Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: PA/04727/2017

THE IMMIGRATION ACTS

Heard at: Field House
On: 8 January 2020

Decision & Reasons Promulgated
On 24 January 2020

Before

Upper Tribunal Judge Gill

Between

Mr T K
(ANONYMITY ORDER MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings. The parties at liberty to apply to discharge this order, with reasons.
I make this order because this is a protection claim.

Representation:
For the appellant: Ms U Miszkiel, of Counsel, instructed by VJ Nathan solicitors.
For the respondent: Mr T Lindsay, Senior Presenting Officer.

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Decision and Directions

1. The appellant, a national of Sri Lanka born on 22 February 1995 who claims to have arrived in the United Kingdom on 10 October 2016, appeals against the decision of Judge of the First-tier Tribunal K Swinnerton who, in a determination promulgated on 17 September 2019 following a hearing on 9 September 2019, dismissed his appeal on asylum grounds, humanitarian protection grounds and human rights grounds.

2. The appellant claimed to have experienced problems with the Sri Lankan authorities during three incidents. The first incident occurred on 20 September 2013, the second on 13 August 2014 and the third on 24 July 2016. He was beaten and detained during the first and third incidents and pushed down a well during the second incident. He was released from detention on two of the three occasions, on the payment of monies. His family continue to be harassed by the Sri Lankan authorities. He is involved in the United Kingdom with the activities of the "*Transnational Government of Tamil Eelam*" ("TGTE"), an organisation which is proscribed in Sri Lanka.

3. The following is a summary of the three incidents, taken from para 7 of the judge's decision:

   i) The first incident: On 20 September 2013, the appellant made a video recording on his mobile phone for over five minutes of a youngster being beaten by two police officers. The police took away his phone and deleted the video that he had made. He was taken by six police officers to the nearby Point Pedro police station where he was beaten with a piece of wire and a gun butt. He was detained for three days after which his father paid 50,000 rupees for his release.

   ii) The second incident: On 13 August 2014, the appellant was in a library discussing with his friends the rape of the wife of a former LTTE fighter and how it should not be allowed. Their discussion was overheard by someone who informed the army. Later that day, five or six members of the army came and pushed him into a well which was 15 feet deep and which resulted in the appellant breaking his hip bone and hitting the back of his head. Nothing happened to the friends with whom he had had the discussion. His parents then moved to another address. At his asylum interview, he said that he spent 7 days in Point Pedro hospital and one month in Jaffna hospital. He remained in bed for 6 months as he was not able to walk.

   iii) The third incident: On 24 July 2016, the appellant went with his paternal uncle and aunt to Keerimalai. He took a photograph of people demonstrating against a building being erected on temple land and put it on Facebook later that day. Four army officers came to the appellant's family home on 29 July 2016 and he was detained until 4 August 2016. On this occasion, he was burnt with cigarette butts and four of his teeth were broken. He was released after his uncle in the United Kingdom sent monies to pay to the army.

4. The documents that were before the judge included the following:

   i) Two reports from Dr Saleh Dhumad, MBChB, MRCPsych, MSc CBT, Consultant Psychiatrist and Cognitive Behavioural Psychotherapist. The first report was dated 4 December 2018 (pages 29-54 of bundle SB1) and the

second was dated 1 July 2019 (pages 6-17 of the bundle SB2). In both reports, Dr Dhumad said, inter alia, that in his opinion the appellant's condition was consistent with a diagnosis of moderate depressive episode. In his second report, he also said that the appellant's condition was consistent with post-traumatic stress disorder ("PTSD") and that the appellant's condition had deteriorated since he saw the appellant in December 2018. He also said that the appellant was fit to attend the hearing and give oral evidence, that he was vulnerable and able to following the proceedings meaningfully and participate safely. However, in Dr Dhumad's opinion, the appellant needed some adjustments, such as more time and regular breaks.

ii) A copy of the records of the appellant's GP from 10 October 2016 (the date of the appellant's claimed arrival in the United Kingdom) until 16 August 2019 (the "GP records") (pages 3-14 of bundle SB3).

iii) A medical report dated 17 June 2017 (pages 14-30 of bundle AB1) from Dr Andres Izquierdo-Martin, Faced FRCEM, Consultant in Emergency Medicine, who examined the appellant on 8 June 2017 and gave expert evidence on the appellant's scars. He grouped the scars into three groups, i.e. Scars 1, 2 and 3. He said, inter alia, that:

a) Scars 1 (six round hyper-pigmented scars on the middle of the back), which the appellant attributed to being burnt with hot cigarette butts during his detention in the third incident, were typical of intentional and unwillingly caused injuries as described by the appellant. Dr Martin considered alternative causes. As to whether these scars could have been the result of self-inflicted injuries, Dr Martin said that, in his opinion, this was "*impossible in view of the position of the scars, on a cluster on the back, an area which would have been difficult to self-reach*". In his opinion, other alternative causes were impossible or extremely unlikely.

b) Scars 2 (several elongated hyper-pigmented scars on the back) and scar 3 (a mildly hyper-pigmented scar on the lower part of the right flank of the appellant's trunk), all of which the appellant attributed to being beaten with long blunt implements, were highly consistent with deliberately caused injuries during an assault as described by the appellant. He considered that "*deliberate self-harm was a theoretical possibility although very unlikely in view of the position of the scars, on an area (back) difficult to self-reach and harm"*, that it was possible that they could have been caused by accidental injury, e.g. falls or every day activities although less likely, and that they were very unlikely to have been caused by a skin infection or other inflammatory skin condition.

