Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12139/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 8th August 2017	**on 11th August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

[M R]
~~**(Anonymity order not made)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S. Muquit of Counsel
For the Respondent: Mr P. Armstrong, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Sri Lanka born on [ ] 1980. She appeals against a decision of Judge of the First-tier Tribunal Quinn sitting at Harmondsworth on 17th of February 2017 in which the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 19th of October 2016. That decision was to refuse the Appellant's application for asylum and/or humanitarian protection.

2. The Appellant entered the United Kingdom on 10th of April 2016 by car using a fake passport and visa. She contacted the Respondent on 14th of April 2016 to make an asylum claim. The Appellant's case was that she had been Active in the LTTE, a Tamil separatist group, between 2003 and 2008 and after detention and ill treatment had escaped from detention in 2016. She feared that if returned to Sri Lanka she would again come to the adverse attention of the authorities. The Respondent did not accept the Appellant's credibility and did not accept that the Appellant had been involved with the LTTE.

The Decision at First Instance

3. The Judge did not find the Appellant to be a credible witness. At paragraph 15 of his determination he indicated that he did not find that the Appellant was even a low-level member of the LTTE between 2003 and 2008. He did not accept that the Appellant was arrested in January 2016 or that she was accused of helping and trying to revive the LTTE. The Judge did not accept that the Appellant escaped detention through the payment bride by her father nor that she was actively involved in LTTE activities and demonstrations in the United Kingdom. He accepted that the Appellant had attended at least one demonstration but had not taken an active part in it. He found at paragraph 18 that the Appellant had attended such a demonstration so that she could be photographed there to bolster her asylum claim.

4. There were a number of reasons why the Judge did not find the Appellant to be a reliable witness. It was not the Appellant's case that she was on a wanted list at the airport. Having left Sri Lanka there was no reason why the Appellant could not have used her own passport as she passed through Europe. The effect of section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 was to damage the Appellant's credibility as the Appellant had used a forged passport and delayed making a claim in Europe.

5. There were other credibility issues taken by the Judge against the Appellant. The Appellant had given two different dates for when her brother had joined the LTTE, 2000 and 2002, in interview. She said she did not know where her brother was and yet her brother was in the United Kingdom living with the Appellant's sister. It was inconceivable that the Appellant would not been told that her brother was in the United Kingdom. The Appellant's sister knew that the brother had come to the United Kingdom although he had not attended court on 17th of February 2016 before Judge Quinn. There were no details of the brother's asylum claim and it could not be taken for granted that he had been given asylum because of membership of the LTTE.

6. At paragraph 28 the Judge pointed out an inconsistency in the Appellant's evidence between on the one hand saying that she had not sworn an oath of allegiance to the LTTE and that she had. The Appellant in

interview had said that she supported the LTTE because they were fighting for a good cause rather than mentioning what might be considered their primary purpose that they were engaged in a struggle for independence. Indeed, at question 95 when asked if there was any other reason why she wanted to work for the LTTE she had replied no. Such information as the Appellant had given about the LTTE was all information that could have been obtained via the Internet.

7. The Judge criticised the vagueness of the Appellant's evidence which had said on the one hand that she had lived in the town of Kandy from 1995 to 2016 but then that she had moved from Kandy to Vavuniya in 2003. In interview, she had said that she was extensively questioned by the police on her first visit to a police station but in oral evidence that it was on her 2nd visit. In contradiction to what she had said in interview she said in oral evidence that she had been interrogated on her 2nd visit.

8. The Appellant's own case was that she had been involved with the LTTE for 8 years and the Judge concluded that any involvement by her would now be considered low level. Relying on the country of origin information report on Sri Lanka of 2012 the Judge noted that those with low level LTTE involvement were released from custody starting in 2010. The adverse interest which the Sri Lankan authorities had in the Appellant had not in the Judge's view been adequately explained. There was no statement from the Appellant's father or uncle corroborating the Appellant's claim to be released from custody through payment of a bribe. The Judge did not believe that the Appellant had ever been detained.

