IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001325
First-tier Tribunal No: PA/52533/2020
IA/00146/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 January 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

RR (SRI LANKA)
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Dolan, instructed by ASK Solicitors
For the Respondent: Ms Ahmed, Senior Presenting Officer

Heard at Field House on 13 December 2022

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court. We make this order because the appellant is an asylum seeker.

DECISION AND REASONS

1. The appellant is a Sri Lankan national who was born on 2 March 1978. He appeals, with permission granted by Judge Feeney, against the decision of First-tier Tribunal Judge R Hussain. By his decision of 17 August 2021, Judge Hussain ("the judge") dismissed the appellant's appeal against the respondent's refusal of his protection and human rights claims.

Background

2. The appellant entered the United Kingdom in April 2008. His asylum claim was made later that month and was refused very promptly the following year. An appeal was heard and dismissed by First-tier Tribunal Judge Chana in July 2008. Judge Chana did not accept that the appellant had encountered problems with the Sri Lankan authorities as a result of his association with a man called Mr Sritharan, or that he would be at risk on that account. Permission to appeal against that decision was refused and the appellant became appeal rights exhausted.

3. The appellant did not leave the United Kingdom. He made further submissions in January 2017 but those submissions were not considered to amount to a fresh claim. Then, in July 2017, the appellant made a second set of further submissions. These submissions were drafted by his current solicitors and the primary assertion was that the appellant would be at risk in Sri Lanka on the basis of his pro-Tamil activities within the diaspora. Personal and background evidence was provided in support of these submissions. The submissions were supplemented, in August 2019, by a medico-legal report from an independent medical practitioner named Dr Goldwyn. In this report, Dr Goldwyn described the scars on the appellant's body and considered them against the framework provided by the Istanbul Protocol. She also expressed opinions about the appellant's mental health, stating that he was suffering from PTSD and severe depression.

4. On 15 October 2020, the Secretary of State accepted that the appellant's further submissions amounted to a fresh protection claim but she refused that claim on its merits, thereby enabling the appellant to appeal to the First-tier Tribunal for a second time.

The Appeal to the First-tier Tribunal

5. The appellant appealed against the respondent's decision and his appeal was heard by the judge, sitting remotely at Hatton Cross, on 6 July 2021. Both parties were represented by counsel. The appellant did not give evidence because Dr Goldwyn had opined in an addendum report dated 3 March 2021 that he was 'in too fragile a mental state to be questioned in an adversarial manner'. The judge therefore heard submissions from counsel before reserving his decision.

6. In his reserved decision, the judge took Judge Chana's decision as his starting point and concluded, after considering the additional evidence provided by the appellant, including Dr Goldwyn's reports, that he reached the same conclusion as regards the credibility of the appellant's historical account. He did not accept that the appellant was at risk on account of his diaspora activities because there was 'insufficient evidence of any prominent role or activity such that he would come to the attention of the Sri Lankan authorities'. He did not accept that the appellant's return to Sri Lanka would be in breach of Article 3 ECHR on medical

grounds because he did not accept that the appellant suffered from PTSD or that there was a risk of suicide.

The Appeal to the Upper Tribunal

7. There are no fewer than eight grounds of appeal against the judge's decision but they were helpfully grouped together by Mr Dolan in his able submissions. It was contended that the judge erred in law in his consideration of Dr Goldwyn's evidence as to mental health and scarring; that the judge failed to consider the extant country guidance decision in evaluating the appellant's sur place claim; and that there was no adequate consideration of the appellant's Article 3 ECHR claim which was brought, as we have already noted, in reliance on his mental health problems.

8. The respondent prepared a response to the grounds under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. That had not been received by the Tribunal or Mr Dolan and Ms Ahmed provided copied immediately by email. Mr Dolan confirmed that he was not disadvantaged by this late service. Nor did he object to it.

Submissions

9. In developing the grounds of appeal, Mr Dolan asked us to note what had been said about Dr Goldwyn's report at [35] of the respondent's decision: there was seemingly no disagreement over what was said in the report. The judge had erred, Mr Dolan submitted, in suggesting that Dr Goldwyn had not considered what had been said by Judge Chana; that decision was one of the documents which Dr Goldwyn had listed as having been provided to her. The expert had noted that she was aware of the appellant having made contradictory statements in the past. The judge had also erred in dismissing the report because it relied heavily on the appellant's account; Dr Goldwyn had noted in her report that she had not done so, and had also taken clinical factors into account. It was obviously necessary for the judge to come to his own conclusion about the appellant's mental health but he was required to adopt a lawful approach to the medical evidence en route to that conclusion. That was particularly so when the respondent's stance was as set out at [35] of the decision under appeal.