In his "*Summary and conclusion*", Dr Martin said, at para 6.2:

"The scars on the back are typical of the events described by the [appellant] of being intentionally burnt. The rest of the scars are less specific but did not show any inconsistencies with the description of events by the [appellant]. Following the recommendation in Chapter V, Section D, para 188 of the Istanbul Protocol where it states that "ultimately it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture which is important in assessing the torture story", overall in my expert opinion the scars are typical of torture as described by the [appellant]".

5. This is a convenient point at which to quote the following from the Istanbul Protocol:

"D. Examination and evaluation following specific forms of torture

187. The following discussion is not meant to be an exhaustive discussion of all forms of torture, but it is intended to describe in more detail the medical aspects of many of the more common forms of torture. For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution given by the patient. The following terms are generally used:

(a) Not consistent: the lesion could not have been caused by the trauma described;

(b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;

(c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;

(d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes; 37

(e) Diagnostic of: this appearance could not have been caused in any way other than that described.

188. Ultimately, it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story (…)."

6. Returning to the judge's decision, he said at para 32 that he was not satisfied that the appellant had given a truthful and accurate account of the basis of his asylum claim and that, taking all of the available evidence into account, he did not accept the appellant's core account. He gave his reasons at paras 22 to 32 of his decision. I shall refer to them as necessary.

7. At the hearing before the judge, the appellant was represented by Ms Amanda Walker, instructed by A & P Solicitors. Ms Walker settled the grounds of appeal in the application to the First-tier Tribunal ("FtT") for permission (hereafter the "FtT grounds"). Following the refusal of permission by the FtT, A & P Solicitors lodged an application to the Upper Tribunal ("UT") for permission. The grounds in support of this application (hereafter the "UT grounds") were settled by Ms Shivani Jegarajah, instructed by A & P Solicitors. The UT grounds were substantially different from the FtT grounds although there was some overlap in issues. They did not refer to the FtT grounds or state that the appellant continued to rely upon them.

8. Permission was granted by Upper Tribunal Judge Kamara on 29 November 2019. The Notice of Hearing for the hearing on 8 January 2020 was sent to the appellant and A & P Solicitors on 3 December 2019.

9. On 19 December 2019, the UT received a letter from V J Nathan Solicitors informing the UT that they had been instructed.

10. At the commencement of the hearing before me, Ms Miszkiel informed me that she had only recently been instructed and that the appellant and his current representatives had not received all the papers in the appellant's case from the previous solicitors. On taking instructions, she informed me that the appellant instructed his current solicitors a few days before they wrote their letter to the UT dated 19 December 2019.

11. I provided Ms Miszkiel and Mr Lindsay with copies of the FtT grounds.

12. There was some overlap between the two sets of grounds. It was clear that Ms Miszkiel had permission to argue those of the FtT grounds which came within the ambit of the UT grounds. These are described and dealt with below, at (A).

13. Ms Miszkiel did not have permission to argue the remainder of the FtT grounds, nor did she suggest at the hearing before me that she did. Indeed, it is impossible to see how it can be said that the appellant had permission to argue the remainder of the FtT grounds given that the application that Judge Kamara considered was the application to the Upper Tribunal for permission, that the UT grounds did not state that the appellant continued to rely upon the FtT grounds and that the UT grounds did not otherwise incorporate the FtT grounds.

14. Ms Miszkiel made an application at the hearing for permission to rely upon certain of the FtT grounds in respect of which the appellant did not have permission. These are described and dealt with below, at (B).

15. I heard submissions on the application for permission to amend *de bene esse*.

16. Given that the grounds in respect of which the appellant had permission and the grounds in respect of which Ms Miszkiel sought permission challenged the judge's assessment of credibility, I have borne in mind the possibility that, whilst one or more of the grounds or proposed grounds may not in themselves be sufficient to cause the decision of the judge to be set aside, the position might be otherwise on a holistic consideration of them all.

17. I pause here to record that Ms Miszkiel informed me that she did not seek to rely upon para 22 of the FtT grounds because this relied upon the notes of Ms Walker of the appellant's oral evidence at the hearing concerning the third incident but Ms Walker's notebook had not been submitted, nor was there any witness statement from Ms Walker. The judge's manuscript Record of Proceedings (RoP) did not assist in this regard because this part of the RoP was not legible.

18. I shall now deal first with the grounds in respect of which the appellant has permission before dealing with the grounds in respect of which Ms Miszkiel made her application for permission to amend. I have adopted my own numbering of the grounds indicating clearly which of the UT grounds and the FtT grounds my numbered grounds relate to.

<u>(A) The grounds in respect of which the appellant has permission</u>

19. These grounds may be summarised as follows:

(i) Ground 1 (ground 1 of the UT grounds and paras 4-6 of the FtT grounds): At para 29, the judge said that he had difficulty in reconciling the assessment of Dr Dhumad in his second report to the effect that the overall condition of the appellant had deteriorated since his previous assessment in December 2018 with the entries in the GP records during that period. The judge considered that the entries in the GP records did not appear to support Dr Dhumad's later assessment *"such that I have difficulty in accepting the overall conclusion of Dr Dhumad in his later report"*.