9. In relation to the Appellant's *sur place* claim the Appellant's description of her own activities in the United Kingdom, attending 4 or 5 demonstrations but not taking an active role in organising them was characterised by the Judge at paragraph 37 as being "very low-key". There was evidence before the Judge from someone who did not attend court to be questioned that the Appellant did take an active role in organising events but that evidence was said by the Judge to be manifestly untrue in the light the Appellant's own evidence. In any event if it was true that the Appellant had taken an active role the Judge said he would have expected to see statements from other members of the organisation with whom the Appellant would be familiar.

10. At paragraph 40 the Judge turned to the medical evidence and in particular a report from Dr Izquierdo-Martin noting that he, the Judge, did not have the letter of instructions. The Judge commented that he had more information to hand than Dr Izquierdo-Martin had and in addition had the advantage of seeing how the Appellant dealt with matters under cross examination. The Appellant had scars but it was a remote possibility that they could have been caused by other means (that is other than how the Appellant described they were inflicted).

11. At paragraph 45 the Judge turned his attention to the report from Dr Dhumad noting again there was no letter of instruction. The doctor diagnosed a moderate depressive episode and although the Appellant had presented with symptoms of post-traumatic stress disorder (PTSD) the Judge noted that the Appellant had performed well at the Tribunal and there was no medical report on the Appellant's medication or treatment. The medication the Appellant was receiving was mild and if the Appellant's depression had affected her badly he would have expected the Appellant to be taking something other than first-line treatment. There was no up-to-date medical report from the Appellant's GP.

12. Having dealt with the two medical reports the Judge then reverted to his assessment of the Appellant's credibility at paragraph 50. The Appellant had failed to mention that her cousin had been arrested and that if the Appellant had been asked to report to the police station in Kandy she would have fled from the police at that stage. If the family had concerns for the Appellant, they could have put her in hiding. There were no substantial grounds of believing the Appellant was at risk of serious harm. He dismissed the appeal.

The Onward Appeal

13. The Appellant appealed on grounds settled by counsel who had not appeared at first instance but who did appear before me. The first ground argued that the Judge's approach to the assessment of evidence and credibility was flawed. That the Appellant had used a false passport to enter the United Kingdom should not have been taken as a point against her. The Appellant left Sri Lanka by boat illegally not through the airport and thus without documents. The use of a false passport provided by the agent must have been thereafter. The issue of why she never claimed asylum on route through Europe was never raised as an issue against her by the Respondent in the refusal letter. The 2004 Act had been raised by the Respondent but in the context of the use of a false passport.

14. The Appellant had referred to her brother in United Kingdom who had refugee status. This was not the same brother who she said had joined the LTTE in Sri Lanka in 2000 and who had not been heard of since 2004. The Appellant had made clear in interview that she had more than one younger brother. The Appellant had mentioned her cousin's arrest at interview. If the status of the Appellant's brother in the United Kingdom was considered relevant the Judge should have asked the Respondent for details. That the injuries on the Appellant could be caused by proxy with her permission was an unfair point as that was not an allegation raised or put to the Appellant by the Respondent either in the refusal letter or at the hearing.

15. The approach to the medical evidence was flawed. Dr Izquierdo-Martin had not simply accepted the Appellant's account but by marginalising the

doctor's view (because of the Judge's view on the Appellant's credibility) the Judge had acted contrary to the principles in the case of **Mbanga** both in relation to Dr Izquierdo-Martin's report and Dr Dhumad's. The relevance of the absence of a letter of instructions was not clear. Dr Izquierdo-Martin had said that the scars on the Appellant were fully matured and therefore the Judge should not have said that Dr Izquierdo-Martin was unable to say whether the injuries were mature or immature.

