Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number:** **AA/02199/2014**

THE IMMIGRATION ACTS

Heard at: Manchester	**Determination Promulgated**
On: 27th February 2015	**On: 17th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

KG
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Dr Mynott, Broudie Jackson and Cantor Solicitors**
For the Respondent: **Mr Harrison, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Sri Lanka date of birth 11th February 1985. He appeals with permission[1] the decision of First-tier Tribunal Judge Malik[2] to dismiss his appeal against the Respondent's decision to remove him from the United Kingdom pursuant to s10 of the

[1] Permission granted by First-tier Tribunal Judge Omotosho on the 24th July 2014
[2] Determination promulgated on the 29th June 2014

Immigration and Asylum Act 1999[3]. That decision had followed the Respondent's rejection of the Appellant's claim to international protection.

2. The basis of the Appellant's claim was that he was a Tamil who had a history of perceived personal and family involvement with the LTTE. As such he was a person likely to be viewed by the Sri Lankan authorities as someone who would present a risk to the unitary state of Sri Lanka. He gave a history of displacement and persecution, including having spent some time in India as a registered refugee there.

3. In a letter dated the 20th March 2014 the Respondent accepted some of the factual basis of the Appellant's claim. It was accepted that the Appellant is a Sri Lankan Tamil (paragraph 9 reasons for refusal letter) who was displaced and subsequently gained refugee status in India (paras 10-13). The Appellant's claim that he was able to return to Sri Lanka passing through the airport without difficulty is found to be inconsistent with the claim that two days later the authorities were looking for him. The Respondent did not accept the Appellant's account of being arrested and detained for two years: if the authorities were actually interested in him he would have been apprehended at port. The Appellant had produced photographs depicting physical scars but in the absence of an Istanbul Protocol compliant medical report the Respondent was not prepared to attach any weight to these. These latter matters were all rejected and the asylum claim refused.

4. The Appellant appealed to the First-tier Tribunal. At paragraphs 16-18 of the determination a number of reasons are given for finding the Appellant's evidence not to be credible and the Tribunal dismisses the appeal. The grounds of appeal now submit that in doing so the Tribunal made the following errors of law:

    i) The finding at paragraph 16 of the determination that the Appellant is (generally) not credible is inconsistent with the Respondent's concessions in the refusal letter. The Tribunal should not have gone behind the refusal letter to make findings on matters that were not in dispute between the parties.

    ii) Failure to assess the medical evidence in the round. The Appellant relied on a detailed medical report which found, *inter alia*, that he had cigarette wounds diagnostic of cigarette burns on the back of his legs, and ligature marks around his wrists and ankle. The determination fails to take these relevant findings into account. In finding there to be "equally plausible reasons" for the Appellant's injuries the Tribunal has

[3] Decision dated 25th March 2014

misunderstood the terminology of the Istanbul Protocol and has arguably applied the wrong standard of proof.

iii) Took points against the Appellant that he did not have an opportunity to respond to. In particular it is submitted that the determination makes negative credibility findings about a number of Sri Lankan documents relied upon by the Appellant when he had not been asked anything about those documents nor had been given an opportunity to respond to the forensic challenge made.

5. The Respondent opposes the appeal on all grounds.

Error of Law

6. On the 3rd November 2014 this matter came before me to determine whether the decision of the First-tier Tribunal contained errors such that it should be set aside. On the date the Appellant was represented by Mr Schwenk of Counsel and the Respondent by Ms Johnstone, Senior Home Office Presenting Officer. Having heard their submissions I found, in a written decision on the same day, that the decision should be set aside. The reasons were as follows.

Ground 1

7. Paragraphs 2-7 of the Grounds – not drafted by Mr Schwenk – submit that the First-tier Tribunal erred in failing to have regard to the agreed facts including "that the Appellant's sister had joined the LTTE, that the Appellant and his family had been accused by the army of supporting the LTTE and that they had been told to leave Sri Lanka by the army". It is said that this failure to consider these agreed facts led the Tribunal into error in its overall credibility assessment, and that the failure to conduct a discrete risk assessment amounted to a material omission.

