Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12008/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1st November 2018	**On 14th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

MR I.P.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Jaquiss, Counsel
For the Respondent: Ms Isherwood, Senior HOPO

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction is made. As a protection claim, it is appropriate to do so.

DECISION AND REASONS

1. The Appellant a citizen of Sri Lanka (born 16th February 1985) appeals with permission against the decision of a First-tier Tribunal (Judge Cohen) dismissing his appeal against the Respondent's decision of 2nd November 2017 refusing his claim to asylum/humanitarian protection.

2. The Appellant's claim in summary is that he was arrested twice in Sri Lanka because of his association with the LTTE. The first arrest occurred in 2009 when he surrendered to the Authorities. His claim is that he was detained for nearly a year abused, beaten and burnt with cigarettes.

3. Following his release in 2010 he went to India where he stayed for a year and a half. He returned to Sri Lanka because of a fear that the Indian police were active against LTTE supporters.

4. He claimed that he was arrested again in December 2014 when Government officials came to his home, looking not for him but for his brother. His brother had already left the home and the Appellant was unaware of where he had gone. On failing to find his brother, the Government forces arrested the Appellant instead. He was detained for over two years, tortured and beaten. He was released only after his father had paid a bribe. On his release arrangements were made quickly with the help of an agent, and the Appellant came to the UK. He sought asylum straight away on arrival. His brother now lives in Belgium and has been granted asylum by the Authorities in that country. The FtTJ disbelieved the core elements of the Appellant's claim and accordingly dismissed it.

5. An application for permission to appeal was granted by Designated First-tier Tribunal Judge McCarthy on 12th September 2018. The grant of permission summarises the five grounds seeking permission and sets out the issues before me. The relevant parts of the grant for the purposes of this hearing are set out below:

> "5. The first ground alleges that Judge Cohen failed to engage with the medical evidence relating to PTSD and contrary to binding case law failed to have regard to the professional standing of the medical expert. These failures meant Judge Cohen did not consider the impact the appellant's mental health might have on his ability to give evidence, contrary to Presidential Guidance on vulnerable appellants. In addition, the grounds complain that Judge Cohen erred by putting the cart before the horse by finding the appellant not credible and then rejecting the medical evidence.
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> 6. The second ground alleges that Judge Cohen gave disproportionate weight to the record of the screening interview, contrary to Upper Tribunal guidance. Judge Cohen failed to have regard to the circumstances in which the screening interview was conducted and the appellant's mental state at that time.

7. The third ground alleges that Judge Cohen made findings not based on the evidence provided by the parties. The judge accused the appellant of not answering certain questions but that is contrary to the record kept by counsel at the hearing (and provided with the application for permission to appeal). In addition, the third ground complains about the summary manner in which Judge Cohen addressed evidence of a witness, merely describing it as self-serving but without explaining why it might be self-serving. The third ground complains how Judge Cohen failed to deal properly with the evidence of another witness, the appellant's brother, dismissing his evidence as being discrepant but without considering the evidence as a whole.

8. The fourth ground argues that Judge Cohen failed to engage with the appellant's case and presented in counsel's skeleton argument or submissions. I find this ground to stand or fall with the first three grounds and that of itself it is not a ground of application.

9. The final ground alleges that Judge Cohen failed to apply country guidance by taking an outdated view of the situation in Sri Lanka. In addition, this ground alleges the judge failed to consider the risk factors identified in the current country guidance case, GJ.

10. Grounds 1, 2, 3 and 5 are made out because after careful examination of the decision and reasons statement those four grounds raise arguable legal errors. The fourth ground is not excluded because it stands with the first three grounds. In reaching this conclusion, I have had regard to the cases cited by Counsel in her grounds of application and to the case of SS, R (on the application of) v SSHD ("self-serving" statements) [2017] UKUT 164.

11. I add that the appellant may require alternative counsel to attend the Upper Tribunal because a key part of the appeal to the Upper Tribunal involves a dispute between the judge's record of proceedings and that of Counsel, who may have to give evidence in the Upper Tribunal. The respondent should be prepared to share information from the presenting officer's record of proceedings.

12. I conclude permission to appeal should be granted."

Thus the matter comes before me to decide if the decision of Judge Cohen contains such error of law that it requires to be set aside and remade.

6. No Rule 24 response was served by the Respondent.

Error of Law Hearing

7. Before me Miss Jaquiss appeared for the Appellant and Ms Isherwood for the Respondent. At the outset of the hearing Miss Jaquiss, in response to paragraph 11 of the grant of permission, served a witness statement from Ms B Jones, Counsel, who had appeared for the Appellant at the original hearing. Ms Isherwood served a

copy of the Presenting Officer's Record of Proceedings again in response to paragraph 11 of the grant of permission. Both parties were given time to examine these documents.

8. I heard submissions from both parties. Miss Jaquiss's submissions were lengthy following the grounds seeking permission. Ms Isherwood responded in detail defending the decision.

Consideration

9. I find there is merit in the first three grounds which were in issue before me. For the purposes of this decision I will give my findings and reasons following the order outlined in paragraphs 5-7 of the grant of permission.

10. The first ground which raises concerns centres around the medical evidence produced in support of the Appellant's claim. The Appellant produced two significant medical reports

    (1) a psychiatric report; and

    (2) a scarring report.

11. The FtTJ deals with these reports at [35] and [36]. The psychiatric report concludes that whilst the Appellant is not suffering from depression, he is suffering from PTSD. The diagnosis of PTSD is further supported by a report from the Appellant's GP and from a senior psychotherapist at the Maudsley NHS Foundation Trust.