16. The Judge did not appear to reject the claim that the Appellant suffered from symptoms of PTSD and thus should have treated the Appellant as a vulnerable witness or otherwise heed the advice of Dr Dhumad at paragraph 19.5 of his report. I pause to note here that paragraph 19.5, referred to in the grounds of onward appeal, stated that it was Dr Dhumad's opinion that the Appellant was fit to attend court hearings or give evidence although her concentration was likely to be worse during cross examination. He recommended that the Appellant be given extra time to answer questions and be given regular breaks.

17. The assessment of risk on return was legally untenable the grounds continued because the assessment of risk was contingent upon the view taken of the Appellant's credibility. The Judge had failed to address the risk from the Appellant's diaspora activities. The Appellant's association with TGTE had been accepted and in the case of UB [2017] EWCA Civ 85 it was held that membership of the TGTE could create risk upon return.

18. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Landes on 15th of June 2017. In granting permission to appeal she wrote that it was arguable that the Judge should have treated the Appellant as a vulnerable witness and if he had that may have affected his approach to credibility. It was arguable that the Judge approach the medical reports based on his finding the Appellant was not credible rather than considering the Appellant's credibility and all the evidence including the medical reports. Failing to claim asylum in Europe was not raised by the Respondent and accordingly unless the Appellant was specifically asked about it the lack of an explanation should not be held to damage her credibility.

19. The Judge had misunderstood the Appellant's case in the sense that she did not mean that she had never heard again from her brother who was in the UK she was referring to her other brother. However, the Judge was entitled under the provisions of Section 8 of the 2004 Act to take account of the production of a false passport as if it were a genuine one but the Judge appeared to have misunderstood the nature of the Appellant's exit from Sri Lanka. It was not clear whether the Judge was making a comment about the failure to provide him with a copy of the letter of instructions. It was not clear why copies of the letters were needed when instructions were replicated in Dr Dhumad's report and apparently adequately summarised in Dr Izquierdo-Martins report.

20. There was little merit in the remainder of ground 2 on its own (that is to say the risk from involvement with the TGTE) because the Judge had placed little weight on the evidence of Mr Yogalingam (who had not attended to give evidence himself but had provided a letter describing the Appellant's membership of and activities for TGTE). In any event the Judge considered that the evidence of the Appellant and Mr Yogalingam was mutually inconsistent.

21. The Respondent replied to the grant of permission by letter dated 13th of July 2017 stating that she opposed the Appellant's appeal. The grounds were primarily a disagreement with the findings of the Judge who had directed himself appropriately. The grounds relied on offering different interpretations of the evidence when matters of weight and interpretation were a matter for the Judge. It was for the Appellant to ensure that her evidence was clear and unambiguous. The Judge had carefully considered the medical evidence but found it wanting. There were multiple serious credibility issues with the Appellant's account and it was open to the Judge to find the Appellant not credible.

The Hearing Before Me

22. The matter came before me in order to decide whether there was a material error of law in the First-tier decision. If there was then the decision would be set aside and the appeal reheard. If there was not, the decision of the First-tier would stand. Counsel for the Appellant relied upon his grounds arguing that the Judge made various errors in the approach to credibility making mistakes of fact and generally. The Judge had failed to take note of Dr Dhumad's assessment of the Appellant's vulnerabilities and had compartmentalised the assessment of credibility distinct from Dr Dhumad's report which was a classic **Mbanga** mistake. He had evaluated the medical report by looking at the findings he had already made about credibility in isolation from that report. He was not looking at the Appellant's vulnerability.

23. There were a number of mistakes of fact beginning from paragraph 20 of the determination onwards. It was not clear that the Appellant had passed through Europe. Section 8 was never put forward in the context of failing to claim en route. It was an unfair point to take against the Appellant.

24. There was no inconsistency in the Appellant's evidence about her brother in the United Kingdom that was a mistake of fact by the Judge. The Appellant had twin younger brothers Prathep and Pardeep. It was the latter who had gone missing. She had not said in evidence that she did not know where her UK based brother was. The Appellant talked about the twins in her statement.

25. Even if the Appellant had been inconsistent about some of the dates one had to consider whether there were reasons for such inconsistencies.

