



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: AA/03274/2014

AA/03278/2014

AA/03281/2014

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly

On 10 March 2015

Decision Promulgated

On 31 March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

NIRMALARAJ JEYARAJAH

RAJITHRA NIRMALARAJ

SATHEEKSHANA NIRMALARAJ

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Paramjorthy counsel instructed by S Satha & Co

For the Respondent: Ms C Johnstone Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Agnew after a hearing on 13 August 2014 which dismissed the Appellants' appeals against a refusal of the first Appellant's claim for asylum and the decision to remove the Appellants from the UK.

Background

3. The Appellant are a husband and wife and their daughter nationals of Sri Lanka.
4. The Appellants are Tamils. The Appellant's claim was in essence that his brother joined the LTTE in 1998 and he last saw him in 2002. Another brother joined the LTTE in 2002 and was actively involved until he was killed in 2006. The Appellant was a Credit Manager for a bank in Batticaloa and was privy to transactions involving loans paid to the LTTE from Tamil Rehabilitation Organisation funds. The Appellant and his colleagues at the bank provided details of this to the CID. The Appellant was promoted and was transferred to work in Dubai from 2007 - 2013 and travelled freely between the two countries and had no problems with the authorities. In 2013 the Appellant's grandmother was told his brother was still alive and contacted the Appellant who was in the United Kingdom to return to find him which the Appellant did in October 2013. The Appellant was detained at his home and taken to another place where he was beaten, abused and questioned about his involvement with the LTTE. He was detained for 6 days and beaten to his back and struck with a hot iron. He was released unofficially after his father paid £10,000 and had to report weekly to the Sri Lankan Intelligence HQ. The Appellant fled the next day to the United Kingdom and fears that he is at risk as someone believed to be a member of or involved with the LTTE.
5. On 31 October 2013 the Appellant applied for asylum.
6. On 30 April 2014 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons which can be summarised in this way:
 - (a) The Appellant's claim that his brother who had been a member of the LTTE was missing was not corroborated by the document produced which was unreliable due to inconsistencies.
 - (b) The claim that his other brother died fighting for the LTTE is not supported by the documents produced which are inconsistent as to the cause of death.

- (c) It is therefore not accepted that the Appellant's brothers were members of the LTTE.
- (d) The fact that the Appellant returned to Sri Lanka on 10 occasions between 2007 -2013 was inconsistent with his claim to be of interest to the authorities.
- (e) The Appellant's suggestion his friendship with a police officer , an Inspector, protected him from national security or the intelligence services was not credible.
- (f) The fresh wounds to the Appellant's back and fading scars on his arms when he was photographed after claiming asylum were not supported by medical evidence to indicate how the scarring was caused. The Appellant also made no reference in his oral or written accounts to damage to his arms while in captivity.
- (g) The Appellant's claim to have only been questioned about his pre 2007 activities is inconsistent with the CG case of GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT (IAC) which suggests that the interest of the authorities is focused on the current Tamil diaspora who are working for Tamil separatism and therefore the Appellant would not be of interest and he does not come within any of the risk categories.
- (h) The Appellant's account of how he left Sri Lanka is inconsistent with the background material.
- (i) The Appellant would not be of interest as a returned failed asylum seeker.

The Judge's Decision

7. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Agnew ("the Judge") dismissed the appeal against the Respondent's decision. The Judge found :
 - (a) In determining whether the scars that the Appellant bore on his body were caused by torture as he claimed the Judge took into account the medical report of Professor Lingam dated 11 August 2014 produced by the Appellant. She noted that the Professor acknowledged that he could not differentiate between wounds inflicted deliberately and wounds inflicted by torture.
 - (b) She concluded therefore that she had to consider the possibility that the scars were so called 'self inflicted by proxy' (paragraph 26)
 - (c) She noted that there was no evidence from the hospital who treated the Appellant on his arrival in the United Kingdom that may have identified injuries

resulting from what the Appellant claimed was extensive beatings over a period of days and that the Professor did not identify any other injuries resulting from what the Appellant had described as an extensive beating over a series of days or comment on whether he would have expected to see such evidence. She did not find his report thorough or helpful.

(d) She found that Dr Persauds psychiatric report and diagnosis of PTSD was underpinned by an acceptance that the Appellant had honestly recounted his history.

(e) She found that although the Tribunal had directed that the Appellant's GP records should be provided none had been lodged.

(f) In relation to documents produced the Judge identified a number of discrepancies between the documents and the Appellant's account between Paragraphs 38-49 such that she seriously doubted the authenticity of the document.

(g) She identified other inconsistencies in his evidence at 50-52 which undermined the Appellant's credibility.

(h) She did not find it credible that the Appellant would not know where or how his father got the money to pay the bribe to secure his release and was unable to evidence the existence and withdrawal of the funds.

(i) She did not find it credible that the Appellant would have been brought from the United Kingdom to search for his brother given the distance and his claim that his father had powerful friends who helped secure his release from prison.

(j) She did not find it credible that the authorities would wait till 2013 to go after the Appellant when he had visited the country regularly over the previous 7 years. She could find no basis for the authorities in viewing him as someone who presented a risk to the unitary Sri Lankan state or government and found that he did not fall into any of the risk categories of the country guidance.

