Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00901/2014

THE IMMIGRATION ACTS

Heard at Field House
On 16th September 2015

Decision & Reasons Promulgated
On 22nd December 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

S S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani (Counsel)
For the Respondent: Ms A Fijiwala (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant's appeal against a decision to remove him from the United Kingdom (made on 28th January 2014) was dismissed by First-tier Tribunal Judge Malins ("the judge") in a decision promulgated on 15th April 2015. In brief summary, the judge found that the appellant's asylum grounds of appeal were not made out on the basis of the account he gave of events said to have occurred in Sri Lanka in 2006 and a risk arising by virtue of visits from the Sri Lankan authorities to his home in 2009. She concluded that the appellant was not a person of adverse interest to the authorities, notwithstanding his decision to join the British Tamil Forum in September 2013, a little over four years after his arrival and that there was nothing other than a minimal risk that he would appear on a "watch list" so as to put him risk of being stopped at Colombo Airport on return. The appellant's case was also advanced on the basis of

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his mental ill-health. The judge concluded that evidence given by an expert in this context was not of assistance and that, in any event, there were health care facilities available to the appellant in Sri Lanka. Overall she found that he was not at risk of persecution or ill-treatment by virtue of his claimed profile as a person of adverse interest or by reason of his mental ill-health. So far as Article 8 is concerned, she found that there was no imminent prospect of the appellant being removed as his mental ill-health, and perhaps other matters, remained unresolved. She accepted that the appellant had established a family life here with his fiancée, whose immigration status is yet to be decided and found that no detailed Article 8 assessment was required in these circumstances.

2. The appellant applied for permission to appeal, contending that the judge erred in three respects. First, having upheld the findings of a First-tier Tribunal Judge who dismissed an appeal brought by the appellant in 2012, the judge purported to apply the "Devaseelan" guidelines. However, she did not direct herself that this guidance permitted different findings based on new evidence. In the present appeal this consisted of medical evidence. The judge erred in finding that she was bound by the earlier judge's findings of fact and by his rejection of medical evidence, the judge in the present appeal describing those earlier findings as "irrefutable".

3. Secondly, although the judge was careful to state that she could not and ought not to usurp the role of the medical expert, the decision showed that she made adverse findings in relation to injuries claimed by the appellant, without any evidential basis for doing so. Moreover, in finding the appellant's account of some of his injuries implausible, the judge overlooked that none of these matters was put to the medical expert who attended and who answered questions from the judge on other matters.

4. Thirdly, the judge misunderstood the nature and effect of the medicines prescribed to the appellant and made assumptions about their impact on him on the basis of what she described as the well-known effects upon soldiers of an antimalaria drug, Lariam.

5. Fourthly, the judge made findings without regard to all the relevant evidence. In particular, she found that admission to immigration detention appeared to have been the catalyst for the appellant's depression, without regard to medical evidence in the form of notes from a GP showing that he suffered signs of depression and was prescribed antidepressant medicines before detention. In finding that the delayed onset of PTSD was improbable in the appellant's case because the delay between the trigger event and the onset was six years, apparently on the basis of the oral evidence of the expert, the judge erred as the expert gave no upper time limit. In this ground, it is also contended that the judge did not properly apply the country guidance case of GJ and Others [2013] UKUT 00319 or country evidence. This showed that the appellant's presence in London for an extended period was a highly relevant consideration in the assessment of risk and that one of the appellants in GJ succeeded on human rights grounds in part because of the inadequacy of facilities in Sri Lanka to treat mental ill-health.

6. Permission to appeal was granted on 11th May 2015. In a rule 24 response from the Secretary of State made on 20th May this year, prepared without sight of the decision, it was stated that the Secretary of State was unable to agree that the decision contained material errors of law.

Submissions on Error of Law

7. Mr Bandegani said that the judge directed herself correctly that the earlier findings of fact were a starting point, in accordance with Devaseelan, but there was no direction that earlier findings may be departed from in certain circumstances. Later in the decision, the judge described herself as bound by the earlier findings. It was clear from Jabor [2004] EWCA Civ 804 that the Devaseelan guidelines were precisely that and there was no lawful basis for the judge finding the earlier findings of fact "irrefutable".

