



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/00848/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Liverpool
On 15 January 2018**

**Decision & Reasons
Promulgated
On 1 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MR DN
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. Karnik, counsel instructed by Broudie,
Jackson & Canter solicitors

For the Respondent: Mr. Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Burundi, born on 5.9.74. He arrived in the United Kingdom on 25.8.99 and made an asylum claim, which was refused and his appeal against that decision was dismissed and he became appeal rights exhausted. However, following a decision by the Respondent to deport him, an appeal against deportation was allowed in a decision on 16.1.09 on the basis that this would be contrary to Article 3 of ECHR due to the risk of suicide. The Appellant was given 12 months discretionary leave to 4.3.10. On 10.3.10 he made a human rights application which

was only refused on 23.1.16.

2. His appeal against this decision came before First tier Tribunal Judge Shimmin for hearing on 27.3.17. The Appellant did not give evidence and the appeal proceeded on the basis of submissions only. In a decision and reasons promulgated on 13.4.17 the appeal was dismissed, on the basis that the judge did not find that the removal of the Appellant to Burundi would be contrary to Articles 3 and 8 of ECHR essentially because he found there to be inconsistencies between the consultant psychiatric report of Dr Ghosh and the GP records; the Appellant had not shown that he has a serious mental illness and thus did not reach the high threshold necessary to show a breach of Articles 3 and 8 of ECHR.

3. An application for permission to appeal to the Upper Tribunal was made in time on the basis that the judge had erred materially in law:

(i) in failing to follow the very clear conclusions of the consultant psychiatrist that the Appellant has a diagnosis of schizophrenia and severe PTSD, because of an apparent difference in presentation by the Appellant before his GP at a single consultation on 20.1.17;

(ii) in failing to consider the “inexcusable delay” by the Respondent as part of the proportionality assessment; and

(iii) in failing to consider whether the Appellant should have been granted ELR at the date of his arrival in line with the then Home Office policy, contrary to public law principles of fairness.

4. Permission to appeal was granted in respect of all three grounds in a decision of First tier Tribunal Judge Gillespie dated 27.10.17.

Hearing

5. At the hearing before me, Mr Karnik accepted that there was no clear diagnosis of paranoid schizophrenia but submitted that the treatment of the medical evidence by the judge was inadequate regardless of the diagnosis. The judge made a mistake of fact regarding the GP and in failing to assess the effect of delay as part of the proportionality assessment.

6. In respect of the medical evidence, addressed at [29] [30] and [36] of the decision at no point is there any suggestion of the Appellant feigning illness. At [30] the judge makes reference to ten consultations with the GP when there were only two. Consequently, the reference at [36] to patent inconsistencies is not a finding which is substantiated.

7. In respect of the fact that the Appellant is suffering from severe mental illness, Mr Karnik submitted that the starting point is the decision of Judge Williams in 2009 at [12]; the evidence of Professor Katona in 2008 at [13] and his conclusion at [21]. The Appellant was unable to give evidence: see [23] and he has a disturbed mental state going back to the December

2002.

8. In response to my point that findings made in 2009 may not necessarily be binding 9 years later, due to a lack of a clear diagnosis, Mr Karnik pointed out that Dr Ghosh is clearly an experienced psychiatrist and it was her job in November 2016 to decide how ill the Appellant is and this is not the job of a GP. Mr Karnik drew my attention to page 117 of the Appellant's bundle at page 5 where Dr Ghosh makes reference to perceptual disturbances including auditory hallucinations and that he appeared quite distressed. In her further analysis at page 8 she noted that the Appellant expresses hostility towards his GP and suffers from command hallucinations from God. Mr Karnik also took me to the GP notes at page 125 onwards, which although they post date Dr Ghosh's report, make clear that the Appellant is not well: see eg. the note of 20.1.17. The Appellant has been prescribed Mirtazepine, an anti-depressant. Mr Karnik submitted that the key point is that there were only two consultations with the GP on 14.3.17 and 20.1.17 and a telephone conversation on 12.9.16. The Appellant also attended the oral surgery clinic, which has nothing to do with his mental health so it cannot properly be said that there were ten consultations. Consequently the conclusion that there are patent inconsistencies is not founded in the evidence and Judge Shimmin should have taken full cognizance of all the facts.

9. In relation to article 8, Mr Karnik submitted that clearly the question of delay is a relevant factor. At [42] there is a finding that the Appellant does not engage article 8 but it cannot be the position that Article 8 is not engaged, given the Appellant's continuous residence in the UK since 1999. No weight was given to the issue of delay. Whilst there is the question of precariousness, the finding that there has been inexcusable delay by the Respondent at [40] means that any feelings of precariousness should be taken with a large pinch of salt.

10. With regard to ground 3, the Respondent accepts that, had she acted with appropriate diligence, the Appellant would have fallen within the policy and this has a bearing on how article 8 should have been dealt with. If the Appellant had been given ELR he would have been eligible for ILR after 4 years. Mr Karnik also sought to rely on the circumstances in Burundi and it is clear from page 159 of the Appellant's bundle at [47] that there are issues with mental health treatment and these conditions are relevant to conditions of return, particularly for someone who has lived in the UK for over 17 years. The Appellant came as an asylum seeker who at that time would have been granted ILR.