8. Grounds of appeal were lodged arguing that the Judge's conclusion that the scars were caused by SIBP was procedurally unfair and was not in accordance with the guidance set out in KV (scarring - medical evidence) [2014] UKUT 230 and he was denied the opportunity to address her concerns about causation; that the Judge erred in her assessment of the documentary evidence; that the Judge's

findings on credibility were irrational; that the Judges assessment of the psychiatric report was fundamentally flawed .

9. On 8 January 2015 Upper Tribunal Judge Coker gave permission to appeal on all grounds.

10. At the hearing I heard submissions from Mr Paramjorthy on behalf of the Appellant that :

(a) He relied on the grounds as drafted.

(b) The guidance of KV was that if there were presenting features there could be a finding of SIBP.

(c) In the absence of such presenting features and the Respondent not having raised the issue in the refusal letter or indeed in the hearing the Judge's concerns about SIBP should have been put to the Appellant to enable him to discharge the burden of proof clinically or otherwise and it was procedurally unfair not to do so.

(d) This finding was such a pivotal issue in relation to credibility and risk on return and was so central to his claim that this error tainted the whole of the decision and he asked for the case to be remitted for re hearing.

11. On behalf of the Respondent Ms Johnstone submitted that :

(a) Professor Lingam raised the issue of SIBP himself.

(b) The Respondent did not accept that the Appellant's scars had occurred in the way he claimed.

(c) The Judge was entitled to reach the conclusions that she did.

(d) In relation to the refusal to adjourn the Appellant's had had sufficient time to prepare the case.

Finding on Material Error

12. Having heard those submissions I reached the conclusion that the Tribunal made a material errors of law.

13. A central feature of the Appellant's claim to be at risk on return was that he had been the victim of torture at the hands of the Sri Lankan authorities shortly before his arrival in the United Kingdom in October 2013. The refusal letter referred to the scars but made no suggestion that they were as a result of SIBP. At the hearing on 13 August 2014 it is accepted that neither the Judge nor the Home Office Presenting Officer suggested to the Appellant that his scars were as a result of SIBP but that the Judge found as a fact at paragraph 68 that the scars were as a result of SIBP.

14. The Appellant produced an expert report from Professor Lingam dated 11 August 2014. The conclusion of the report was that the scars were diagnostic of burns and at page 10 that he *'found no reason to dispute the history provided by the patient.'* The only possible reference to the SIBP is at page 9 of the report where he states:

"Secondly , I considered if these were caused deliberately to mislead. There is no way I could scientifically differentiate between wounds inflicted deliberately from the wounds inflicted from the said torture."

15. The case of KV was relied on by the Appellant in this case. The judge purports to summarise the ratio of the case and does so in this way :

"....Of course the facts were different (referring to KV) but the point is that it has been accepted and, if more than a fanciful possibility, scares caused by SBIP have to be considered as a possibility."

16. I am not satisfied that this summary accurately reflects the ratio of KV as the headnote , following what is said in paragraph 286 and following, states:

"Where there is a presenting feature of the case that raises self-infliction by proxy (SIBP) as a more than fanciful possibility of the explanation for scarring:-

(i) a medical report adduced on behalf of a claimant will be expected to engage with that issue; it cannot eliminate a priori or routinely the possibility of SIBP; and

(ii) a judicial fact-finder will be expected to address the matter, compatibly with procedural fairness, in deciding whether, on all the evidence, the claimant has discharged the burden of proving that he or she was reasonably likely to have been scarred by torturers against his or her will. “ (my bold)

17. In this case the medical report did not identify any presenting feature that made SIBP more than a fanciful possibility. I am satisfied that that the Judge was entitled to consider SIBP of her own motion had she identified the presenting feature of the Appellant's account that led to her consideration but given what is said at paragraphs 298 and 300 of KV she was then obliged to allow the Appellant to address this as a possibility:

“298 So far as concerns tribunal judges dealing with appeals, we consider that the head note in RR recognises the importance, in order to guarantee a fair hearing, of ensuring that an appellant has an opportunity to deal with allegations that an injury has been “not caused in the way alleged by the appellant but by a different mechanism

300 We do not exclude either, subject to the parties being given proper opportunity to address the matter, that a tribunal might want to explore with a claimant and the parties the possibility of SIBP of its own motion. It follows from what we have said earlier that this is not something a tribunal should do lightly: it would require there to be some presenting feature, as described earlier. “

18. I do not propose to address the remaining grounds advanced by Mr Paramjorthy because I accept that there is a possibility that the remainder of the Judges findings on credibility were infected by the error relating to a central feature of his claim.

19. I therefore found that error of law have been established and that the Judge's determination cannot stand and must be set aside in its entirety. All matters to be redetermined afresh.

20. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) 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.

21. In this case I have determined that the case should be remitted because the Appellant did not have a fair hearing due to the failure to allow him to address the issue of SBIP. In this case none of the findings of fact are to stand and the matter will be a complete re hearing.

22. I consequently remit the matter back to the First-tier Tribunal sitting at Manchester to be heard on a date to be fixed by the Tribunal before me.

23. I made the following directions for the resumed hearing:

- The case is to be listed for 4 hours
- A Tamil interpreter is required.
- Any additional medical evidence relating to the issue of the Appellant's treatment on arrival in the United Kingdom or SBIP to be served on all parties 5 days before the resumed hearing.

Signed

Date 28.3.2015

Deputy Upper Tribunal Judge Birrell