8. The main difficulty in this ground is that there was no concession by the Respondent that the Appellant's sister had been in the LTTE or that he or any other member of his family had been suspected of involvement in the Tigers. Paragraph 10 of the reasons for refusal reads:

> "you have given a detailed account of your families experience in India as a displaced person, following your family's decision to leave Sri Lanka in 2006…"

It continues at 13:

> "It is considered that on the basis of your evidence of your experience in India your family were granted some form of leave and that you were formally habitually resident there as a displaced Sri Lankan…"

No mention is made of the Appellant's sister or accusations against him or any other family member.

9. Mr Schwenk submitted that it was implicit in paragraph 10 that the Respondent accepted the reasons that the Appellant gave for why he and his family fled to India in 2006. That is simply not so. There could have been many reasons why this particular family fled Jaffna in 2006 and sought sanctuary in India. There is no agreement – implied or express – about these facts. It follows that there was no error in Judge Malik proceeding to make her own credibility findings on each aspect of the Appellant's case from the point at which he returned to Sri Lanka from India.

Ground 2

10. The medical evidence is dealt with at paragraph 17 (i). The reasoning begins by recording that the Appellant has a number of scars which he does not attribute to ill-treatment. It then reads:

> "In relation to a scar on the appellant's chin Dr Lord states '….it is much more likely to be as a result of a blow from a hard object such as the butt of a gun' yet the appellant says in his statement of 29 April 2014 that he was hit with a baton on his chin. No reference is made to having been hit by a gun. Further Dr Lord attributes general pigmentation due to previous bruising the appellant sustained when he was diving for a catch whilst playing cricket. Dr Lord states that when playing cricket he would have worn pads, but I can find no reference to this contained in Dr Lord's summary of the appellant's history or in any of the appellant statements. Further whilst the appellant says that scarring on his leg resulted from a blow that in turn resulted in fracture, no x-ray was taken to establish whether this was the case. Whilst I have regard to the findings of Dr Lord, I am satisfied that there are equally plausible reasons for injuries highlighted in the report".

11. I find there to be two material errors of law in this paragraph.

12. First is the failure to address specific conclusions in Dr Lord's report including:

i) That the scar below the right knee was diagnostic of a healed laceration and in that position would be likely to be due to a blow;
ii) A scar above the right knee being diagnostic of a incised wound;
iii) Scars on the back of the right thigh being diagnostic of cigarette burns;

iv) The finding that the pigmentation and scarring to both wrists, and to the right ankle, are as one would expect to see if his hands (or feet) had been tied tightly and the rope had either rubbed on or had bitten into the skin.

These were all important findings that merited consideration in the context of the evidence as a whole.

13. The second error arises from the first. In making the finding that there were "equally plausible" reasons for the injuries highlighted by Dr Lord the First-tier Tribunal appears to have failed to have regard to the repeated use of the term "diagnostic of" which is defined in the Istanbul Protocol as "the appearance could not have been caused in any way other than that described". It further suggests a misapplication of the standard of proof. If the injury could "equally" have been caused in the manner claimed the Appellant has discharged the burden of proof.

14. Since the medical evidence went to the heart of the Appellant's case that he was detained and ill-treated in Sri Lanka for a period of two years it follows that the credibility findings in the determination must be set aside in their entirety. I need not then deal with the other detailed criticisms of the approach taken to the medical evidence save to note that the finding in respect of the chin injury may be flawed for lack of clarity. Dr Lord found that the scar was, in appearance and position, "diagnostic of a healed laceration likely to have been caused by blow from a hard object *such as* the butt of a gun" (my emphasis). The fact that the Appellant attributed it to a baton (arguably a hard object *such as* the butt of a gun) would appear to be a consistent explanation: it is not clear what the First-tier Tribunal's conclusions on this matter were.