Contrary to what was said in the determination Dr Izquierdo-Martin had said that the Appellant's injuries were mature. One could not discount the possibility that a correct appreciation of the medical evidence would have affected the Judge's deliberations. The Judge was also in error in saying that the Appellant had failed to mention the arrest in interview.

26. In reply for the Respondent it was observed that the Appellant had failed to mention her cousin in the screening form. The Respondent relied on the rule 24 response which I have summarised above (see paragraph 21). The Judge had carefully considered the medical evidence. It was not correct to say the Judge was unaware of the Appellant's mental state as he had referred to the medical reports. The Judge had noted the change in background circumstances in Sri Lanka and was correct to say that the Appellant had not engaged in activity in the United Kingdom which might bring her to the attention of the authorities. As a low-level member of the LTTE the Appellant was not at risk on return. There was no material error of law and the determination was well reasoned. The Judge may have been mistaken about the existence of the brothers but if so it was due to the confused nature of the evidence which the Judge heard. The witness statement had failed to say which brother the Appellant was talking about. The determination should stand.

27. In conclusion for the Appellant it was accepted that it was for the Appellant to make her evidence clear but if an Appellant had difficulties then it was a question of how much weight should be given to a lack of clarity or mistakes. The Judge had not made clear he was taking the Appellant's vulnerabilities into account. In the event of the finding of material errors or errors of law such that the determination should be set aside the proper venue for rehearing would be for the matter to be remitted back to the First-tier.

Findings

28. Certain of the issues in this case turned on the credibility of the Appellant. The Appellant's case was that she had been arrested and ill-treated by the authorities in Sri Lanka because of her involvement with the LTTE but had managed to escape from detention by payment of a bribe. The Judge did not find the Appellant to be a credible witness and did not accept any of the arguments put forward by the Appellant.

29. The attack on the Judge's assessment of credibility falls into 3 categories. The first is to say that the Judge made a number of mistakes of fact and misunderstood the evidence in certain places. The 2nd category is to argue that even if the Appellant was unclear or vague at points of her evidence she was a vulnerable witness and that should have been taken into account in the consideration of her credibility. The 3rd category of attack on the Judge's findings is that the Judge had made up his mind about the Appellant's credibility and dealt with the two medical reports as something of an afterthought rejecting them because he had already

rejected the Appellant's credibility. In this way, it is argued the Judge did not place adequate weight on the medical evidence which the Appellant states support her case.

30. The Respondent by contrast points to the sheer number of difficulties with the Appellant's credibility and argues that the Appellant's case on appeal amounts to no more than a disagreement with the result.

31. It is important at this stage to make one further point which is that although the Judge did not accept the Appellant's credibility, he did in certain respects consider the Appellant's case at its highest. He found that on the Appellant's own evidence her involvement with the LTTE had been at a minor level as had her *sur place* activities in this country. Even if therefore the Appellant's account was by the Respondent as a person of interest. Whilst membership of the TGTE could potentially bring a risk to an Appellant, see the case of **UB** that was not the case for this Appellant. The Judge rejected the evidence of Mr Yogalingam in part at least because it conflicted with the Appellant's own description of her activities. That was the point made by Judge Landes when she granted permission to appeal on other grounds but not on the Appellant's claimed TGTE connections. I would respectfully agree with that; the Judge gave sound reasons why he rejected the evidence of Mr Yogalingam who had not attended to be questioned.

32. Although the Appellant sought to make a forensic attack on the determination analysing the Judge's findings in considerable detail, I do not consider that the criticisms made of the determination disclose a material error of law. Although much has been said in both the grounds and the grant of permission about the reference by the Judge to the fact that he was not supplied with the letters of instruction to the two doctors, I do not read the determination as being a criticism of the reports in consequence of the failure to supply letter of instructions. It is worth bearing in mind what the Upper Tribunal have said in **AS [2005] UKUT 172** about the instruction of experts. If instructions to an expert contain an error of fact it may be necessary to take this into account when assessing the weight to be attached to the expert report. This may be relevant for example where an Appellant appears to relate more of their account to the expert than they did to the Respondent. It was therefore appropriate for the Judge to note the absence of a letter of instructions. That he did not draw any adverse conclusions from that indicates that he did not consider that to be a matter to be pursued. That so much was made of this minor issue in the grounds of onward appeal underlines the point that the challenges to the determination appear at times to be more an attempt to find errors than a demonstration of them.