Ground 1 contends that the judge had misapprehended the GP records which, it is contended, were consistent with Dr Dhumad's opinion that the appellant's condition had deteriorated in the period between December 2018 and July 2019.

ii) Ground 2 (ground 2 of the UT grounds and paras 8-11 of the FtT grounds): Although the judge had stated at para 13 of his decision that he had informed the parties that he had agreed to the appellant being treated as a vulnerable witness, there was nothing in his decision to indicate that he had applied the Joint Presidential Guidance Note No 2 of 2010, *'Child, vulnerable adult and sensitive appellant guidance'* (hereafter the "Joint Presidential Guidance"), in his assessment of the appellant's credibility. He did not refer to the appellant's mental illness as being a potentially relevant factor in his assessment of the difficulties in the appellant's evidence which he considered adversely affected the appellant's credibility.

iii) Ground 3 (ground 3 of the UT grounds): Ground 3 contends that the judge failed to take into account the overall evaluation of Dr Martin at para 6.2 of his report, that the scars were typical of torture. In view of the overall evaluation of Dr Martin, the judge should have made a finding as to whether the appellant had been tortured because Dr Martin had ruled out other causes.

20. I turn now to ground 1.

21. Ms Miszkiel took me to the GP records for the period between December 2018 and July 2019. Mr Lindsay did not dispute that these showed that, as at December 2018, the appellant was prescribed mirtazepine 15mgs, that the dose was doubled on 16 April 2019 to 30 mgs and that he remained on the higher dose of 30 mgs in July 2019.

22. However, Mr Lindsay drew my attention to the fact that the entry for 16 April 2019 stated, inter alia: "*History: (1) … recently feeling anxious all the time - 2 yr hx but seems worse now, nil triggers. mood low. compliance with mirtazepine 15 mgs …*" whereas the entry for 11 July 2019 stated, inter alia: *"Examination: looks well. appropriately dressed. smiling + maintaining good eye contact. Appropriate response/speech."*

23. Mr Lindsay submitted that, even if the appellant was taking medication in July 2019 at double the dose that he had been taking in December 2018, the entries for 16 April 2019 and 11 July 2019 in the GP records showed that the appellant's *condition* had improved between December 2018 and July 2019. On this basis, Mr Lindsay submitted that the judge was entitled to conclude that the GP records could not be reconciled with the opinion of Dr Dhumad that the appellant's condition had deteriorated in the period between December 2018 and July 2019.

24. I do not accept Mr Lindsay's submission that the GP records show that the appellant's condition had improved between December 2018 and July 2019. In my view, Mr Lindsay was seeking to focus only on the appellant's outward physical presentation on 11 July 2019, as recorded in the entry of that date in the GP records, as being determinative of the state of his mental health then. However, it is reasonable to think that Dr Dhumad, as a consultant psychiatrist and cognitive behavioural psychotherapist, would have focused on the appellant's *overall* condition, and not merely upon his physical presentation.

25. The judge was aware that the appellant's medication was increased from 15 mgs mirtazepine to 30 mgs, as he said at para 29 that this was mentioned in the report of Dr Dhumad. However, on any reasonable view, he could not have taken this into account when he said that he had difficulty in reconciling Dr Dhumad's opinion with the GP records. Given that the appellant's medication was doubled in April 2019, the GP records could not reasonably be said to be at odds with the conclusion of Dr Dhumad that the appellant's overall condition had deteriorated between December 2018 and July 2019.

26. Accordingly, I am satisfied that the judge did err in law in his assessment of the medical evidence when he said that he had difficulty in reconciling the assessment of Dr Dhumad in his second report of July 2019, that the overall condition of the appellant had deteriorated since his previous examination of the appellant, with the entries in the GP records for the relevant period "*such that he [had] difficulty in accepting the overall conclusion of Dr Dhumad in his later report*". It is clear from the way the judge expressed himself in this sentence that his error in concluding that Dr Dhumad's opinion was at odds with the GP records led him either to place less weight than he otherwise might have or to ignore it completely.

27. I have therefore concluded that ground 1 is established.

28. I turn to ground 2.

29. Paras 14 and 15 of the Joint Presidential Guidance state:

> "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 the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
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> 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."

30. Ms Miszkiel submitted that the judge had erred by failing to apply the Joint Presidential Guidance in his assessment of credibility. The judge only mentioned the

Joint Presidential Guidance at para 13 of his decision where he referred to the fact that the appellant had said in cross-examination that he did not want to answer any questions about being pushed down a well and then said:

> "I explained that I agreed to the Appellant being treated as a vulnerable witness but that no specific requests had been made at the outset of the hearing on behalf of the Appellant as to any matters about which he should not be questioned or as to any limits to questioning and reference was made to the report of Dr Dhumad dated 4.12.2018 which stated that the Appellant was fit to attend court and give oral evidence and, in that report and the later report of Dr Dhumad, reference was only made to extra time and more breaks being allowed for the Appellant. I made clear that it was not for the Appellant to select which questions he did or did not wish to answer and I stated that we could take a break during which Ms Walker could make clear to the Appellant that he could take whatever breaks he needed and as much time as was needed was available for the hearing but that it was not open to the Appellant to select the questions that he wished to answer. A break was taken and the hearing resumed with Ms Walker confirming to me that she had explained the position to the Appellant which he understood."

31. Ms Miszkiel submitted that, in particular, the judge erred in failing to apply the Joint Presidential Guidance when he took into account at para 25 of his decision, against the appellant's credibility, the discrepancy between the appellant's oral evidence that the total period he had spent at the two hospitals following the second incident was 7 days and his asylum interview when he had said that he had spent a total of one month and one week at the two hospitals. At para 25, the judge said that he did not accept the appellant's explanation that he had made a mistake in answering the question due to the problems he had with his memory. In assessing the appellant's explanation, the judge failed to apply the Joint Presidential Guidance.

32. Ms Miszkiel submitted that, given that the appellant had said that he had suffered a head injury when he fell down the well, that he had been tortured and given that the judge had documents from the two hospitals in question that confirmed the period that the appellant had spent in each hospital, the judge should have made allowances in his consideration of the discrepancies in the appellant's evidence about the length of his stay at the two hospitals.