Ground 3

15. The grounds of appeal set out a number of instances where, it is alleged, the First-tier Tribunal took points against the Appellant without him having had an opportunity to respond. Not all of these are made out. It was clear from the refusal letter that the core of the Appellant's claim – that he was captured and held by the Sri Lankan authorities – was rejected as not credible and in those circumstances he understood that his account was generally being challenged. I do however have some concerns about the approach taken to the documentary evidence. Mr Schwenk tells me, without contradiction by Ms Johnstone (although neither were present before Judge Malik) that these documents were produced on the day by the Appellant and that his Counsel had not had an opportunity to take instructions or produce a statement setting out the background to their introduction. Counsel was therefore inhibited from asking questions in

examination-in-chief that might have assuaged any concerns that the Tribunal had. Even if he had been prepared to ask questions to which he did not know the answer, Tribunal was not alerted to those concerns. The grounds state, again without contradiction, that the specific criticisms made of the documents at paragraph 17 (iii) were not put in cross-examination and that neither the Appellant nor his representative were invited to respond to them in submissions. If this is so, I would find there to be material unfairness in the points being taken.

Adjourning the Re-making

16. In the course of her submissions on the 3rd November 2014 Ms Johnstone came close to suggesting that the cigarette burns to the back of the Appellant's legs may have been 'self-inflicted by proxy' (SIBP). As this has never been the Respondent's case I asked her to clarify and she indicated that the Secretary of State would like time to consider whether to issue a supplementary refusal letter. I agreed to adjourn the matter in order for the Respondent to consider her position and the medical evidence of Dr Lord, produced only after the original refusal letter was written. I directed that the Respondent should bear in mind that there must be some evidential basis for suggesting that any of the Appellant's injuries were SIBP: in the words of the Tribunal in KV (scarring - medical evidence) Sri Lanka [2014] UKUT 00230 (IAC) "there must be a presenting feature that raises SIBP as more than a fanciful possibility". A further issue arose in that the Appellant had produced five original documents said to emanate from Sri Lanka, which were now missing. Neither party could tell me where they were. They were:

a) A receipt issued by the Human Rights Commission of Sri Lanka on the 14th February 2011;
b) A letter from the Human Rights Commission of Sri Lanka dated 23rd March 2011
c) A Human Rights Commission of Sri Lanka letter dated 14th February 2011
d) A letter from Police Headquarters, Colombo dated 21st January 2014
e) A letter from the Red Cross concerning family tracing and dated 16th May 2014

I issued further directions that the documents were to be located and produced at the next hearing.

17. The matter was listed for a case management review on the 9th December 2014. On that date the Respondent was represented by Mr Harrison, and a supplementary refusal letter was filed. The letter raised the issue of SIPB, with no reasons advanced as to why the

evidence might suggest, as more than a fanciful possibility, this to be the cause. Mr Harrison agreed that in light of my clear directions, and the guidance of the Tribunal in paragraphs 286-287 of KV, this was not good enough. After some discussion between the parties it was agreed between them that the case would proceed on the basis that SIPB was not in fact being alleged. As to the missing documents, the search had been fruitless.

18. The matter next came before me on the 27th February 2015. It was set down for a full hearing and an interpreter requested. For reasons unknown to me, no interpreter was in fact available. The parties agreed that in view of the contested evidence the matter could not therefore proceed. There had been some development in that the missing documents had been located on the solicitor's file, and had been sent to the Respondent for verification checks. Mr Harrison accepted that this was the case. Unfortunately they could not be now traced. He believed that they would be in the Presenting Officer's Unit somewhere: they would be found and produced for the next hearing. If the Respondent wished to conduct verification checks this would be done before then.

19. Given that the case management issues now appeared to be resolved, and in light of the extensive fact finding required[4] in this case, the parties and I agreed that the most appropriate course would be for the matter to be remitted for full re-hearing in the First-tier Tribunal.

Decisions

20. The decision of the First-tier Tribunal contains errors of law such that it must be set aside.

21. Having regard to the alleged facts in this case, and having regard to the Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: *Anonymity Orders*, I make an order for anonymity:

> "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".

[4] Practice Statements for the Immigration and Asylum Chamber of the Upper Tribunal paragraph 7 (b) provides that an appeal may be remitted to the First-tier Tribunal where "the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal".

22. The decision is to be re-made in the First-tier Tribunal.

Deputy Upper Tribunal Judge Bruce
9th March 2015