8. So far as the second ground was concerned, the judge's findings here were not sufficient. The decision was lengthy and thorough but on close reading, it was apparent that more was required. There were particular findings regarding the injuries claimed to have occurred during the appellant's detention, listed at paragraph 15 of the decision but the evidence before the Tribunal did not, in fact, support those findings. An example was the extent and nature of the damage the judge found occurred to the appellant's penis and urethra, which led to doubt being cast on his subsequent flight and his later studies and work. There was, in fact, nothing to show that the damage was so substantial that the appellant could not leave his place of detention and flee Sri Lanka, with help from his lawyer and father, or that he would not have been able to undertake studies or work subsequently. The inference drawn by the judge and the finding at paragraph 16 were unsustainable. In any event, if there were concerns, they should have been put to the expert, Dr Katona. The expert's evidence was to the effect that the appellant struggled on and was able to function, even if only in a superficial way. If the judge had doubts or concerns, they should have been put to the witness. In reaching an overall conclusion that Dr Katona's evidence was not of assistance, the judge did not properly assess the expert's evidence that the injuries were one of two triggers causing PTSD, the other being the appellant's detention. The judge also speculated on the effects of the physical ill-treatment at paragraph 19 of the decision even though she properly accepted that she was not qualified in any formal sense to do so. She went on to deal with the clinical effects of Lariam but none of that was put to Dr Katona. This was the basis of the third ground.

9. The fourth ground was that the judge erred in failing to have regard to the GP's notes, which showed that the appellant suffered from depression before his immigration detention. Dr Katona's evidence was that his fear of what would happen on return was so strong that there was a real risk of suicide but the judge failed to take into account and apply guidance from the Court of Appeal in J and Y. There was no reference to these cases and the only mention of health care facilities appeared at paragraph 21.6 in the decision. In GJ and Others, the third appellant was found to be at real risk in part because of the nature and extent of his mental

ill-health. The judge did not accept a submission in the present appeal that the appellant's case was on all fours but, in any event, she did not consider J and Y. In a similar way, the judge did not engage with country guidance in the light of the appellant's decision to join the British Tamil Forum. This was a proscribed organisation in Sri Lanka, as the country evidence showed. Even if the appellant joined the organisation in an opportunistic way, the judge was nevertheless required to deal with the country evidence and engage with it. The appellant would be returned and in the light of his mental ill-health, and as he could not be expected to lie about his circumstances, there was a real risk that he would be detained and ill-treated. The decision contained no engagement with this part of the country guidance and country evidence.

10. In response, Ms Fijiwala said that no error was shown by what appeared in the first ground. Even if there were an error here, it was not material. The judge was clear that the earlier decision was merely the starting point. She clearly agreed with the earlier findings but it was open to her to do so. Although she described herself as "bound" at one point, a full reading of paragraph 15 showed that she would have reached the same conclusion in the light of her assessment. The same chronology was involved and so there was no material error. There was no error either in the judge describing her findings as being made through the "prism" of the earlier findings, as she agreed with those earlier findings.

11. There was also no error shown in the second ground, regarding the medical evidence. The judge made a number of findings and not just the particular ones Mr Bandegani had drawn attention to. It was open to the judge to find the appellant's reasons and his explanations not credible. The weight to be given to the evidence was a matter for the judge and the decision showed that she considered the evidence before her carefully. So far as the particular injuries were concerned, the appellant's account was that he was able to walk away from the place of his detention and it was open to the judge to find that he would have gone to a hospital if he had suffered the torture or ill-treatment claimed. Moreover, these were not the only findings made by the judge. She was entitled to find that damage to parts of the appellant's body would have been palpable. As this part of the case concerned physical injuries, they were not within the expertise of Dr Katona. He considered the matter of the late onset PTSD and the judge was perfectly able to make the findings she did regarding the appellant's studies and employment. She was entitled to find that given those activities, the diagnosis of delayed onset PTSD was not a reliable one. The judge dealt with this at paragraph 18(5)(c) of the decision and reached her conclusion in the paragraph which followed.

