



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/02716/2020

THE IMMIGRATION ACTS

**Heard at Bradford (via Microsoft
Teams)
On 20 August 2021**

**Decision promulgated
On 14 September 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SASITHARAN THARMALINGHAM
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Patyna instructed by Reeves & Co Solicitors

For the Respondent: Mr Bates, a Senior Home Office Presenting Officer

DECISION AND REASONS

- 1.** The appellant appeals with permission a decision of First-tier Tribunal Judge Colvin promulgated on 15 February 2021 in which the Judge dismissed the appellant's appeal on all grounds.
- 2.** The appellant is a citizen of Sri Lanka, born on 13 March 1994, who appeals the respondent's decision dated 28 February 2020 to refuse his asylum and humanitarian protection claim.

Background

3. The appellant relies on a number of grounds of challenge. Permission was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:
 - “2. The grounds argue that the Judge did not apply the guidance on vulnerable witnesses and had not considered relevant background material, it is argued that the Appellant’s risk on return had not been properly addressed.
 3. The points made in regard to the report of the Dr the Judge observed that the Appellant had given significant discrepancies in his accounts of ill-treatment which the report had not addressed. However, the guidance on vulnerable witnesses in the assessment of the evidence was not obviously factored into the Judge’s assessment. The grounds may be argued.”
4. The Secretary of State in her Rule 24 response dated 29 March 2021 claims that the Judge was not satisfied that the appellant was ill, arguing that if an appellant wishes to be treated as a vulnerable witness, then it is for him to show he is actually vulnerable and what actually is being argued that vulnerability means in the context of the hearing. It is argued that it would be irrational to find a failure of the Judge to mention the Presidential guidance when clear findings had been made that it does not apply.
5. The specific terms of the Ground relating to the application of the Presidential Guidance is in the following terms:

Ground 1: Failure to apply Presidential Guidance on vulnerability

2. In assessing A’s credibility. The Judge failed to address her mind to and apply the Joint Residential Guidance Note No.2 of 2010: Child, vulnerable adult and sensitive appellant guidance (“the Guidance Note”). The FTTJ had been invited to apply the Guidance Note in Counsel’s skeleton argument ([7-8, 14c] and at the hearing. There is no express reference to the Guidance Note in the Determination.

3. In *JL (medical reports-credibility) China* [2013] UKUT 00145 (IAC), the Upper Tribunal found [26] that it is incumbent upon judges to apply the Guidance Note. It referred to [15] of the Guidance Note which states:

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 that 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”.

4. The approach in *JL (China)* was approved by the Court of Appeal in *AM (Afghanistan) v SSHD* [2017] EWCA Civ 1123. Sir Ernest Ryder referred to the Guidance (and also the Practice Direction, First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses as follows [30]:

The directions and guidance contained in them are to be followed (...) Failure to follow them will most likely be a material error of law

5. In line with *JL (China)* and the Guidance Note, it was incumbent upon the FTTJ to: (a) make an express finding whether A was vulnerable in the context

of the Guidance Note - and in what sense; and (b) consider what impact his vulnerability had on the assessment of his evidence.

6. The Determination has no express finding in respect of A's vulnerability. While the Judge raised concerns about the report of Dr Balasubramaniam [45 - 46, 54, first bullet point], it is unclear whether she dismissed it outright. The FTTJ failed to reach a finding as to whether A had PTSD or was otherwise vulnerable, or how that vulnerability impacted on the inconsistencies she identified.

7. It follows that the FTTJ failed to apply the Guidance Note on the principles set out in *JL (China)*. This renders her assessment of credibility materially flawed.

Error of law

6. The first reference to the issue of vulnerability appears in the Judges Record of Proceedings supporting the submission of Ms Patyna that this matter was raised before the Judge. The Judges note appears to read "Appellant a vulnerable witness".
7. The Judge had before her medical evidence by way of a report from a psychiatrist and copies of the appellant's GP medical records. In relation to this evidence the Judge writes at [45 - 47]:

