IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02895/2012

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 October 2014	**On 31 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVID TAYLOR

Between

DION DIAS REGINALD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Chapman of Counsel
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a 26 year old Sri Lankan national who has been in the UK since December 2010, originally on a student visa. He applied for asylum in December 2011 and his claim was refused on 8 March 2012. He appealed against that decision.

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2. His appeal has been heard three times, having been remitted twice by the Upper Tribunal. His present appeal, and on which he seeks a further remittal and rehearing, is against the decision of First-tier Tribunal Judge Plumptre who, in a determination dated 10 March 2014, dismissed the appellant's appeal on all grounds.

3. Grounds of Appeal against that decision were submitted by Mr Nishan Paramjorthy of Counsel who had represented the appellant at almost all the previous hearings. He did not appear before me as the appellant changed his solicitors and Counsel a few days before the matter came before me.

4. Permission to appeal was first refused by Upper Tribunal Judge Martin (sitting in the First-tier Tribunal). She refused permission to appeal for the following reasons:

> "2. The first ground asserts that the judge erred in her recording of what was submitted about two previous determinations. That discloses no arguable error of law as the judge states in terms that she ignored the two earlier determinations completely as they had both been set aside for containing errors of law.
>
> 3. The second ground argues that the judge erred in not accepting the evidence of Professor Lingam in relation to the appellant's scars. On the contrary the judge was entitled to find, as she did, that the description and photographs of the scars was such that they could not have been caused in the way the appellant claimed and the expert failed to deal with that point."

5. Permission to appeal was, however, later granted by Upper Tribunal Judge Kebede on 5 June 2014 on the following basis:

> "Whilst the judge clearly undertook a detailed assessment of the medical report from Professor Lingam, the Grounds of Appeal raise issues which merit further and more detailed consideration. On that basis I am prepared to grant permission and find the grounds to be arguable."

6. In relation to my decision on the issue of error of law, there are a number of paragraphs in Judge Plumptre's determination which are relevant and, for the purposes of reference, I set them out below. The underlinings are mine.

> "9. Unhappily this appeal has had a complicated procedural history. Suffice it to say that it has been twice remitted by the Upper Tribunal. The history of the proceedings is set out with admirable clarity by Deputy UT Judge McWilliam in a determination dated 2 August 2013. Thereafter there were two abortive hearings before Judge Easterman *[in the First-*

tier Tribunal] who made notes and directions dated 3 October 2013 and 6 December 2013. The dilemma was that Judge Milligan-Baldwin had found that paragraph 14 of the Upper Tribunal decision

> '14. The finding that the appellant had been detained and tortured, which was not affected by any error of law, is to be preserved unless anything emerges during the hearing before the First-tier Tribunal to demonstrate that such a finding ought not to be preserved'

was ultra vires. This direction related to findings by Judge R I Walker who first determined this appeal. After considerable debate with Judge Easterman when the appellant was represented by the same Counsel as before me, agreement had been reached and was so maintained before me, that this should be a de novo or fresh hearing. However it was suggested to me by Ms Chopra *[the Presenting Officer]* that, although a fresh hearing, the evidence of the appellant had been tried and tested on two occasions and her suggestion to his evidence would be limited.

10. Mr Paramjorthy suggested that I could consider the determination of IJ Walker in relation to paragraphs 1-28 which summarised the appellant's claim but not paragraphs 29-38 where findings of fact and credibility issues were intermingled. During submissions Ms Chopra also referred me to observations of Judge Milligan-Baldwin relating to the medical report of Professor Lingam. In consequence how I approached the two previous decisions of the First-tier Tribunal – if at all – was a running theme throughout the hearing.

12. I have concluded that since both First-tier determinations were found by the Upper Tribunal to contain errors of law that the only safe course is to ignore both of them. Hence I have summarised the appellant's claim from his own witness statements, Asylum Interview Record and the refusal letter and not from paragraphs 1-28 of Judge Walker's determination as suggested by Mr Paramjorthy.

14. I heard oral evidence from the appellant through the Tamil interpreter who adopted both his witness statements at pages 1-3 and 1-7 of the two bundles. I record that many of the questions and cross-examination related to the lateness of the appellant's asylum claim which I had indicated was an issue of concern to me given the number and severity of the appellant's scars.

34. In relation to the medical report of Professor Lingam, *[Ms Chopra]* submitted that IJ Walker had not considered this in any detail although he had accepted that the appellant had

been detained and tortured. Although not relying on her findings she suggested I consider the observations of Judge Milligan-Baldwin at paragraphs 49-53 which were observations and separate from her findings at paragraph 54. She asked me to rely on discrepancies between the appellant's account as per his AIR and witness statements and what he had said to Professor Lingam. It was not credible that the appellant had not obtained any medical treatment after his release. The presence of scars was not determinative of the claim and the issue was whether these were as a result of ill-treatment and torture as the appellant claimed.