12. The FtTJ after noting that he had been provided with the above reports said the following in analysing the medical evidence from the consultant psychiatrist, Dr Hajioff:

> "I secondly note that DR Hajioff accepts the appellant's credibility at face value. As will be noted from my findings above, I have found major discrepancies in the appellant's evidence going to the very core of his claim."

13. In a few sentences the FtTJ appears to effectively dismiss the expert's standing. Likewise I find that I cannot be satisfied that the judge has considered the evidence holistically as he is tasked to do. Paragraph [35] gives the impression that the FtTJ has considered the medical evidence after he has made his mind up about Appellant's credibility. I find that this is a material error in that the judge fails to engage with the medical evidence as independent corroboration of the Appellant's claim (**Mibanga v SSHD [2005] EWCA Civ 367**). Nowhere do I see that the judge has actually made a finding on whether or not he accepts that the Appellant is suffering from PTSD. The Appellant is entitled to have evidence viewed in the light of any such finding.

14. One point that I consider I must mention at this stage is the criticism made of the judge that he should have treated the Appellant as a vulnerable witness. I find this criticism to be unfair. There is no note that those representing the Appellant made any application for the Appellant to be treated as such. The Appellant was legally represented throughout the hearing and as Ms Isherwood pointed out to me in her submissions, the psychiatric report indicated that the Appellant was "fit to plead."

15. Similarly with the scarring, there was a detailed report submitted by Dr Martin covering six pages of detailed examination showing scarring consistent with the Appellant's history of ill treatment. It is hard to see how after summing up the doctor's findings in two lines, the judge reaches a conclusion that the Appellant's scarring is:

> "... historic, was not caused during any claimed recent detention and would not bring him to the attention of the authorities." [36]

Again a reading of [36] gives the impression that the FtTJ has considered the scarring report only after reaching his conclusions on the Appellant's credibility.

16. The second ground centres on the assertion that the FtTJ gave disproportionate weight to the record of the screening interview. Building on this, Miss Jaquiss submitted that he had erred by making a material error of fact. It was said that this error then led the judge to follow an incorrect approach when dealing with the evidence as a whole. I find there is merit in this submission on this basis:

17. The judge's decision and findings start at [26]. At [27] the judge says the following:

> "There are substantial discrepancies which permeate the Appellant's claim and further discrepancies arose before me. I will set out the same herein."

18. The judge then sets out what he considers to be discrepancies with the Appellant's screening interview and says at [30]:

> "In his screening interview, the appellant stated that he had never been detained or accused of an offence for which he could have been convicted whereas the appellant subsequently claimed to have been detained on two occasions, the latter for a three year period and accused of membership of a proscribed terrorist group which I find to be a further discrepancy in the appellant's evidence."

19. In fact an examination of the screening interview at 4.1 shows that the Appellant made the following response when asked why he could not return to his home country. He is recorded as saying:

> "One of my brothers was working for a Tamil organisation. While the police were searching for him, they were torturing me. I was in prison from 25/12/2014 to 23/04/2017. My parents arranged for my release through an

> agent. They bribed someone. I fear if I am returned to Sri Lanka I will be tortured and imprisoned".

20. Paragraph [30] gives the impression that the FtTJ found a discrepancy in the Appellant's account and therefore disbelieved the account because the Appellant had made no mention of being detained at the screening interview.

21. I find the judge was in error to find that the Appellant did not mention his detention at the Screening interview. It is a material error because it has always been part of the Appellant's core claim that he was detained for a period of two and a half years before being released through a bribe. The judge held it against the Appellant that he had not mentioned his detention at the screening interview. Ms Isherwood, whilst generally defending the judge's assessment of credibility, accepted that the screening interview does show that the Appellant mentioned that he had been detained and tortured.

22. The third ground raises concerns that the judge has incorrectly recorded part of the evidence which was put forward at the hearing. It mainly hinges on the cross-examination of the Appellant and the relevant paragraphs in the decision are contained at [15] and [16]. The judge records the following:

> "The appellant was referred to his response in interview (Q30) where he indicated that the authorities would know that he was involved with the LTTE because of scars on his body and was asked how the authorities would know that he had scars and did not answer the question asked. The question was repeated and he still did not answer the question."

23. Miss Jaquiss drew my attention to the contemporaneous notes recorded by Ms Jones who appeared at the hearing on behalf of the Appellant. Ms Jones's contemporaneous note shows that the Appellant in fact did answer the question albeit in a discursive manner. Ms Isherwood accepted that Ms Jones's note was correct in that the HOPO recorded likewise that the Appellant did answer the question albeit it had to be repeated.

24. Miss Jaquiss submitted that this was a material point because the fact that the judge has mis-recorded the evidence taints his credibility evaluation. I find that this point is well made. I find that the judge was in error to record at [15] that the Appellant did not answer the question. This is a material error because I cannot be satisfied that it did not impact upon the judge's credibility assessment.

25. I find that the cumulative effect of these errors is such that I cannot be satisfied that the FtTJ's decision concerning the Appellant's credibility is sustainable. That is sufficient to enable me to dispose of this matter. I find it is not necessary to consider ground 5 of the grant (failure to apply country guidance by taking an outdated view of the situation in Sri Lanka). This is a matter which will need to be considered at the fresh hearing. The decision is set aside in its entirety with nothing preserved. The decision will need to be remade afresh in the First-tier Tribunal, because of the

amount of judicial fact-finding required. The matter will therefore be remitted to the First-tier Tribunal (not Judge Cohen) for that Tribunal to remake the decision.

Notice of Decision

The decision of the First-tier Tribunal promulgated on 8th August 2018 is set aside for material error. The decision is remitted to the First-tier Tribunal for the decision to be remade there before a judge other than Judge Cohen.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed C E Roberts Date 06 November 2018

Deputy Upper Tribunal Judge Roberts