10. As for the appellant's scarring, it was important to note that the appellant had not produced a report before Judge Chana, and that she had refused an adjournment application made by counsel in order that such a report could be obtained. Dr Goldwyn had considered the scarring and had used the Istanbul Protocol in order to gauge the consistency of that scarring with the causes claimed by the appellant. Whatever the reason, Judge Chana had not had that evidence. The judge had observed that the scars did not 'necessarily' lead to the conclusion that the appellant had been ill-treated in the manner claimed. The use of the adverb suggested that the judge had misdirected himself in law.

11. As for the sur place claim, Mr Dolan accepted that there was relatively scant evidence in support of this limb of the appeal. It was expressly relied upon by the appellant, however, and it was for the judge to resolve it lawfully. He had failed to do so because he had failed to consider the country guidance given in KK & RS (Sri Lanka) CG [2021] UKUT 130 (IAC) and had consequently erred in his reference to the appellant not having a 'prominent' role.

12. Mr Dolan submitted finally that the judge had erred in his consideration of the Article 3 ECHR medical claim; there had been no adequate analysis of what was said by Dr Goldwyn and no application of the leading authorities on the point.

13. For the respondent, Ms Ahmed submitted that there was no legal error in the decision of the FtT. This was a case to which Devaseelan [2003] Imm AR 1 applied and Judge Chana had given extensive reason for finding against the appellant. The judge had given sound reasons for rejecting Dr Goldwyn's opinion, not least of which was the fact that he had not sought or received any treatment from the NHS for his mental health. The grounds of appeal were in error in suggesting that the judge had rejected Dr Goldwyn's opinions merely because the appellant had been found incredible by Judge Chana. The judge's paragraph [23] was to be considered as a whole. It was correct that the expert had relied heavily on the appellant's account and that the expert had not considered the difficulties identified by Judge Chana with the appellant's narrative.

14. The judge's consideration of the appellant's scarring was adequate. The observation that no scarring report had been provided to Judge Chana was not the crux of the judge's analysis. The judge had focused, instead, on the reality of the scarring, which was that the scars were only consistent or highly consistent with the appellant's account and did not add much. The judge's observation that the scars did not 'necessarily' prove the appellant's case was to be seen in context.

15. There was very little evidence of any sur place activity. Even if there had been reference to KK& RS, the outcome would have been the same. The judge had understood the law in relation to the Article 3 ECHR medical claim and did not need to refer to all of the authorities.

16. Mr Dolan responded briefly. He did not assert that the judge's conclusion as to the scarring was irrational; the complaint was that he had erred in other ways. The judge might have rejected the appellant's sur place claim for other reasons but to reject it on the basis that the appellant was not prominent was objectionable. Dr Goldwyn's report was reliant on the appellant's account and the judge had been entitled to make that observation but she had dealt with the inconsistencies in the appellant's account and the judge had failed to take that into account. The judge had fettered his consideration of the expert evidence by reference to Judge Chana's decision.

17. We reserved our decision at the conclusion of the submissions.

Analysis

18. At [72] of its recent decision in SSHD v HA (Iraq) & Ors [2022] UKSC 22; [2022] 1 WLR 3784, the Supreme Court emphasised the need for judicial caution and restraint when considering whether to set aside a decision of a specialist fact-finding tribunal. Lord Hamblen (with whom the remaining Justices agreed) reiterated the statement made in previous decisions that 'it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right'.

19. In its evaluation of the appellant's sur place claim, however, it is unfortunately clear that the FtT got it wrong. The FtT heard the appeal in early July 2021. KK & RS – the latest Sri Lankan country guidance decision – had been issued about six weeks earlier. Although Mr Dolan did not refer to that decision in his skeleton

argument (which had been prepared before the CG decision was issued) he confirmed that he and his opponent made submissions on that decision before the judge.

