



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/09964/2012

THE IMMIGRATION ACTS

Heard at Manchester
On 14 January 2014

Determination Sent
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Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ZAKARIAS SHEWANDY

(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Ficklin instructed by Greater Manchester Immigration
For the Respondent: Mr G Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Ethiopia, appeals with permission against the decision of the respondent to set removal directions to Ethiopia having refused to recognise him

as a refugee, to grant humanitarian protection, or to give him leave to remain in the United Kingdom on human rights grounds. The appellant was born in Addis Ababa, before Eritrea came into existence. His father is Eritrean and his mother Ethiopian. The appellant is an Ethiopian citizen and has served in its army. The respondent has not sought to remove him to Eritrea: the removal directions are limited to Ethiopia.

2. The appellant travelled from Ethiopia through Sudan, Libya, Malta, Italy and France before coming to the United Kingdom in July 2009. He has made two asylum claims, the first in July 2009, when he arrived in the United Kingdom; that claim was refused, and Immigration Judge Brunnen dismissed his appeal on 10 November 2009. His account of deserting from the Ethiopian army was rejected by the first immigration judge, as was his account of being tortured in Ethiopia. The appellant was admitted for psychiatric assessment immediately after receipt of that determination. The appellant did not appeal the first immigration judge's rejection of his account and his appeal. On 14 January 2011 the appellant made further submissions, supported by medical evidence, which were eventually accepted as a fresh asylum claim, but rejected by the respondent.

First-Tier Tribunal hearing

3. The appellant appealed to the First-tier Tribunal: his appeal was heard by First-tier Tribunal Judge Chambers and dismissed, on 20 February 2013. Judge Chambers began by considering the credibility and factual findings of the first immigration judge and then considered the medical evidence of Dr Nicholas Smith of Freedom from Torture, and a psychological report from Dr Stephanie Sneider, as well as a letter from the appellant's General Practitioner. He considered the effect of the new evidence on the negative credibility findings of the first immigration judge, with particular emphasis on the effect of post-traumatic stress disorder on the reliability and internal consistency of the appellant's evidence. He accepted that the medical evidence now produced showed that the appellant had torture scars and a history of self-harm. However, he concluded that the evidence did not establish in which country and when the torture had occurred, and therefore was not probative of torture in Ethiopia or the appellant's account of desertion from the Ethiopian army.
4. The judge rejected the asylum, humanitarian protection and Article 3 elements of the appellant's claim on that basis. He then considered Article 8 ECHR. He noted that the appellant had no family life in the United Kingdom, nor indeed in Ethiopia, since he had last lived at home when he was 17. He was one of nine children, from a farming family in the Ethiopian countryside, who because the family had become impoverished, had all left home. Although his appeal lacked merit, he was not mentally well and had encountered difficulties, suffered depression and felt suicidal, on his evidence, in all the countries to which he had travelled: he had not been happy in Ethiopia, Sudan, Malta, Italy or France before coming to the United Kingdom. Although he probably had some private life here, there was little evidence of it and all his efforts while in the United Kingdom had been directed towards various applications to enable him to stay. The First-tier Tribunal Judge decided that the appellant's removal would not be disproportionate under Article 8 ECHR.

5. The appellant challenged that determination in three ways:
 - (1) The first immigration judge's negative credibility findings should not have been the starting point, given that there was now evidence corroborating at least part of the appellant's account;
 - (2) His evidence had not been subject to cross-examination and was therefore 'effectively unchallenged'; and
 - (3) The First-tier Tribunal's treatment of the risk assessment, in accordance with the principles in *J v SSHD [2005] EWCA Civ 629*, was inadequate in that he had failed to address the suicide risk at each step in the enforcement procedure.
6. Permission to appeal was granted by Designated Judge Shaerf, who considered that the first and third grounds were arguable. He rejected the second ground, since credibility was plainly in issue in the letter of refusal. That was the basis on which this appeal came before me for an error of law decision.

Error of law

7. On 31 July 2013, I set aside the determination of the First-tier Tribunal for error of law, to be remade by the Upper Tribunal. I did not consider that there was any merit in the *Devaseelan* point but I did consider that, given the appellant's mental health problems, the First-tier Tribunal judge should have considered all of the steps in the enforcement procedure, as set out in *J's* case. I summarised the relevant history of this appeal in my decision as follows:
 - "9. At paragraphs 27 to 36 of his determination, Judge Chambers considered the medical evidence ...
 10. He noted that the medical evidence now before the First-tier Tribunal would have served as an aid to findings on the important issue of credibility and that Dr Smith considered the scarring on the appellant's body to be highly consistent with injuries sustained during torture, but even having regard to the torture evidence he concluded that the appellant had not established the factual basis for which he contended, and dismissed the asylum appeal.
 11. Judge Chambers accepted that medical facilities in Ethiopia were not well developed and the available treatment was very limited but having regard to *J v Secretary of State for the Home Department [2005] EWCA Civ 629* and *N v. Secretary of State for the Home Department [2005] UKHL 31*, he concluded that the appellant's circumstances did not reach the high threshold required to engage international protection under Article 3 ECHR.
 12. The judge then considered Article 8 following the five steps set out in *Razgar, R (on the application of) v Secretary of State for the Home Department [2003] EWCA Civ 840* and concluded that the appellant had no family life in the United Kingdom. His parents were still in Ethiopia. All of his eight siblings had left home. The appellant was unwell both physically and mentally and in various places he had travelled to he had

encountered further difficulties and as a result of which he had become depressed and felt suicidal. He has attempted suicide. Those had been his feelings in Ethiopia, Sudan, Malta, Italy and France. He concluded however that removal was proportionate, dismissed the Article 8 appeal and made no anonymity order. ”

8. I gave directions to accompany my decision: the appellant was directed to file and serve all relevant medical evidence for the substantive hearing by 11 August 2013. Both parties were given leave to make further submissions if so advised, but neither did so.
9. Nor did the appellant comply with the medical evidence directions. The most recent medical evidence on the file is that of Dr Nicholas Smith of Freedom from Torture, dated 12 October 2011.