45. In my opinion these discrepancies in the appellant's evidence are material and highly relevant to the Psychiatric report submitted. Dr Balasubramaniam who prepared the report confirms that he received copies of the screening and asylum interviews and the appellant's written statement before interviewing the appellant. However, the report makes no reference to the discrepancies disclosed in these documents. Between the initial claim of being hit by sticks on the feet at the screening interview and the claim made in the written statement of being hit by heavy rods. Indeed, the report makes no reference to heavy rods when setting out the description of ill-treatment at paragraph 3: "*... he was beaten with sticks on his back, arms and foot. He was also kicked with booted foot and whilst he was being beaten water was poured on him. On some occasions, he fainted and when he woke up, he was without clothes and felt burning sensations in his genitals.*" Whilst the report does refer at one point to the reasons why there may be a late disclosure of sexual assault. In such cases, it makes no reference to the fact that the appellant was saying initially that he had no injuries and no reference as to whether the appellant was even asked about injuries sustained. This means the report does not say as part of the clinical assessment whether and why or why not such discrepancies affects the diagnostic opinion that is reached.
46. These omissions also need to be considered alongside the fact that Dr Balasubramaniam's report does not consider whether the appellant may be exaggerating or feigning his symptoms. Paragraph 290 of the Istanbul Protocol makes clear in relation to psychological examinations that there is a duty to consider whether the presented symptoms may be falsified or exaggerated. In the circumstances that the appellant's account of ill-treatment had significant discrepancies I consider that this requirement becomes even more important in this case, and not to have done so is in my view, a significant area of the report.
47. It is also to be noted that the GP medical records show that the appellant was registered with the GP on 24 September 2019 and first attended the surgery on 30 October 2019 with a complaint of diarrhoea. He appears not to have raised any other matter at this appointment - although I accept he was not asked to explain at the hearing why this was so. He then attended on 22

November 2019 and complained of nightmares. "Following torture in Sri Lanka in July 2019". Again, I accept the appellant was not asked at the hearing to explain why he did this four days before the asylum interview and not before.

8. At [54, bullet point 1] the Judge writes:

- The significant discrepancies in the account given by the appellant of the claimed ill-treatment and injury sustained at the hands of the Sri Lankan authorities whilst in detention. This goes to the core of the appellant's claim and no reasonable explanation has been given for the discrepancies. In this context I find a little weight can reasonably be placed on the findings made in the psychiatric report due to the report's failure to consider the discrepancies or to consider whether the appellant may have faked or exaggerated his psychological symptoms before making the diagnosis of PTSD.

- 9.** The finding the Judge claims to place only little weight upon the Psychiatrist's report is a finding that creates uncertainty in the mind of a reader. The thrust of the Judge's comments regarding the report appear to challenge the claimed causation of the PTSD rather than the fact the appellant had been clinically diagnosed as suffering from PTSD. It is not clear what the Judge placed "little weight" upon: was it upon the explanation provided by the appellant for what had happened to him which the psychologist found explained his presenting with symptoms justifying the clinical diagnosis of PTSD or was it on the report as a whole, including the claim that the appellant was suffering PTSD?
- 10.** It must also be remembered that the GP report refers to the appellant being prescribed sertraline, a recognised antidepressant. The Judge highlights issues concerning the consultant with the GP at [47] and clearly recorded a number of those issues arise as a result of the evidence not being explored with the appellant at the hearing.
- 11.** The credibility of the claim was not a matter for the medical profession but for the Judge.
- 12.** The Judge may have been entitled to have found that whilst accepting the clinical diagnosis of PTSD the issue of causation was not accepted as a result of unexplained discrepancies, but there is no such finding in these terms. If one infers from a reading of the determination that that is what the Judge meant to say it would mean that the grounds asserting the Judge failed to refer to the Joint Presidential Guidance on Child, vulnerable adult and sensitive witnesses is made out. The appellant as an individual suffering PTSD, for whatever reason, falls within the definition of a vulnerable witness.
- 13.** The Judge failed to specifically record in clear unequivocal terms whether it was found the appellant is a vulnerable witness and how that vulnerability had been factored into the assessment of the evidence before her. It appears that just because there were discrepancies in the evidence this justified little weight being placed upon the evidence of the psychologist, rather than considering that the diagnosis by the psychologist of PTSD might have provided an explanation for the discrepancies.

- 14. I find in light of this the Judge has erred in law in a manner material to the decision to dismiss the appeal. I do not need to consider the remaining two grounds on the basis that the failure to properly assess the credibility of the appellant's claim is material to the assessment of risk on return and the country background material.
- 15. I set the decision aside. The appeal shall be remitted to the First-tier Tribunal sitting at Taylor House to be heard afresh by judge other than Judge Colvin. There shall be no preserved findings.

Decision

- 16. **The Judge materially erred in law. I set the decision aside. This appeal shall be remitted to Taylor House to be heard afresh by judge other than Judge Colvin.**

Anonymity.

- 17. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated 23 August 2021