20. As we have recorded, the judge's decision was issued in August 2021, by which stage the decision in KK & RS had been available for nearly three months. It should have been clear, therefore, that the appellant was not required to show that he had a high profile or a 'prominent' position in the diaspora: [21] of the headnote to that decision refers. The signal feature of the judge's decision, however, is that no reference is made to the country guidance, whether in connection with the appellant's sur place claim or otherwise. Whether or not that failure was material to the outcome of the appeal is a point to which will turn in due course. For the present, we merely observe that a failure to consider – or even to mention – the latest country guidance decision in an appeal of this nature is a matter of concern, and suggestive of a lack of anxious scrutiny on the part of the specialist judge.

21. Having made those preliminary observations, we turn to consider Mr Dolan's criticisms of the way in which the judge dealt with Dr Goldwyn's reports. As we have explained above, there were two reports. The first was supplied with the appellant's further submissions, the second appeared in the appellant's bundle before the FtT.

22. The judge considered Dr Goldwyn's evidence at [18]-[23] of his decision. At [18], he stated that the appellant relied upon 'a medical report by Dr Charman Goldwyn dated 30/05/2019'. That statement was correct but incomplete; the appellant also relied on Dr Goldwyn's addendum report of 3 March 2021, which itself ran to seven pages of single-spaced type.

23. At [19]-[21], the judge made reference to three authorities: JL (China) [2013] UKUT 145 (IAC), IY (Turkey) v SSHD [2012] EWCA Civ 1560, and BN (Albania) [2010] UKUT 279 (IAC). He then dealt with Dr Goldwyn's evidence in the following paragraphs:

> [22] I have considered the expert report by Dr. Goldwyn. The appellant relies on this in support of his claim. I recognise the writers' [sic] expertise in their field and duly regard it as independent evidence. This identifies numerous scars and [sic] are said to be consistent with the account of ill treatment given by the appellant. However I do not accept that the presence of these scars necessarily leads to the conclusion that the appellant was ill treated as claimed . This is because the appellant has been in the UK since 2008 and the expert is only able to state that the scars are over six months old. Whilst the scars are said to be consistent or highly consistent with the account of mistreatment as claimed by the appellant, the expert dos [sic] not rule out that there may well be other causes. So whilst I accept that the medical evidence demonstrates that the appellant has scars consistent with being beaten they do not show when and how they were sustained. In particular given that the appellant failed to produce a medical report at the time of his initial asylum claim and appeal hearing the ability to identify the age of the scars has been greatly diminished. The issue of a medical report was raised before FTTJ Chana and, whilst the application to adjourn for it to be obtained was refused FTTJ Chana, was aware of the scars and considered them in the context

> of the appellant's overall evidence. Consequently I do not accept that the appellant was detained and mistreated as claimed MN(Sri Lanka) v SSHD 2014 EWCA Civ 1601
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> [23] The medical report by Dr. Goldwyn also suggests that the appellant suffers from PTSD. I do not accept the opinion that the appellant suffers from PTSD or is at increased risk of suicide if he is returned to Sri Lanka. This is because the report relies heavily on the account given by the appellant himself and whilst acknowledging some inconsistencies during his asylum interview, it fails to address the many inconsistencies in the appellants [sic] account as found by FTTJ Chana. Furthermore, the report notes that the appellant, whilst being registered with a GP, only receives treatment for Blood pressure and diabetes. He seems not to have complained or received any treatment for any Psychological problems.

24. We accept Ms Ahmed's submission that these paragraphs contain some persuasive reasons for rejecting Dr Goldwyn's opinion, or for attaching little weight to that opinion. The final point made in these paragraphs – that the appellant has not sought any treatment on the NHS for his mental health problems – falls into that category. The judge's reasons are to be read cumulatively and as a whole, however, and we find that the judge erred in the following respects in his consideration of the medical evidence.

25. The judge erred, firstly, in criticising Dr Goldwyn for failing 'to address the many inconsistencies in the appellant's account as found by Judge Chana'. It was no function of the expert to undertake a running commentary or critique of what had been said by Judge Chana, however, as is clear from JL (China), which was cited by the judge. What the expert was required by that decision to do was to study any assessment made by the judge but not to conduct a running commentary on the reasoning of the judge.