33. Furthermore, at para 22 of his decision, the judge said that he had borne in mind, when assessing evidence given especially at interviews, that *"small inconsistencies and errors may be attributable to matters such as nerves and consequently may not merit much weight"*. However, he made no mention of the need to apply the Joint Presidential Guidance in his assessment of credibility, at para 22 or anywhere else in the decision.

34. In response, Mr Lindsay submitted that the judge did apply the Joint Presidential Guidance in his assessment of credibility. In this regard, he drew my attention to the following:

    i) para 16.7 of Dr Dhumad's first report (page 40 of bundle SB1) where Dr Dhumad said that the appellant's concentration was poor and he therefore recommended that he is offered some adjustments in court such as extra time and more breaks;

ii) para 6.4 of Dr Dhumad's second report (page 10 of bundle SB2) where Dr Dhumad said that the appellant is vulnerable, that he is able to follow the proceedings meaningfully and participate safely and that he needs some adjustments such as more time and regular breaks; and

iii) para 13 of the judge's decision where he referred to the appellant having been given a break of 15 minutes and also to the fact that Dr Dhumad's reports had only made reference to the appellant being given extra time and allowed more breaks.

35. Mr Lindsay drew my attention to the fact that the grounds do not assert that Dr Dhumad's recommendation had not been complied with.

36. It is clear that the only reference to the Joint Presidential Guidance in the judge's decision is at para 13 where he said, in dealing with the fact that the appellant had said that he did not want to answer any questions about being pushed down a well, that the appellant could take whatever breaks he needed and as much time as he needed but that it was not open to him to select the questions that he wished to answer.

37. It is clear that, at para 25 of his decision which dealt with the discrepancy in the appellant's evidence about the total length of stay at the two hospitals, a discrepancy which the judge described as very significant, he did not explain pursuant to para 15 of the Joint Presidential Guidance the effect that he considered the appellant's vulnerability had in assessing the discrepancy. Nor did he mention the Joint Presidential Guidance at para 22, as Ms Miszkiel submitted, or anywhere in his decision other than at para 13 in connection with the fact that the appellant had said that he did not want to answer any questions about being pushed down a well.

38. However, the ways in which, and the extent to which, a person's vulnerability may impact upon their account or accounts of their experiences varies from case to case. Each case is different. In the instant case, Dr Dhumad said that the appellant's condition was consistent with moderate depressive episode and PTSD and he made clear in his reports that the appellant should be given extra breaks and allowed more time. There was nothing in Dr Dhumad's reports that suggested that the appellant may have difficulties in relaying his history accurately provided he was given extra breaks and allowed more time. Ms Miszkiel drew my attention to the fact that the appellant had said that he had had a head injury when he fell down the well. However, it is clear from para 25 of the judge's decision that the appellant was able to give very precise information about the dates when specific incidents happened. Furthermore, there was simply no medical evidence that he suffered from memory problems due to any such head injury or for any other reason.

39. Given that there was no medical evidence that the appellant suffered from memory problems, that there is no suggestion that the recommendations made in Dr Dhumad's reports were not complied with at the hearing, that Dr Dhumad's reports did not indicate that the appellant might have problems in relaying his history accurately provided he was given extra breaks and allowed more time, I am not persuaded that it was necessary for the judge to refer in terms to the Joint Presidential Guidance in order to make clear that he had applied it in assessing credibility. If he had said something explicitly, he could only have said that Dr

Dhumad's reports did not assist the appellant because there was nothing in the reports to indicate that the appellant's mental health condition might be an explanation for the discrepancy. Indeed, even if he had overlooked applying the Joint Presidential Guidance in his assessment of credibility at para 25, he could not have said anything other than that Dr Dhumad's reports do not help to explain the discrepancy, for the reasons I have given.

40. Accordingly, I have concluded that ground 2 is not established.

41. I turn to ground 3.

42. During the course of her submissions in relation to ground 3, Ms Miszkiel argued that the judge had erred in that: (i) he should have placed more weight on the report of Dr Martin; (ii) he should have assessed Dr Martin's report with "*more anxious scrutiny*"; (iii) he considered Dr Martin's report after he had assessed the rest of the evidence; and (iv) he failed to take into account that Dr Martin had ruled out other causes. When I pointed out that these submissions went beyond the ambit of ground 3 of the UT grounds and that she would therefore need permission, Ms Miszkiel said she would limit herself to ground 3 of the UT grounds as pleaded.

43. The submission that the judge had erred by failing to make a finding as to whether the appellant had been tortured ignores the fact that he made a clear finding that he was not satisfied that the appellant had given a truthful and accurate account and that he did not accept the core of the appellant's account, at para 32. It is also clear from the judge's reasoning at paras 23-31 that he did not accept that any of the three incidents that the appellant relied upon had occurred. It is therefore implicit that he rejected the appellant's evidence that he had been tortured.

44. Ms Miszkiel also relied upon paras 32-35 of the Supreme Court's judgment in KV (Sri Lanka) [2019] UKSC 10. I agree with Mr Lindsay that KV (Sri Lanka) is irrelevant in deciding whether the judge had materially erred in law given that he did not rely upon, or take into account, any possibility of the appellant's scars having been self-inflicted.

45. Ms Miszkiel came close to suggesting that, in view of Dr Martin's opinion about the appellant's scars and his view as to the likelihood of alternative causes, the judge should have made a finding as to whether the appellant had been tortured on the basis of Dr Martin's report alone. I agree with Mr Lindsay that this submission is misconceived given that it is clear from decided cases that medical evidence forms part of the overall evidence and that an assessment of credibility should be undertaken on an assessment of the evidence as a whole.