12. It was clear from the decision that the judge was well aware of the medicines the appellant was taking. She invited Dr Katona to take her through the particular drugs and made findings at paragraph 19. The judge made observations on these and concluded that the appellant was taking an ever increasing dose. There was no merit in the third ground.

13. So far as the fourth ground was concerned, the judge took into account the appellant's weight loss, low mood and period of detention and these were all factors in her assessment, as was apparent from a full reading of paragraph 19.1. There was further consideration later on, the judge finding that the appellant only complained to his GP of dry skin and a verruca. She made a clear finding that the appellant did not suffer the trauma claimed and his low mood was likely to have arisen because of concerns about his immigration status. The judge did refer to the Court of Appeal decision in J and found that the appellant did not meet the fifth component of the test set out in that decision. The appellant who succeeded in GJ and Others was in a different position. It had been accepted in his case that he suffered ill-treatment in Sri Lanka but this was not so in the present appeal. He had firm plans regarding suicide which was not the case with the appellant here. On the particular facts, the severe illness and suicide risk of the appellant in GJ were accepted. Paragraphs 449, 452 and 456 of GJ and Others made all of this clear. The Upper Tribunal in GJ and Others also found that there are some facilities to treat mental ill-health in Sri Lanka and in the present appeal, the judge found that the appellant's sister had been able to gain access to facilities in the past. She was entitled to conclude that the appellant was not at real risk of a breach of his Article 3 rights in this context. She went on to consider diaspora activities. Although she did not refer to country evidence expressly, there was no error in the light of paragraph 336 of GJ and Others.

14. In a brief reply, Mr Bandegani said that paragraph 336 of GJ and Others was very helpful to the appellant's case as the Upper Tribunal had in mind there country evidence showing that there was heavy state penetration of the Tamil diaspora, the authorities being vigilant to detect perceived threats to the unitary state. Moreover, the judge had before her country evidence from the Secretary of State dating from August 2014, postdating GJ and Others, which was not available to the Upper Tribunal. That country evidence suggested that a risk will be present for those perceived as terrorists or threats to the unitary state.

15. So far as treatment in Sri Lanka was concerned, the evidence before the judge was that the appellant's sister received treatment over a decade ago. The clear conclusion reached by the Upper Tribunal in GJ was that facilities in Sri Lanka are inadequate and sparse and limited to the big cities. The judge simply did not engage with this evidence. Although she suggested that weight loss and the other symptoms might be reasons explaining the appellant's poor state, none of that engaged with Dr Katona's clear evidence that the appellant had suffered major trauma and that this was the cause. The evidence from the GP showed that the appellant suffered hallucinations in 2011, prior to his detention.

16. So far as the third ground was concerned, the judge in fact described the debate about Lariam as relevant. Mr Bandegani accepted that she referred to the particular medicines the appellant was taking but the medical evidence all pointed one way. So far as the second ground was concerned, it was circular to suggest that the judge was entitled simply to rely on negative findings made by the first judge where what was required was an engagement with the evidence before the judge in the present appeal.

Findings and Conclusions on Error of Law

17. The decision has been prepared by a very experienced judge and the architecture of the document is impressive. There can be no doubt that she approached her task with vigour and with an altogether proper intention to bring the litigation to a conclusion, not least because the decision under appeal was the second made in the appellant's case and, in addition, there have been two applications for judicial review and injunctions to restrain the appellant's removal to Sri Lanka.

18. Ms Fijiwala made a careful and precise response to the first ground in support of the appellant's case, regarding the judge's approach to findings of fact made by the earlier judge in 2012. It is, as she submitted, clear that the judge agreed with those findings. She was, on the other hand, faced with a considerable amount of new evidence, given by Dr Katona and others, supporting a case that the appellant suffered severe ill-treatment while in detention, notwithstanding rejection of that case by the earlier judge. The decision shows that the judge properly directed herself at the outset that the earlier findings were her starting point, in the light of guidance given in Devaseelan [2002] UKIAT 00702. The experienced judge was, of course, very familiar with that case.