26. What was said in JL (China) was attributed to one of the other decisions cited by the judge in this case: IY (Turkey), in which the medical expert (Dr Katona) had 'engaged in a detailed commentary on the FTTJ's reasoning': [24] refers. At [37], Davis LJ (with whom Longmore and Tomlinson LJJ agreed) stated that a 'running commentary on the FTTJ's reasoning is not the proper province of an expert at all'. It was not for the expert in this case to 'address' the many inconsistencies found by Judge Chana, therefore, and the judge erred in suggesting otherwise. She had plainly seen Judge Chana's decision as it was identified (as *Determination and reasons 4/7/08*) in both reports. In her second report, she described how poor she considered the appellant's short-term memory to be and how PTSD could cause difficulty in concentrating and poor memory. Similar observations were made in her first report. Dr Goldwyn also commented in that first report that 'a central feature of PTSD is the inability to remember parts of the trauma' and that there may be 'gaps in memory'. We doubt that it would have been permissible for the expert to say any more than this, and what she was certainly not required to do was to analyse and attempt to address the specific reasons given by Judge Chana for rejecting the appellant's account. One of the judge's reasons for rejecting what was said by Dr Goldwyn was therefore flawed.

27. Secondly, with respect to the judge, we do not understand what is said in the penultimate sentence of [22]. It is clear that Judge Chana was aware that the

appellant had scars and that he said to her that they had been caused by his ill treatment at the hands of the Sri Lankan authorities. But the appellant did not at that stage have a medical report which stated that the scars, aged as they certainly were, were consistent or highly consistent with the appellant's account of ill-treatment. In the circumstances, Judge Chana's consideration of the scars was immaterial; what mattered before the judge was that there was now medical evidence which offered some (albeit limited) support to the account given. We agree with Mr Dolan that this evidence did not fall squarely into the category considered at [40](4) of Devaseelan: evidence which was not brought to the attention of the first judge which should be treated with the 'greatest circumspection' by the second. This was expert evidence which tended to show that the appellant had a number of scars which were consistent or highly consistent with his account, and which the judge was required to evaluate for himself.

28. Whilst we do not accept Mr Dolan's categorisation of this error as a Mibanga v SSHD [2005] INLR 377 error, we do accept that the judge fell into error by failing to assess the credibility of the appellant's account for himself. He was required to take the medical evidence into account and he was required to take account of what it said about the scarring and the appellant's difficulties with recall. Both of those matters had a bearing on the ultimate question before the judge, which was whether he should depart from Judge Chana's original findings. In failing to consider that question correctly, we are satisfied that the judge erred as suggested in the appellant's first five grounds. It follows that the judge's assessment of the appellant's credibility cannot stand and must be set aside.

29. We were originally concerned also by the judge's observation in [22] that the scars do not 'necessarily' lead to the conclusion that the appellant was ill-treated as claimed. We baulked initially at the use of that word, which tends to suggest the application of a higher standard than is required in a protection claim. On reflection, however, and given the context in which the observation was made, we think it more likely to represent an infelicitous gloss on the Istanbul Protocol's classification of lesions. Later in the paragraph, the judge observed that Dr Goldwyn had stated that the scars were consistent or highly consistent with the appellant's attribution. By the use of the word 'necessarily', we think that the judge was merely observing that these were not scars which were 'diagnostic' or 'typical' of the claimed attribution. We do not consider ground six to disclose a legal error on the part of the judge, therefore, although that conclusion is immaterial, given the favourable view we have formed of the first five grounds.

30. We return, therefore, to the judge's consideration of the appellant's sur place claim. We are concerned that this limb of the protection claim was resolved without reference to the country guidance given in KK & RS, which was largely (although not exclusively) directed to the consideration of sur place protection claims. It was an error of law for the judge to fail to consider that guidance. But, as Ms Ahmed observed, there was very limited evidence before the judge to establish that the appellant would be at risk as a result of those activities. Given the conclusions we have reached on the first five grounds, however, we consider that the appropriate course is for the decision as a whole to be set aside and reconsidered by a different judge of the FtT. That will enable a judge of the FtT to evaluate all of the evidence and to conclude whether there is a proper basis on which to depart from Judge Chana's decision on the appellant's credibility and to consider, on the proper footing, whether the appellant would in any event be at

risk as a result of his sur place activity and whether his mental health is such that his removal would in any event be contrary to Article 3 ECHR.

Notice of Decision

The appellant's appeal is allowed. The FtT erred in law and its decision is set aside. The appeal is remitted to the FtT to be heard afresh by a judge other than Judge R Hussain.

M.J. Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

03 January 2022