the appellant's account which he found undermined his credibility as a witness. He was right to consider matters which went to the core of the appellant's account rather than peripheral issues. I consider that anyone reading this determination would be left in no doubt as to the reasons why the judge had not accepted the appellant as a witness of truth. It is also trite law that the judge was not required to deal with and make findings in respect of each and every item of evidence in his determination.

12. I find that the judge has not erred in law such that his determination falls to be set aside and as a consequence this appeal is dismissed.

DECISION

13. This appeal is dismissed.

Signed Date 1 September 2013

Upper Tribunal Judge Clive Lane