19. The salient feature of the appellant's case in the present appeal was the wealth of medical evidence. Engagement with this evidence, not available in 2012, was required to assess whether the earlier findings remained reliable and sound. With some reluctance, not least because of the detail and evident thoroughness shown in the decision, I find that Mr Bandegani's submission that the judge erred in this respect is made out. In paragraph 15(c) of the decision, containing findings of fact regarding events in August 2006 in Sri Lanka, including the severe ill-treatment claimed to have occurred, the judge described the earlier findings as ones "by which (she is) of course bound". This part of the analysis contributes to the conclusion that the appellant travelled abroad for economic betterment and to rejection of the claim that he suffered ill-treatment. In paragraph 17 of the decision, rejection of that case is described as the result of "inevitable findings made through the prism of the preserved findings of (the earlier judge) and my findings of fact above". Those findings refer back to and cannot sensibly be separated from rejection of the account of events in August 2006. The related finding at paragraph 17(c) that the appellant fabricated an account to Dr Katona is clearly made and certainly should not be seen in isolation from the other findings. Nonetheless, there was a gulf between rejection by the earlier judge of the claims regarding events in 2006 and the medical and psychiatric evidence relied upon by the appellant in the present appeal, maintaining his case in that regard. Resolution of that conflict required engagement with Dr Katona's evidence concerning delayed onset PTSD and trauma. That the judge felt herself bound by the earlier findings gave them an apparently unshakeable foundation which, as a matter of law, they did not have.

20. So far as Mr Bandegani's other submissions are concerned, I also accept that in the light of the clear finding, properly made, that the appellant suffers from severe

mental ill-health, more was required in relation to the application of guidance given in J [2005] EWCA Civ 629. Paragraphs 21.3 and 21.4 of the decision deal with this aspect and the judge made a particular finding that the fifth of the criteria identified by the Court of Appeal was not met, in other words that the risk of suicide was not objectively well-founded. However, that finding is one which flows from the judge's conclusion that Dr Katona's assessment of the likely impact of removal on the appellant was not of assistance and there is a reference back to paragraph 17(c) of the decision, which is where the judge found that the appellant had fabricated his account. Dr Katona's evidence was not the only medical evidence before the First-tier Tribunal and the brief finding in the light of J does not fully engage with that evidence.

21. Finally, so far as country evidence and country guidance is concerned, the assessment of the facilities available to the appellant on removal to Sri Lanka proceeded on the basis of the judge's finding that the appellant is mentally very unwell. In paragraph 21.6 of the decision attention was drawn to recourse to health care by the appellant's sister and there is a finding that the appellant is unlikely to feel inhibited by fear from accessing this help. In the light of the Upper Tribunal's findings of fact in GJ and Others regarding the relative paucity of facilities to treat mental ill-health, and taking into account the historic nature of the recourse the appellant's sister had, I conclude that the evidence before the First-tier Tribunal required a closer application of the country guidance given by the Upper Tribunal.

22. In summary, the decision contains material errors of law and must be set aside. So far as the appropriate venue for remaking is concerned, I accept Mr Bandegani's submission that the appropriate venue is the First-tier Tribunal, having regard to paragraph 7.2 of the Senior President's practice statement, made in 2012. The judge noted that many issues remain unresolved regarding the state of the appellant's health and there is no imminent prospect of removal. I was told that it is likely that Dr Katona will give evidence, although the appellant may well not. An up-to-date assessment will be required. The hearing will be de novo and no findings of fact are preserved.

NOTICE OF DECISION

The decision of the First-tier Tribunal is set aside. It shall be remade in the First-tier Tribunal at the Hatton Cross hearing centre, before a judge other than First-tier Tribunal Judge Malins.

ANONYMITY

The anonymity direction made by the First-tier Tribunal Judge shall continue in force, unless and until varied by a court or Tribunal.

Signed Date

Deputy Upper Tribunal Judge R C Campbell