46. Mr Lindsay submitted that Dr Martin's consideration of the possibility of Scars 1 being the result of self-inflicted injuries was inconsistent because he had stated (para 5.5.1 on page 21 of bundle AB1) that it was "*impossible*" that the injuries were self-inflicted because the scars were an area of the back "*which would have been difficult to self-reach*". He submitted that the fact that an area was difficult to reach does not mean that it is impossible. In my view, Mr Lindsay was merely seeking to split hairs. It was well within Dr Martin's expertise to arrive at his conclusion in relation to each set of scars. It is sufficient that he demonstrated that he had considered possible alternative causes in order to reach his opinion on each set of scars.

47. Finally, Mr Lindsay drew my attention to the fact that Dr Martin did not state that, in his opinion, the appellant's scars were 'diagnostic' of torture but that Scars 1 were 'typical' and Scars 2 and 3 'highly consistent with' injuries caused as described by the appellant. He submitted that only scars that were diagnostic of torture meant that other causes were ruled out. Scars that were 'highly consistent with' meant that other causes exist and scars that were 'typical of' meant that other possible causes exist. He submitted that ground 3 was therefore fatally undermined.

48. In this regard, it seems to me that Mr Lindsay was, in effect, submitting that, in the absence of an opinion that the appellant's scars were 'diagnostic' of torture, any error of law on the part of the judge in his assessment of Dr Martin's report is not material. That cannot be right.

49. The judge considered Dr Martin's report at paras 27-28 of his decision which I now quote:

> "27. In relation to the medical report of Dr Martin dated 17.6.2017, this was based upon an examination and interview of the Appellant as well as consideration of documentation detailed in Dr Martin's report. The examination of the Appellant by Dr Martin showed that the Appellant had scarring to his back and trunk. The scarring consisted of six round hyper-pigmented scars to the back (from the Appellant's detention in July 2016), several elongated hyperpigmented scars also to the back (from the Appellant's detention in 2013) and, to the trunk of the Appellant, one mildly hyper-pigmented scar (again from the Appellant's detention in 2013). In the section of the report where particularly important general principles are detailed, Dr Martin states (amongst other things) that after six months it is usually impossible to estimate the date of an injury with any degree of accuracy. In relation to the six round scars, Dr Martin states that: *"they are typical intentionally and unwittingly caused injuries as described by the claimant".* In respect of the other scars, Dr Martin states that *"the appearance of the scars is highly consistent with deliberate injuries during an assault as described by the claimant".* Dr Martin adds that deliberate self-harm is a theoretical possibility for the scars from the 2013 detention although very unlikely in view of the position of the scars. <u>In the section of the report entitled 'Summary and Conclusion', it is stated (amongst other things) that: *"[The appellant's] overall pattern of scarring is not suggestive of a self-inflicted explanation".* I note also that Dr Martin states that the six round scars were not caused by any recognised religious or cultural ritual and they were not caused by any surgical procedure and that it is unlikely that the other scars were caused by a surgical procedure</u>.
>
> 28. In consideration of the report of Dr Martin, I was directed to the relevant paragraphs in the skeleton argument provided on behalf of the Appellant and I was also provided with the judgment of the Supreme Court in the case of KV which I considered. All the scarring of the Appellant was more than six months old at the time of the examination of Dr Martin which makes it, according to Dr Martin, usually impossible to estimate the date of an injury with any degree of accuracy. It is not, therefore, possible to estimate the date of the scarring to the Appellant. <u>I also take note of one of the concluding comments of Dr Martin that the overall pattern of scarring is not suggestive of a self-inflicted explanation</u>. <u>Overall, I do attach weight to the report of Dr Martin but I must also consider the</u>

report of Dr Martin along with all the other evidence."

(my emphasis)

50. It is clear that the judge quoted extensively from Dr Martin's report and set out his opinion in relation to each set of scars. He also referred to the "*Summary and conclusion*" insofar as it mentioned the likelihood of the alternative cause being self-inflicted injuries. What is notably absent from paras 27 and 28 is the fact that Dr Martin stated that his overall evaluation of all lesions, in line with para 188 of the Istanbul Protocol, is that the scars were typical of torture.

51. It is true that judges are not obliged to refer to every piece of the evidence. Even if a document or aspect of evidence is not referred to in terms, it does not follow that the judge had not taken it into account or that any failure to do so, if established, is material.

52. In the instant case, the judge said at para 22 of his decision that he had considered all of the documentation provided even if he had not referred to it specifically. Not only did the judge specifically refer to Dr Martin's report, he did so in some considerable detail. I am therefore slow to reach the conclusion that he failed to take into account Dr Martin's overall evaluation.

53. It is necessary, in my view, to remind oneself of para 188 of the Istanbul Protocol, which I have set out above. It is clear from this that it is ultimately "*the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story*". I consider this fact in conjunction with the fact that it was Dr Martin's overall evaluation that the scars were "*typical of torture as described by the appellant*" and the fact that such an opinion is not encountered very often in this jurisdiction, in my experience. It is clear from para 188 of the Istanbul Protocol that an overall evaluation to the effect that the appellant's scars were typical of torture as alleged by the appellant actually *increases* the likelihood that his account is true as compared with the opinion as to the consistency of each individual set of scars with the account given. In these circumstances, I am satisfied that the judge should have demonstrated, in terms, that he had taken into account Dr Martin's overall evaluation, failing which I cannot be satisfied that he had taken it into account in his assessment of credibility.