Upper Tribunal hearing

10. On 14 January 2014, the case came back before me for the determination to be substantively remade. There was, in the event, no change at all from the evidential situation at the end of the First-tier Tribunal hearing. The medical evidence was now substantially out of date and there was no evidence as to how the appellant’s mental health and/or his private life might have progressed since 2011. Absent any written submissions or skeleton arguments, the appeal proceeded on oral submissions alone.
11. Mr Ficklin for the appellant apologised for not having provided any new medical evidence. The appellant’s consultant had refused to write a report; he could not say which doctor it was who had so refused. There was no new witness statement. The appellant struggled to maintain contact with both his treating physicians and his solicitors, but given his poor mental health, that should not be held against him. His psychiatric state was precarious, as the medical evidence of torture and post-traumatic stress disorder established; he had made three attempts at suicide in the past three years, according to Mr Ficklin, and had been in and out of hospital intermittently since the last hearings.
12. Mr Ficklin accepted that on the evidence, the appellant could not meet the high test set in *N*. However, the evidence was that up to 2009, he was self-harming. While detained in Malta, he had tried to hang himself on one occasion, and on another, to cut his throat; he should be regarded as having a moderate intent to die, while in Malta. He did have scars on his throat, as set out in Dr Smith's report. Dr Smith also noted deep incisions and high levels of body scarring consistent with torture. Dr Smith considered that there was a moderate to high risk of further self-harm and First-tier Tribunal Judge Chambers when dismissing the appeal had accepted that the determination should not be sent directly to the appellant, in case he self-harmed on receiving it.
13. There was no new evidence, but that was not evidence that the appellant’s condition had improved and his state of mind would be exacerbated by the process of removal, and by being served with a negative determination. Mr Ficklin asked me to substitute a decision allowing the appeal.

14. For the respondent, Mr Harrison reminded me that when the appellant's fingerprints were taken for Eurodac, while he was in Malta on 24 June 2007, they were found to have been damaged. The appellant had acknowledged that he had done so himself, and had altered the length of time he said he had spent in Sudan, to avoid disclosing his detention in Malta. That, he contended, should damage the appellant's overall credibility. The appellant was Ethiopian by birth and citizenship and, on his own account, had served in the Ethiopian army. His account of having deserted the army and being tortured in Ethiopia had not been accepted by the respondent or by either of the judges. The appellant had travelled through five countries before coming to the United Kingdom and although it purported to do so, the evidence of Dr Smith could not establish, from the scarring he had, the country in which he had been tortured.
15. The respondent's letter of refusal was prepared in October 2012, on the most up-to-date medical evidence then available. It was regrettable that the appellant had not seen fit to provide current evidence for the Upper Tribunal hearing, despite being given plenty of time to do so. There was no evidence of further self harm, although whether that was as a result of the beneficial effects of continued treatment and monitoring, or because of any improvement in his condition, was impossible to state given the paucity of evidence before the Tribunal. The Tribunal should not be prepared to infer that the appellant remained at risk of suicide attempts at any stage of the removal process. Mr Harrison invited me to dismiss the appeal.
16. I reserved my decision, which I now give.

Discussion

17. An asylum appeal must always be determined as at the date of hearing. The crucial question here is the appellant's mental state and the effect which that might have during the process of removal: Mr Ficklin accepts that the appellant cannot show that his state of health is sufficiently poor that removing him to Ethiopia would engage Article 3 ECHR as in *N's* case.
18. The evidence before me is woefully out of date. There is no new evidence at all from the appellant and I therefore treat the factual matrix as that found by the First-tier Tribunal: that he is Ethiopian, that his family have all left his home area, that he was in the army in Ethiopia and then left the country, travelling through a number of other countries, in all of which he suffered depression, and in particular, in Malta, where he was detained and fingerprinted. I have regard to the appellant's attempt to erase his fingerprints to escape identification as the person detained there. I accept that there is clear evidence of torture, but not where or why it occurred.
19. The appellant does not keep in touch regularly with his doctors or his lawyers, and there is simply nothing before me to indicate how he is, or what his engagement is with the United Kingdom now.
20. The test in *J* requires evidence (at the lower level applicable to international protection) of a minimum level of severity, such that the risk is serious and removal

would be an affront to fundamental humanitarian principles. The appellant must show a causal link between the act or threatened act of removal or expulsion and such risk of self-harm, at the level of Article 3 ECHR. The fear must be objectively well founded. Only if all of that is shown must the respondent show that there are effective mechanisms in the United Kingdom and in the receiving state to reduce the threat of suicide. Whilst Article 3 can in principle succeed, in relation to a foreign case, the standard is particularly high and it is not suggested that the appellant has shown that it is met.

21. The question which caused me to set aside the determination and remake it was the risk to the appellant during the removal process. He has had more than sufficient time to put evidence before the Upper Tribunal to assist me in considering that risk, if it still exists, but he has not done so. The appellant himself has not provided a witness statement. His doctor has refused to give more evidence. The appellant has not come close to establishing that, today, he would self-harm during the removal process.

22. I dismiss the appeal.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside and re-make the decision in the appeal by dismissing it.

Date:

Signed

Judith Gleeson
Judge of the Upper Tribunal