33. Although the Appellant argues that she should have been treated as a vulnerable witness, it was not the case that the Appellant was declared unfit to give evidence. What Dr Dhumad recommended was that the Appellant should be given breaks and time to answer questions. I have

seen no complaint that breaks were withheld from the Appellant during the hearing or that she was rushed into giving answers. The Judge by contrast noted that the Appellant had been able to give her evidence fully during a lengthy hearing. I also note that the Appellant's interview with the Respondent consisted of 235 questions and took place over almost 6 hours (including breaks) I do not accept the criticism therefore that the Judge fell into error in his assessment of the Appellant's credibility by overlooking the difficulties the Appellant might face in stating her case.

34. The Judge's view was that the Appellant was vague and inconsistent because her account was not true and the Appellant had displayed an incomplete grasp of it. That was a matter for the Judge and that view was open to him on the evidence before him. There are a number of details in the Judge's assessment of credibility that are queried but in many cases the confusion arose because of the unclear way in which the Appellant gave her evidence and the inconsistencies between the Appellant's interview and what she later said in her witness statement for example the Appellant contradicted herself over her move to Vavuniya and appeared unable to say clearly why she supported the LTTE. It was for the Appellant to clarify these matters but she did not do so to the Judges satisfaction. I remind myself that the Judge had the benefit of seeing and hearing the Appellant give her evidence and was entitled to form an impression of her truthfulness or otherwise.

35. Where details could be relatively easily checked for example her claims to be involved in activities in this country, her evidence was found to be wanting. There was a lack of supporting witnesses such as the brother who was said to have been given status and was living with the appellant's sister. There was nothing in writing from the Appellant's family in Sri Lanka confirming the account of the escape through a bribe. It was reasonable to have expected this evidence which could have been easily obtained to be produced but no explanation for the failure to provide the evidence was given to the Judge beyond a claim that the brother was unwell. It was open to the Judge to draw the inference as he did at paragraph 26 that the Appellant could not establish an important part of her case.

36. Although Dr Dhumad described the Appellant's participation in demonstrations as therapeutic and Mr Yogalingam characterised the appellant's involvement in demonstrations as being at a high level the Judge noted at paragraph 39 that the Appellant's account of her activities was vague. If she had been organising demonstrations one could reasonably expect that the Appellant would give a clear account of what she had done. If she was vague because she was not organising them that raised questions over why she had submitted a false document in support of her case. If her participation was indeed therapeutic some explanation why she could still not recount it clearly was needed but was

not provided. In these circumstances, it was open to the Judge to conclude as he did that the Appellant was fabricating parts of her case.

37. Although the Appellant was taking medication the Judge pointed out that this was first line treatment and was not therefore evidence of serious mental difficulties that might affect the way the Appellant gave her evidence. There was no up to date information from the Appellant's treating doctor, her GP. The Appellant claimed to have entered the United Kingdom by car on 10th of April 2016. By definition, given that Great Britain is an island, the Appellant must have travelled through another European country prior to her arrival and in the light of what she said in interview potentially two. It was not therefore an unreasonable conclusion for the Judge to draw that the Appellant had travelled through Europe before arriving in United Kingdom and yet had made no effort to claim asylum en route. That conclusion arose from the Appellant's own account. If she wished to clarify that further it was open to her to do so in her statement but it is difficult to see how the Judge can be validly criticised for drawing a conclusion on the basis of the Appellant's own evidence. No alternative explanation for her journey has ever been provided.