54. I am therefore satisfied that the judge erred in failing to take into account the overall evaluation of Dr Martin. This error led him to give less weight to Dr Martin's report than he might otherwise have given it. Ground 3 is therefore established.

55. However, it does not follow that ground 3 is material. I am not satisfied that it is material, *taken on its own*, given that the judge did give weight to the report of Dr Martin.

The application for permission to amend the grounds

56. Mr Lindsay objected to permission being granted to amend the grounds. He submitted that the test in deciding whether permission to amend the grounds should be granted was whether the grounds sought to be relied upon were *Robinson* obvious points, in reliance upon the UT's decisions in AZ (error of law: jurisdiction;

PTA practice) Iran [2018] UKUT 00245 (IAC) and Durueke (PTA: AZ applied, proper approach) [2019] UKUT 00197 (IAC).

57. This submission is misconceived, in my view. As is well-known, "*Robinson obvious*" is a term derived from the Court of Appeal's judgment in R v SSHD ex parte Robinson [1998] QB 929. It arises in circumstances where there is a point with a strong prospect of success but which a claimant's representative has not raised in the grounds of appeal. This principle is not applicable in the instant case for the simple reason that this is not a case in which the point sought to be relied upon has not been raised by the appellant. All of the grounds that Ms Miszkiel sought to rely upon in her application for permission to amend the grounds were raised in the FtT grounds.

58. I consider the application for permission to amend the grounds by taking into account the following factors: The fact that the application for permission to amend the grounds was made at a very late stage, i.e. at the hearing itself; the explanation for the delay in making the application; the underlying merits of the grounds sought to be relied upon; their impact on the appellant's case in this appeal as a whole; the overriding objective and any prejudice to the respondent.

59. The grounds for which Ms Miszkiel sought permission to amend may be summarised as follows:

    i) Proposed ground 4 (para 16 of the FtT grounds): The judge misapprehended the appellant's oral evidence, at para 23 of his decision, in his assessment of the first incident.

    ii) Proposed ground 5 (ground 4 of the FtT grounds): The judge erred in failing to make findings in relation to the oral evidence of the appellant's uncle and the witness statements from the appellant's family members in Sri Lanka. He failed to give reasons why he gave no weight to this evidence.

    iii) Proposed ground 6 (ground 5 of the FtT grounds): In his consideration of the appellant's *sur place* activities at para 30 of his decision, the judge erred in stating that the photographs submitted to show that the appellant had attended demonstrations in the United Kingdom "*consist[ed] of several photographs of the Appellant at two protests…".* Proposed ground 6 contends, inter alia:

        a) that the photographs submitted showed that the appellant had attended several demonstrations in the United Kingdom. In addition, the appellant had described in his witness statements the demonstrations that he had attended which were in excess of two demonstrations;

        b) that the judge had failed to state whether, and to what extent, he accepted the appellant's evidence regarding his involvement with the TGTE; and

        c) that the judge failed to engage with the country guidance decision in GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC).

    iv) Proposed ground 7 (ground 3 of the FtT grounds): The judge erred in his assessment of the appellant's evidence relating to the third incident. At para 26, the judge said:

> "The appellant has produced a TamilNet article dated 24.7.2016 detailing the protest on that day with photographs such that I find it very difficult to accept why the posting of a photograph on Facebook of the protest by the appellant would result in his being apprehended by the police, beaten and detained by the army for five days before again being released on payment of monies. I fail to see why this claimed action by the Appellant would have prompted such a response by the Sri Lankan authorities."

Proposed ground 7 contends that the fact that the *TamilNet* article had publicised the protest was irrelevant in considering the likelihood of the appellant being of adverse interest to the Sri Lankan authorities on account of having published the photographs on Facebook. Given that *TamilNet* is a US-based Tamil news site, it was irrational to suggest that the publication of an article by an overseas media agency was relevant in considering the likelihood of the appellant being of adverse interest for publishing the photographs he had taken on Facebook. The evidence showing that *TamilNet* was a US-based Tamil news agency had not been submitted to the judge because the judge had not raised his concern at the hearing and the respondent had not relied upon it.

60. I turn to consider proposed ground 4. This relates to the first incident. The judge considered this at para 23 of his decision which reads:

> "23. … In respect of the claimed incident on 20.9.2013, <u>at the asylum interview</u> (which took place in April 2017 about three and a half years after the incident) the Appellant stated that he walked past the police station, saw a youngster being beaten by two police officers and *"the public tried to stop the police from beating the youngster but they could not".* Those people who were trying the help the youngster were *"beaten and chased away by the police".* The Appellant stated that he filmed the incident for over five minutes and that he did not know that the police were behind him watching. I do not find it at all credible that the Appellant would have been allowed to record a very violent incident such as this for over five minutes when two police officers were beating up a youngster at the same time, members of the public had involved themselves in the violent incident by trying to prevent the police officers from beating up the youngster and there were other police officers present at the scene who were simply watching the events and allowing the Appellant to continue filming for such a length of time despite the Appellant stating at the hearing that he now does not remember for how long he was filming although it was for some time. I also do not find it at all credible that those who had actively sought to obstruct the police physically would be beaten up and then simply chased away without any further interest from or action taken against them by the police whereas the Appellant, who had simply recorded the incident and not tried to intervene or obstruct the actions of the police, was taken away by six police officers and kept in detention for three days during which time he was beaten up and only released on payment of a bribe."
>
> (My emphasis)

61. Proposed ground 4 contends that the judge misapprehended the evidence when he said, at para 23, that it was the appellant's evidence that other members of the public were simply chased away by the police with no further interest. There is no challenge to the judge's view that it was not credible that the appellant would have been allowed to record a very violent incident such as this for over five minutes.