11. In his submissions, Mr Bates submitted that the refusal is premised on the basis that the medical situation had changed for the better. The Judge was mindful of the fact that, at the date of hearing, he needed to look at it with fresh eyes. The medical evidence provides no definitive diagnosis and the Dr Ghosh report pre-dates the GP notes. It is not known how long Dr Ghosh spent with the Appellant but nevertheless the Judge was entitled to consider this. With regard to the recent consultations recorded in the

GP report the Appellant was presenting as a well kept man. There was no evidence before the GP as to self-harm. Thus the judge was entitled to consider that in the absence of up to date medical evidence that the Appellant was not undergoing treatment for his mental health needs and was not suggesting he would self-harm. The judge was entitled to assess the claim in the round and the letter from Dr Ghosh makes no mention of the medical records. There is no suggestion she had access to the medical records, which goes to the weight to be attached to the expert report.

12. At [30] of the decision, the judge finds that Dr Ghosh records that the Appellant is ambivalent about treatment yet there was some level of engagement with the GP, which contradicts the suggestion that he has not remained in contact at all with the GP. At [32] not only does the Appellant appear to have had an improvement in his mental health but his condition also improved in 2011 following the grant of leave. Mr Bates submitted that the Appellant had been “laying it on a bit” when he went to see the psychiatrist as an incentive to embellish the situation and the GP records formed a more general view of the Appellant over a period of time and reduced the embellishment that otherwise would have taken place. Mr Bates sought to rely on the decision in AAW [2015] UKUT 00673 (IAC). He submitted that the judge had been entitled to find the reliability of the expert report had been brought into question in light of the fact that the psychiatrist did not see the GP notes. The judge was not satisfied with the evidence at the date of hearing and concluded that the Appellant had not discharged the burden of proof. These findings were open to the judge for the reasons given.

13. In respect of the issue of delay and Article 8, even though the judge appeared to find that the Appellant’s circumstances did not engage article 8, he was primarily looking at it through the medical issue. The judge factored in the countervailing public interest considerations and the Appellant’s status has always been precarious as he has never had settled status and he is not working so not financially self-sufficient. The issue of delay was considered in the legacy cases and the Courts ultimately concluded that each case had to be decided on its own merits. The fact the Appellant has been here for 17 years does not reach the 20 year threshold set out in the Rules. The judge considered the totality of the evidence at [44]. The judge dealt with the medical issues and was entitled to find that article 8 was unlikely to succeed where article 3 fails. Mr Bates submitted that, even if the Appellant had been granted ELR his prolific offending would have counted against him being granted ILR. His PNC check runs over 2 pages and 30 offences. The judge was entitled to come to the conclusion he did and there was no material error.

14. In his reply, Mr Karnik submitted that the submission by the Presenting Officer had been extremely lengthy yet the decision is short and very briefly reasoned. He reiterated that the consultations and contact with his GP occurred after he had been examined by Dr Ghosh. There is a degree of contact and it is not as black and white as the judge seeks to make out. Mr Karnik submitted that there is no rule of law that settled status equates to precariousness or otherwise and each case is

fact sensitive. He submitted that the point made about the Appellant's eligibility for ILR is purely speculative and that if the Appellant's mental health problems developed in the UK and are intimately linked with that then it is open to the Tribunal to look at the causes of offending.

15. I found a material error of law in the decision of the First tier Tribunal Judge and announced my decision at the hearing. I now give my reasons.

Findings

16. The GP notes served in respect of the Appellant post date the psychiatric report of Dr Ghosh and thus she could not have taken these notes into consideration as part of her assessment of the Appellant. I find that the judge erred in preferring the medical evidence contained in those notes, rather than the report of an experienced psychiatrist. This is because: a psychiatrist is trained to assess and diagnose mental health disorder to a greater degree than a GP; the purpose of the GP notes was simply to record issues relating to the Appellant's health generally and not solely his mental health; the judge misapprehended the number of material consultations that the Appellant had with his GP following his psychiatric assessment by Dr Ghosh and it is apparent from [30] of his decision that he placed weight on this. The GP notes only appear to start on 22 March 2016 but, contrary to the judge's finding at [30] that the GP notes did not support the Appellant's assertion that he had not remained in contact with his GP, there are no recorded consultations from that start date, apart from a telephone consultation about his alcohol consumption on 12.9.16, until he attended on 20.1.17 when he agreed to resume anti-depressant medication since he had stopped drinking.

17. Moreover, it is clear from the evidence as a whole and as found by Judge Williams in 2009 at [33] that the Appellant at that time had a history of psychiatric illness *viz* schizophrenia and severe PTSD. It is further clear, from the report of Dr Ghosh, that he was still suffering from psychiatric illness 8 years later and that his illness is exacerbated by the consumption of alcohol. Thus when the Appellant attended his GP not having had an alcoholic drink for a month it is to be expected that he would show some improvement in his presentation and general mental state. Nevertheless, it is clear from the notes of the consultation with the GP on 20.1.17 that he reported low mood, trouble sleeping, irritability, fear he would harm someone or something, fear he will lost control and that he felt as he had at the start of his previous major depression when he was hospitalised.

18. I find the judge's errors in the assessment of the Appellant's mental health to be material given that they go to the heart of his human rights appeal. I further note that, presumably in light of the judge's erroneous preference for the GP notes, there were no findings as to the risk of suicide if the Appellant were to be removed from the United Kingdom, despite the fact that Dr Ghosh opined that he is a "*very serious suicide risk*" due to the fact that he has quite severe suicidal thoughts, has attempted suicide and hears command hallucinations telling him to kill

himself. She further opined that any threat of deportation will lead to him killing himself.

Decision

19. I find material errors of law in the decision of First tier Tribunal. I remit the appeal for a hearing *de novo* in the First tier Tribunal, to be listed before a judge other than First tier Tribunal Judge Gillespie.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

30 January 2018