38. One of the main criticisms made by the Appellant of the determination is that the Judge dealt with the medical evidence as an afterthought rather than looking at all of the evidence in a holistic way. The Judge of necessity had to set his conclusions out in some form of order. The medical evidence indicated that the Appellant had sustained injuries at some point in the past but what the Judge had to decide was whether the Appellant's account of how those injuries were incurred was or was not credible. It was not for the doctors to decide the issue of credibility. Inevitably they were likely to accept the account of the Appellant since they were not in a position like the Judge to probe the account to establish its veracity. Indeed that would hardly be considered to be the role of a medical expert. The Judge was right therefore to point out that he was in a better position than the doctors to establish the credibility of the Appellant's account.

39. The credibility matters which troubled the Judge which he set out in some detail in his determination could not possibly have been dealt with by the doctors. This is not to say that the Judge ignored the medical evidence rather that he put that medical evidence in its context. After dealing with the two medical reports he went on in his determination to consider other credibility issues suggesting that even after considering the medical evidence there were still further credibility matters which troubled him. I do not consider therefore that this is an **Mbanga** case.

40. At paragraph 44 the Judge noted Dr Izquierdo-Martin's view that the causation of the scars by means other than as described by the Appellant was remote and he acknowledged that comment on causation by going on to say that it was not possible to rule that explanation out. What the

Judge had to do was to weigh up the medical evidence as to the consistency of the injuries with the alleged causation in his general view on credibility. The wording of paragraph 44 shows that he did this. The Judge was not speculating as to the cause of the injuries he was merely pointing out that the Appellant's account of how they were inflicted was not credible. Whether the injuries were mature or otherwise was beside the point and it is difficult to see why so much turned on this point that the Judge might otherwise have changed his conclusions on credibility.

41. What the Judge went on to do at paragraph 53 after considering the medical evidence and taking the Appellant's case (particularly on the sur place activities) at its highest was to note that the objective evidence indicated that as a low-level member of the LTTE the Appellant would no longer be of adverse interest to the authorities because of the changes in country conditions. I say taking the Appellant's case at its highest because the Appellant had given evidence which very much indicated that she was a low-level member while in Sri Lanka. It was her witness Mr Yogalingam who sought to suggest the Appellant's involvement (in this country) was greater than that but his evidence was properly discounted for the reasons already given.

42. Dr Izquierdo-Martin's view, that the Appellant's overall pattern of scarring was not suggestive of self-inflicted injuries was as the Judge pointed out at paragraph 44 merely the doctor's opinion. It is important to note that at page 8 of his report Dr Izquierdo-Martin indicated it was scientifically impossible to differentiate self infliction injuries by proxy from injuries caused by torture. Dr Izquierdo-Martin's view was that there were no presenting facts to make self infliction by proxy more than a remote possibility but that was evidently felt by the Judge to be merely an expression of an opinion not grounded in an overall assessment of the Appellant's credibility. That was the place of the Judge to decide.

43. In any event, even taking the Appellant's case at its highest, the background evidence did not suggest that the Appellant would be at risk upon return. It is incorrect as the grounds seek to argue that the Judge failed to address the risk from the Appellant's diaspora activities. On the contrary the Judge considered that they were not of such a level that they would cause any risk to the Appellant. The Judge took a dim view of the reason why the Appellant had taken part in the demonstrations although that of itself would not be conclusive since *sur place* activities even if conducted in bad faith can still give rise to a claim. The important point here was that the Judge's finding was that the Appellant's activities would not bring her to the attention of the authorities.

44. Even if one accepts that the Judge did make some errors in his determination, for the reasons I have given above I do not accept that they are of significance. The Appellant's claim was bound to fail and the forensic examination of the determination is in many ways a red herring since the Appellant's claim could not succeed. I do not find that the Judge

made any error in dismissing the appeal and I therefore dismiss the Appellant's onward appeal against that determination.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 9th day of August 2017

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was payable and I have dismissed the appeal and therefore there can be no fee award.

Signed this 9th day of August 2017

.....
Judge Woodcraft
Deputy Upper Tribunal Judge