62. Para 16 of the FtT grounds relies upon Ms Walker's notes of the appellant's oral evidence. However, Ms Walker's notebook has not been submitted, neither was there any witness statement from Ms Walker. On the other hand, I was able to ascertain, from the judge's RoP (the relevant part of which was sufficiently legible) that the appellant had said, in cross-examination when asked whether it was right that he was not aware of anyone else being arrested, that he did not know and that someone else may have been arrested.

63. It is not clear whether the judge was referring to the appellant's oral evidence in the final sentence of para 23, although it is clear that he was referring to the appellant's asylum interview in the first sentence. If the judge was referring to the appellant's oral evidence in the final sentence of para 23, then he clearly misapprehended the evidence given that his RoP shows that the appellant had said, in cross-examination when asked whether it was right that he was not aware of anyone else being arrested, that he did not know and that someone else may have been arrested.

64. If, on the other hand, the judge was referring to the appellant's evidence at his asylum interview, the judge failed to take into account the appellant's oral evidence that he did not know what had happened to others and that some else might have been arrested. In either event, it is clear that the judge did err in law.

65. If therefore the appellant had permission to argue proposed ground 4, it would be established.

66. In relation to proposed ground 5, Mr Lindsay did not seek to suggest that the judge had considered the evidence of the appellant's uncle. There was a witness statement from the appellant's uncle. He also gave oral evidence.

67. However, Mr Lindsay submitted that the fact that the judge had not engaged with the evidence of the appellant's uncle, in terms, does not mean that he did not take it into account. In this regard, Mr Lindsay relied upon the fact that it has been made clear in several cases that judges are not obliged to refer to every aspect of the evidence.

68. I have no hesitation in rejecting Mr Lindsay's submission. Whilst it is correct to say that judges are not obliged to deal with every aspect of the evidence before them or every document that is before them, proposed ground 5 concerns the evidence of a witness who gave oral evidence which was potentially corroborative of part of the appellant's case because it was alleged that it was this uncle who had sent the funds that were used to pay the bribe for his release from his detention in 2016.

69. I therefore have no hesitation in concluding that, if the appellant had permission to argue proposed ground 5, it would be established.

70. Proposed ground 6 concerns the appellant's evidence about his *sur place* activities which the judge considered at para 30 of his decision. Para 30 reads:

> "30. With respect to the political activities of the Appellant he stated that he was not a member of the LTTE in Sri Lanka and that, whilst being in the UK, he stated in his asylum interview that he was not a member of the TGTE but refers to his activities for the TGTE at length in his witness statements of 19.12.2018 and 9.9.2019. The Appellant gave evidence that the Sri Lankan authorities would be aware of his activities in the UK but I do not find that the evidence produced by

the Appellant, which consists of several photographs of the Appellant at two protests, supports that claim."

71. Ms Miszkiel sought to rely upon various pages in the bundles that were before the judge in order to demonstrate that the judge had had before him photographs that established that the appellant had attended more than two demonstrations. However, the pages she relied upon were missing from the bundles that were before the judge. Several pages had simply been omitted from the appellant's bundles. It was clear from the page numbering that several pages were missing.

72. In this connection, I noted that the Presenting Officer who represented the respondent before the judge made an application at the commencement of the hearing before the judge for the hearing to be adjourned, stating that the number of bundles and witness statements made conduct of the hearing and presentation of his case difficult. Ms Walker, representing the appellant, acknowledged before the judge that a consolidated bundle would have been helpful but objected to the adjournment request.

73. In view of the objection made on the appellant's behalf to the adjournment request and the sheer number of documents lodged, the judge's failure to draw the appellant's attention at the hearing to the incomplete bundles did not give rise to any unfairness, in my judgement. The judge may not even have been aware at the commencement of the hearing or during the hearing that there were many missing documents.

74. However, as Ms Miszkiel submitted, the appellant described his *sur place* activities in detail, at paras 13-34 of his "additional witness statement" dated 19 December 2018 (pages 3-9 of bundle SB1). Two points emerge from this witness statement:

    i) The appellant described having attended more than two demonstrations, providing a level of detail about a certain number and describing others in brief terms.

    ii) In the case of all of the demonstrations, his witness statement specifically referred to pages in his bundles by number, the pages which I discovered at the hearing before me were in fact missing from the bundles that were before the judge.

75. Having considered the detail in the additional witness statement and noted that the page numbers of the bundles mentioned in the additional witness statement were missing from the bundles that were before the judge, I am satisfied that the judge failed to consider relevant evidence about the appellant's *sur place* activities. If he had considered the appellant's additional witness statement, he would have noted that there were several pages that were missing from the bundles and that he simply could not fairly assess the appellant's profile on account of his *sur place* activities without the missing pages. At that stage, notwithstanding that the appellant had objected to an adjournment for a consolidated bundle to be produced, the judge would have had no option but to notify the parties that the bundles before him were incomplete and, if necessary, reconvene the hearing. The fact that the judge did not take this action and referred at para 30 to only two demonstrations satisfies me that he did not take into account the appellant's evidence in his additional witness statement about his *sur place* activities.

76. Accordingly, if the appellant had permission to argue proposed ground 6, it would be established.

77. In my judgement, there is sufficient merit in proposed grounds 4, 5 and 6, when combined with grounds 1 and 3, to lead me to conclude that the judge had materially erred in law, albeit that grounds 1 and 3 were not sufficient in themselves. This is so notwithstanding the fact that the judge gave other reasons for his adverse credibility assessment. However, I still need to consider the remaining issues explained at para 58 above, such as the length of the delay and the explanation for the delay.

