Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/04140/2015**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Decision and Reasons Promulgated**
On 7 March 2018	**On 1 May 2018**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

VP
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Paramjorthy, Counsel
For the respondent: Mr Harrison, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

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1. I have anonymised the appellant’s name because this decision refers to his asylum claim and medical evidence regarding his mental health and claimed experiences of torture.

Summary of asylum and human rights claims

2. The appellant, a citizen of Sri Lanka, claims that he has been detained and tortured in Sri Lanka for reasons relating to his LTTE activities. He claims a well-founded fear of persecution for reasons relating to his imputed political opinion. He also claims that he faces treatment in breach of Article 3 of the ECHR if returned to Sri Lanka, given his mental health difficulties.

Appeal proceedings

3. The appellant arrived in the UK in December 2013 and claimed asylum on arrival. He appealed against a decision to refuse him leave to enter to the First-tier Tribunal, and in a decision dated 31 July 2015 First-tier Tribunal Judge Nicol dismissed his appeal. This decision was set aside by Upper Tribunal Judge Bruce in a decision dated 25 May 2016, because the First-tier Tribunal failed to make any clear findings supported by reasons, and failed to properly assess the medical evidence before it.

4. The appeal was remitted to the First-tier Tribunal and a hearing took place before First-tier Tribunal Judge Gladstone on 2 June 2007, who comprehensively rejected the credibility of the appellant’s account and dismissed his appeal.

5. Upper Tribunal Judge Smith granted permission to appeal, noting that the grounds raised issues of procedural fairness.

Appellant’s vulnerability

6. I begin this decision by considering a report prepared by Dr Dhumad, a Consultant Psychiatrist, dated 4 May 2017. The report is based upon a 2-hour interview with the appellant. Reference is made to an earlier report dated 22 June 2015 by Dr Persaud, a Psychiatrist, who concluded that the appellant suffered from a serious psychotic disorder, including major depression and PTSD. It is clear however that the conclusions in Dr Dhumad’s report are based upon his own mental state examination of the appellant, during which he noticed evidence of self-neglect, severe depression, and anxiety. Dr Dhumad considered the appellant’s ‘clinical presentation’ to be consistent with a diagnosis of severe depressive episode and PTSD. He described the risk of suicide as moderate.

7. At the beginning of the hearing before me, Mr Harrison agreed that unless there was any cogent updated evidence to the contrary, the appellant should be treated as a vulnerable appellant in accordance with the Joint Presidential Guidance Note No 2 of 2010 ('the Guidance').

8. Mr Paramjorthy explained that since Dr Dhumad's report was prepared and after the hearing before First-tier Tribunal Judge Gladstone, the appellant's mental health has deteriorated. He has attempted suicide and received treatment in a mental health unit.

9. Given this, and the medical evidence already available to the Tribunal, Mr Harrison accepted without hesitation that it was appropriate to regard the appellant as a vulnerable appellant, and I do so.

SSHD's concession

10. I heard from Mr Paramjorthy briefly. He clarified that his strongest ground is set out at paragraph 8 of his grounds of appeal i.e. the First-tier Tribunal failed to adequately engage with the psychiatric evidence and failed to approach the appellant as vulnerable. He acknowledged that the grounds of appeal alleging procedural unfairness vis a vis a failure to grant an adjournment and the encouragement of inappropriate questioning, were less strong because he failed to particularise these by reference to any evidence in the form of a witness statement.

11. Mr Harrison conceded that there was cogent medical evidence before the First-tier Tribunal, sufficient to support the contention that the appellant should have been treated as vulnerable. The failure to do so meant that the First-tier Tribunal failed to apply the Guidance when conducting the hearing or when assessing the evidence, and failed to make credibility findings with the Guidance in mind.

12. Mr Harrison acknowledged the SSHD's rule 24 notice opposed the appellant's appeal but he did not consider it was appropriate to rely upon the notice in all the circumstances. Mr Harrison conceded that the First-tier Tribunal committed material errors of law in its approach to the appellant's evidence and in the circumstances, it was appropriate to set aside the decision and remit the appeal to the First-tier Tribunal irrespective of the other grounds of appeal. Mr Paramjorthy agreed with this approach.

Legal framework

13. In AM (Afghanistan) v SSHD [2017] EWCA Civ 1123, [2017] Imm AR 6, Sir Ernest Ryder, the Senior President of Tribunals, considered an appeal involving a young man from Afghanistan with a claimed

traumatic history. In AM's case the psychologist offered advice as to how AM could obtain effective access to justice given his psychological difficulties. It was agreed before the Court of Appeal that insufficient steps had been taken to ensure that the proceedings were fair. In the instant case Dr Dhumad considered the appellant fit to give evidence but highlighted his severe depression, hopelessness and poor concentration and recommended the use of extra time and breaks to help him to participate meaningfully.

14. Ryder LJ said this in AM (my emphasis):

> "30. To assist parties and tribunals a Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses', was issued by the Senior President, Sir Robert Carnwath, with the agreement of the Lord Chancellor on 30 October 2008. In addition, joint Presidential Guidance Note No 2 of 2010 was issued by the then President of UTIAC, Blake J and the acting President of the FtT (IAC), Judge Arfon-Jones. The directions and guidance contained in them are to be followed and for the convenience of practitioners, they are annexed to this judgment. Failure to follow them will most likely be a material error of law. They are to be found in the Annex to this judgment.
>
> 31. The PD and the Guidance Note [Guidance] provide detailed guidance on the approach to be adopted by the tribunal to an incapacitated or vulnerable person. I agree with the Lord Chancellor's submission that there are five key features:
>
> a. the early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing through the use of a CMRH or pre-hearing review (Guidance [4] and [5]);
> b. a person who is incapacitated or vulnerable will only need to attend as a witness to give oral evidence where the tribunal determines that "the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so" (PD [2] and Guidance [8] and [9]);
> c. where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing (PD [6] and [7] and Guidance [10]);
> d. it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence (Guidance [10.2] to [15]); and
> e. relevant additional sources of guidance are identified in the Guidance including from international bodies (Guidance Annex A [22] to [27]).