35. Mr Paramjorthy objected to the way Ms Chopra and the SSHD now put its case. This Tribunal should not look at the previous determinations as suggested. They were unreported decisions which had been overturned and hence should not form my starting point re any assessment of evidence. This was a de novo hearing. Observations on the rationale of previous First-tier Tribunal Judges should not form any part of my assessment. **Devaseelan** was not applicable. Contrary to this submission he then suggested that I consider paragraph 33 of IJ Walker who had apparently accepted that the appellant had been detained and tortured as claimed.

36. At this point Ms Chopra intervened to say that she was not relying on any findings by either First-tier Judge which did not stand but was relying on the observations at paragraphs 45-53 of Judge Milligan-Baldwin.

37. Mr Paramjorthy made what he termed a public law submission that I was not reviewing the previous First-tier determinations and submitted that I could not look at the observations of Judge Milligan-Baldwin as to the medical report in isolation because such observations had resulted in findings of fact. I indicated that I could circumvent all these difficulties by not referring to the decision of Judge Milligan-Baldwin.

38. Mr Paramjorthy submitted that I should exclude these observations from my findings and that there was no reason for favouring any findings of Judge Walker over Judge Milligan-Baldwin who had made her own decision about the medical report and the appellant's scars. It was wrong to tactically favour the decision of one First-tier Judge over another. Hence his submission changed that I should not consider paragraph 33 of Judge Walker and that I should make my own assessment of the facts, the appellant's credibility and risk on return.

41. I make no criticism of either Counsel when referring to the previous First-tier determinations of Judge Walker and Judge Milligan-Baldwin which were clearly made in an effort to

> assist me but ultimately did not because I have considered that the only safe approach is for me to refer to neither decision – both of which have been overturned by the Upper Tribunal. I have as Mr Paramjorthy rightly submitted made my own assessment of the facts of the appellant's claim, the appellant's credibility and risk on return."

7. At the commencement of the hearing before me, Ms Chapman sought permission to include additional Grounds of Appeal which had not been included in the Grounds of Appeal submitted by Mr Paramjorthy. Her new ground was on the basis that there had been a finding by Judge Walker that the appellant had been detained and tortured as claimed and that the Upper Tribunal had made a direction preserving those findings. It is claimed that Judge Easterman and, later, Judge Plumptre had no authority to disregard the Upper Tribunal direction and that that alone was sufficient error of law to set aside Judge Plumptre's determination.

8. I gave permission for the new proposed ground to be argued and detailed submissions were made by both representatives for and against the point in issue. I have concluded that the First-tier Tribunal did have jurisdiction and power to hear the appeal afresh without regard to the findings of either of the previous substantive hearings. My first reason for reaching that conclusion is contained in the wording of the Upper Tribunal direction itself which provides that the findings of Judge Walker were to be preserved "unless anything emerges during the hearing before the First-tier Tribunal to demonstrate that such a finding ought not to be preserved." There having been an agreement by the appellant's Counsel Mr Paramjorthy – Counsel of some seniority and experience in this Tribunal – that the appeal was to be heard afresh, it was clear that the Judge was entitled to make her own factual findings.

9. That too is in itself good reason for rejecting the argument that the findings of Judge Walker should be preserved. It is abundantly clear from the extracts set out above from Judge Plumptre's determination that Mr Paramjorthy agreed on behalf of the appellant not only that the appeal should be heard afresh but also that no account should be taken by Judge Plumptre of either of the two previous determinations. Both representatives as well as Judge Plumptre took the sensible and reasonable decision that in the unusual circumstances of this case, where the appeal had already been heard twice and had been remitted twice, the best course of action was for the appeal to be heard again without any regard to previous decisions.

10. It is clear from the latest determination that the judge heard detailed oral evidence from the appellant, she was referred to the medical report from Professor Lingam and she was invited by both Counsel to make her decision based on the evidence that she heard on that occasion. Mr Paramjorthy submitted on behalf of the appellant that the judge should not consider either of the previous substantive determinations and she

accepted those submissions. See in particular paragraphs [35]-[38] of the determination as well as [41].

11. The only other ground of substance relates to the medical evidence of Professor Lingam. Again, submissions on that issue were made to me by both representatives but I find myself in agreement with Upper Tribunal Judge Martin who initially refused permission to appeal for the reasons set out above. Judge Plumptre considered Professor Lingam's report in some detail at paragraphs [43]-[54]. Her reasons for declining to follow the conclusions of the report are clearly stated and were open to her on the evidence. As such, they do not disclose any error of law. I note, in particular, her reasons at [48] and [50] and her conclusions at [53].

12. In summary, for the reasons I have set out above, I am satisfied that there was no error of law in the determination of Judge Plumptre and her decision is to stand.

Notice of Decision

There was no error of law in the First-tier Tribunal determination of Judge Plumptre. Her decision is to stand.

No anonymity direction was sought and none is made.

Deputy Upper Tribunal Judge David Taylor
30 October 2014