78. I turn then to consider the explanation for the delay in making the application for permission to amend the grounds and the other factors mentioned at my para 58 above.

79. The application for permission to amend the grounds was made at the last minute, i.e. at the hearing. The explanation given for the delay in making the application for permission to amend the grounds was that Ms Miszkiel had only recently been instructed and that she did not have sight of the FtT grounds until I provided her with them at the commencement of the hearing. When I pointed out to Ms Miszkiel that it was a matter for the appellant that he chose to withdraw instructions from his previous representatives and instruct his current representatives shortly before the festive period in December 2019 and in the knowledge that his appeal was due to be heard in the UT in the first week of January 2020, Ms Miszkiel informed me (having taken instructions) that the reason why the appellant instructed his current representatives was that he was concerned about the representation he was receiving from his solicitors.

80. It is plain from my assessment of proposed ground 6 that the appellant was prejudiced by his previous representative's failure to submit complete bundles. Not only were the bundles incomplete, there was no indication in the index or anywhere else that there were missing pages and that these would be submitted subsequently. This is simply unacceptable.

81. On the other hand, it was a matter for the appellant that he chose to instruct new solicitors at the time that he did. He would have known that much of the period between that date and the date of his hearing fell over the festive period. It is therefore reasonable to think that he could have anticipated that the timing of his decision to withdraw his instructions from his previous representatives and instruct his current representatives was such that it would be unlikely that his new solicitors would receive his papers from his previous representatives in time for them instruct Counsel in sufficient time to be properly prepared for the hearing on 8 January 2020.

82. On the other hand, Mr Lindsay was able to address me in full on the proposed grounds 4, 5 and 6.

83. In these circumstances and taking into account the overriding objective, I have decided to exercise my discretion and grant the application for permission to amend the grounds to include proposed grounds 4, 5 and 6.

84. I am satisfied that grounds 1, 3, 4, 5 and 6 establish that the judge had materially erred in law, that his decision to dismiss the appellant's appeal on asylum grounds,

humanitarian protection grounds and Article 3 of the ECHR should be set aside and that his reasoning at paras 22-32 should be set aside in its entirety. My reasons are given above. There is no therefore need for me to consider proposed ground 7.

85. The appellant's asylum claim, the related Article 3 claim and his humanitarian protection claim are to be decided again on the merits.

86. The following are to stand:

i) The judge's summary of the oral evidence, at paras 13-16 of his decision. This does not refer to the evidence that was the subject of ground 4.

ii) The judge's assessment of the appellant's Article 8 in the latter part of para 32 of his decision, where he said:

> "32. … The Appellant is not married, has a girlfriend in Sri Lanka which is where he had always lived prior to coming to the UK and where his parents, siblings and other family members live. I see no reason why the Appellant cannot return to Sri Lanka and continue his life there with the support of his family. I find that there is nothing about his case that makes his removal from the UK a disproportionate breach of his right to a private and family life as protected by Article 8 of the ECHR."

The judge's assessment of the appellant's Article 8 claim was not challenged in the FtT grounds or the UT grounds, nor was it raised at the hearing before me.

87. The next question is whether the decision on the appellant's appeal should be re-made in the UT or whether the appeal should be remitted to the FtT.

88. Ms Miszkiel requested that the appeal be remitted to the FtT. Mr Lindsay agreed that, in the event that credibility needs to be re-assessed in its entirety, the appeal should be remitted.

89. I am, of course, aware that, in the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it 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."

90. I am also aware that this appeal was previously decided by Judge of the First-tier Tribunal N Manyarara whose decision was set aside and the appeal remitted. Ms Miszkiel submitted that this fact should not lead me to refrain from remitting the appeal as it is not the appellant's fault that this is the second time that the decision in

his appeal has been set aside. However, the decision whether or not the appeal is remitted is not made by considering whether or not the appellant is at fault.

91. There is a lot of evidence in this case. The overall evaluation of Dr Martin of the appellant's scars is not one that is encountered very often. In these circumstances, I am satisfied that the appellant ought to have his appeal decided again by the FtT so that, if the decision is again adverse, he will have a further level of scrutiny.

92. I have therefore reluctantly concluded that it is only fair that this appeal be remitted again to the FtT.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision to dismiss the appeal on asylum grounds, humanitarian protection grounds and in relation to Article 3 of the ECHR is set aside. The decision to dismiss the appeal in relation to Article 8 of the ECHR stands.

This case is remitted to the First-tier Tribunal for a re-hearing of the appellant's asylum claim, humanitarian protection claim and Article 3 claim on the merits by a judge other than Judge of the First-tier Tribunal N Manyarara and Judge of the First-tier Tribunal K Swinnerton.

Directions to the parties

(1) An interpreter in the Tamil language (as spoken in Sri Lanka) will be provided at the hearing, unless notified otherwise by the appellant within 5 days of the date on which this decision is sent to the parties.

(2) It will be assumed that the appellant and his uncle will give evidence at the hearing unless notified otherwise by the appellant within 5 days of the date on which this decision is sent to the parties.

(3) Not less than 14 calendar days before the next hearing date, the appellant to file and serve a single consolidated paginated and complete bundle as follows:

i) The bundle must include all documents previously served as well as any further documents that he seeks to rely upon.

ii) In relation to any background evidence relied upon, essential passages must be identified in a schedule, or highlighted.

At the same time, the appellant must file and serve a skeleton argument identifying all relevant issues and citing relevant authorities.

Signed
Upper Tribunal Judge Gill

Date: 20 January 2020