15. At [33] Ryder LJ observed that the emphasis on the determination of credibility in an asylum appeal is such that there is particular force in the Guidance at [13] to [15], which states as follows:

> "13.The weight to be placed upon factors of vulnerability may differ depending on the matter under appeal, the burden and standard of proof and whether the individual is a witness or an appellant.
> 14.Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were

clear discrepancies in the oral evidence, consider the extent to which by mental, psychological or emotional trauma or disability; the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
15.The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind."

Error of law discussion

16. Ms Harrison was correct to make the concessions he did. Given that the respondent agrees that the decision must be set aside and remitted to the First-tier Tribunal, I can set out my reasoning briefly. In so doing, I recognise the First-tier Tribunal's decision is lengthy and detailed. It runs to 30 pages and contains 177 paragraphs, making wide ranging adverse credibility findings.

17. It is not necessary for me to address each of the grounds of appeal regarding the credibility findings or indeed the other findings made by the First-tier Tribunal. This is because there has been such a fundamental error of approach toward the psychiatric evidence. There has been a failure to directly address whether the appellant is vulnerable, and if so the consequences of this upon decision making, such that the entire decision must be set aside. In particular:

   (i) All the medical evidence pointed in one direction: the appellant should have been treated as vulnerable. He was diagnosed with severe depression and PTSD, and at a moderate risk of suicide (with the hopelessness, anxiety, low concentration attendant upon this) very shortly before the First-tier Tribunal hearing. This diagnosis is consistent with the opinion of Dr Persaud in June 2015.

   (ii) The failure to do so meant that the First-tier Tribunal failed to apply the Guidance when assessing the evidence, and therefore failed to take account of the importance of the matters set out at 10.3, 14 and 15 of the Guidance. Failure to follow the Guidance in a case such as this constitutes an error of law.

   (iii) The First-tier Tribunal was clearly aware of Dr Dhumad's report and took it into account – see by way of example [25], [89], [94], [119] and [122] of the decision. The First-tier Tribunal was therefore aware that Dr Dhumad recommended extra time and breaks, and "*bearing the above in mind, [I] outlined the format of the hearing*" at [90] and indicated that

she carefully considered the medical evidence at [119]. However, there was a failure to make any clear findings as to whether the assessment and conclusions in the psychiatric evidence were accepted. It is difficult to see what the First-tier Tribunal made of Dr Dhumad's report, when the decision is read as a whole, although the First-tier Tribunal appears to doubt the cogency of the medical reports at least partly on the basis that there has been a failure to explain how the appellant's ability to travel between Liverpool and London, has been taken into account at [122]. The First-tier Tribunal has rehearsed some of the contents of the medical evidence at [124] to [129] without making any clear findings as to whether the conclusions supporting the appellant's poor mental health are accepted at not.

(iv) Although the First-tier Tribunal goes on to make factual findings "*taking into account the experts' opinions*" at [130], it remains unclear whether she accepts those opinions to be well-founded and to what extent they support a finding that the appellant is vulnerable and ought to be treated as such.

(v) The First-tier Tribunal appears to adopt a compartmentalised approach to the evidence from [134] to [160], that is not warranted by the psychiatric evidence available. The First-tier Tribunal reasons that as the appellant's memory is "*now poor*", it was open to her to consider "*clear contradictions*" between "*his earlier accounts*" in the screening interview (December 2013) and the asylum interview (January 2015). This approach fails to take into account: Dr Persaud's June 2015 diagnosis of major depression and PTSD came shortly after the asylum interview; Dr Persaud noted that the appellant's psychological distress and PTSD symptoms started after his torture in Sri Lanka and therefore before he came to the UK in December 2013; there was detailed (but incomplete in some respects) evidence that the appellant's PTSD symptoms, including but not limited to poor memory, have been apparent for an extended period of time.

(vi) The compartmentalised approach was not a fair way to approach the appellant's evidence in all the circumstances. The First-tier Tribunal appears to have left the appellant's oral evidence out of account, and instead focused upon the "*earlier evidence*", without considering all the evidence holistically together with the psychiatric evidence explaining inconsistencies, and without giving this vulnerable appellant the benefit of the doubt.

Disposal

18. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the First-tier Tribunal. This is because completely fresh findings of fact are necessary. It is regrettable that this shall be the third occasion that the First-tier Tribunal considers the appeal. However, as both representatives agreed, it is important that the appellant is afforded a fair hearing before the First-tier Tribunal, which takes proper account of the medical evidence in light of the parties agreed position: the appellant is a vulnerable appellant, to whom the Guidance applies.

19. This decision was prepared on 8 March 2018 but due to an administrative error was not served on the parties at that time. I have therefore amended the directions outlined at the hearing to take this into account, hence the decision is now dated 1 May 2018.

Decision

20. The decision of the First-tier Tribunal involved the making of a material error of law. Its decision cannot stand and is set aside.

21. The appeal shall be remade by the First-tier Tribunal de novo.

Directions

(1) The appellant shall file and serve a comprehensive indexed and paginated bundle of all the medical evidence relied upon, including updated medical evidence before 4pm on 21 May 2018.

(2) The matter shall be listed for a case management hearing before the First-tier Tribunal on the first date after 28 May 2018.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
1 May 2018