



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08684/2016

THE IMMIGRATION ACTS

Heard at HMCTS Employment Tribunals Decision and Reasons Promulgated
Liverpool On 5 March 2018 On 28 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

NM
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Davies, Counsel, instructed by Loshana & Co Sols.
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1 The appellant appeals against the decision of Judge of the First-tier Tribunal Tobin dated 20 February 2017, in which the judge dismissed the appellant's appeal against the decision of the respondent dated 27 July 2016, refusing his protection claim.

- 2 The appellant is a national of Sri Lanka, and claimed to fear serious harm in that country due to his perceived opposition to the Sri Lankan government. The appellant entered the UK in April 2009 using entry clearance as the dependent of a Tier 4 student. This leave was later extended. On 8 March 2012, the appellant returned to Sri Lanka to attend his brother's wedding. He returned to the UK on 28 March 2012.
- 3 The appellant ultimately claimed asylum on 5 February 2016. He claimed that during the visit to Sri Lanka in March 2012, he had been detained and seriously ill treated during interrogation about previous activities of the LTTE. As part of his claim for protection, the appellant also claimed that in 2001 he had supported the election campaign of a politician [M], acting as media officer, and had also overseen the management of a de-mining program. Further, the appellant claimed to have assisted members of the LTTE from 2004 onwards, providing them with accommodation.
- 4 The respondent refused the protection claim for reasons set out in the decision letter dated 27 July 2016, principally on the grounds that the appellant's account was not credible.
- 5 On appeal, the appellant relied *inter alia* on a report from consultant psychiatrist Dr Dhumad dated 1 February 2017, in which the doctor set out the account as given by the appellant to the doctor (paras 6.1-8.2), and the appellant's mental health history after the events of 2012 (10.1-10.7). The doctor expressed his opinion that the appellant's presentation was consistent with a diagnosis of moderate depressive episode (17.1), and that the appellant also suffered from post-traumatic stress disorder symptoms such as avoidance, flashbacks, and nightmares, meeting the criteria for Post Traumatic Stress Disorder (17.2). The doctor also discussed a potential risk of suicide for the appellant (17.3).
- 6 Dr Dhumad ended the 'opinion' section of his report as follows (there is some repetition of the paragraphs numbers, and a number of grammatical errors in the original):

“17.2 In my opinion he is fit to attend court hearing and give oral evidence. However he is depressed, has PTSD, hopeless and his concentration is poor and is likely to be worse, if he were to be cross-examined. Therefore I respectfully recommend that he is given regular breaks and is allowed enough time to comprehend questions.

17.3 He might come across as vague or inconsistent in his recall of some of the events, in my opinion this is very common presentation in PTSD, due to memory difficulties.

17.4 I was asked to consider the possibility that he might be feigning or exaggerating his mental illness. I have not taking his story at face value but carefully examined his symptomatology and his emotional reactions during

interview. It is my clinical opinion that his clinical presentation is consistent with a diagnosis of depression and PTSD.”

7 The judge rejected the appellant's account as not credible, and dismissed the appeal. The judge found the appellant’s evidence ‘wholly unconvincing’; being generally unwilling to answer direct questions, giving generalised responses, being hesitant and unwilling to commit or give clear answers to questions. He gave contradictory answers. He was evasive, inconsistent, and unconvincing with his responses. Consequently, his evidence lacked credibility (all [24]).

8 Further, the appellant was not credible in his account of working for [M]. His explanation as to why he had not mentioned this element of his count in his original asylum application was wholly unconvincing [25]. The judge was unconvinced of the appellant's account about how he became a media officer working for this very senior politician. The judge was particularly unconvinced about how the appellant came to be managing a mine clearance programme, having no experience of of mine clearance or logistics [26, 30]. The appellant's evidence did not make sense, and it was unbelievable [26]. The judge was of the view that the appellant's accounts were riddled with inconsistencies and incredible assertions [30].

9 The judge then observed as follows at 31:

“The appellant raised his purported psychiatric condition only relatively recently. This was not referred to in previous proceedings, which has raised obvious questions or even doubt in my mind. Dr Dhumad (*sic*) medical report appears on the face of it to be reasonably comprehensive. I am surprised that his interview with the appellant was conducted in English, when the claimant required a Sinhalese interpreter for this hearing. Nevertheless, the appellant claimed Post Traumatic Stress Disorder and that he was a suicide risk. I was not convinced by anything the claimant had said to me in evidence, to the extent that I could not believe a word he had to say. Therefore, this raised serious questions over Dr Dhumad’s medical report. The appellant raised the onset of PTSD after the effluxion of many years, which seems contrary to most cases of PTSD, as this is usually a condition gradually improves over time. I needed the consultant psychiatrist to explain to me the late onset of this condition and late reporting of the symptoms and why he accepted the claimant's purported suicide. I was so dissatisfied with the claimant's credibility that I wanted to hear Dr Dhumad’s account first hand and to listen carefully to his explanation as to how he came to his conclusions. It is with trepidation that I reject medical evidence, even a medical report without the benefit of oral evidence. In the absence of hearing such an account from a consultant psychiatrist, I accept the respondent's submission that I should attached very little weight to Dr Dhumad’s written evidence. It is not consistent with the rest of the appellant’s case, it was introduced relatively late, and there remains unanswered questions in my mind over the psychiatrist’s conclusions. I determine that the claimant would do or say

anything to further his asylum case and I want to be satisfied that the psychiatrist was not duped and Dr Dhumad has exercised his professional judgement correctly.'

- 10 The appellant's appeal was accordingly dismissed.
- 11 In the grounds of appeal dated 4 August 2017, the appellant argues that the judge erred in law, in summary, as follows:
- (i) failing to consider the appellant's mental health issues, and failing to take into account the doctor's opinion at para 17.3 (set out above) regarding the appellant's memory and the way in which he might answer question during the hearing;
 - (ii) rejecting the clinical findings of the doctor;
 - (iii) irrationally rejecting the doctor's opinion, in part because the judge was surprised that the doctor's interview with the appellant was held in English;
 - (iv) proceeding unfairly; having indicated that "I needed to the consultant psychiatrist to explain to me the late onset of this condition late reporting of the symptoms and why he accepted the claimant's purported suicide risk. I was so dissatisfied with the claimant's credibility that I want to hear Dr Dhumad's account first-hand and listen carefully to his explanations as to how he came to his conclusions"; the judge should have adjourned the appeal so that the doctor could be produced to be cross-examined or questioned by the judge;
 - (v) when finding discrepancies in the appellant's account, by failing to engage with the evidence in the appellant's witness statements and his interview records.
 - (vi) failing to consider whether there was sufficient treatment for the appellant's post-dramatic stress disorder on return to Sri Lanka.
- 12 Permission to appeal was granted by judge of the first-tier Tribunal Nightingale on 17 October 2017 on the grounds that it was arguable that the judge fell into error in making findings with regard to credibility before turning to the consideration of the medical evidence. "Whatever the shortcomings of the report might be, the medical evidence should have been considered in the round and it is arguable that the judge fell into an error of the nature encapsulated by Lord Justice Wilson in Mibanga [2005] INLR 377 at para 24:

"What the fact finder does at his peril is to reach a conclusion by reference only to the applicant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence"

- 13 There is no rule 24 response from the respondent.
- 14 I heard submissions from the parties in the appeal. Mr Davies relied upon the grounds of appeal. Mr McVeety argued that the case of Mibanga related to cases where the credibility assessment had been completed before a fact finder turned to medical evidence, whereas in the present case, he argues, the judge had not concluded his credibility assessment, but identified shortcomings in the psychiatric report in order to justify giving little weight to it.

Discussion

- 15 I find that there are material errors of law in a way that the judge determined the appeal.
- 16 It is appropriate to set out the guidance given by the Court of Appeal in the case of Mibanga:

“24 It seems to me to be axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto. Just as, if I may take a banal if alliterative example, one cannot make a cake with only one ingredient, so also frequently one cannot make a case, in the sense of establishing its truth, otherwise than by combination of a number of pieces of evidence. Mr Tam, on behalf of the Secretary of State, argues that decisions as to the credibility of an account are to be taken by the judicial fact-finder and that, in their reports, experts, whether in relation to medical matters or in relation to in-country circumstances, cannot usurp the fact-finder's function in assessing credibility. I agree. What, however, they can offer, is a factual context in which it may be necessary for the fact-finder to survey the allegations placed before him; and such context may prove a crucial aid to the decision whether or not to accept the truth of them. What the fact-finder does at his peril is to reach a conclusion by reference only to the appellant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence. Mr Tam has drawn the court's attention to a decision of the tribunal dated 5 November 2004, namely HE (DRC - Credibility and Psychiatric Reports) [2004] UKIAT 00321 in which, in paragraph 22, it said:

"Where the report is specifically relied on as a factor relevant to credibility, the Adjudicator should deal with it as an integral part of the findings on credibility rather than just as an add-on, which does not undermine the conclusions to which he would otherwise come."

25 In my view such was the first error of law into which the adjudicator fell. She addressed the medical evidence only after articulating conclusions that the central allegations made by the appellant were, in her extremely forceful if rather unusual phraseology, 'wholly not credible'.

...

30 The adjudicator's failing was that she artificially separated the medical evidence from the rest of the evidence and reached conclusions as to credibility without reference to that medical evidence; and then, no doubt inevitably on that premise, found that the medical evidence was of no assistance to her. That was a structural failing, not just an error of appreciation, and demonstrated that the adjudicator's method of approaching the evidence diverted from the procedure advised in paragraph 22 of HE, set out by my Lord."

- 17 One should also have regard to the observations of the Tribunal in HH (medical evidence; effect of Mibanga) Ethiopia [2005] UKAIT 00164:

"The Tribunal considers that there is a danger of Mibanga being misunderstood. The judgments in that case are not intended to place judicial fact-finders in a form of forensic straightjacket. In particular, the Court of Appeal is not to be regarded as laying down any rule of law as to the order in which judicial fact-finders are to approach the evidential materials before them. To take Wilson J's "cake" analogy, all its ingredients cannot be thrown together into the bowl simultaneously. One has to start somewhere. There was nothing illogical about the process by which the Immigration Judge in the present case chose to approach his analytical task."

- 18 Bearing such guidance in mind, I find that the judge had expressed clear conclusions on the credibility of the appellant's account, before he turned to consider the medical report. Even within paragraph 31, it is in my view apparent that the judge was approaching the medical report on the basis that he was considering whether the content of the report was capable of overturning the adverse credibility findings that the judge had already made; for example: "I was not convinced by anything the claimant had said to me in evidence, to the extent that I could not believe a word he had to say. Therefore, this raised serious questions over Dhumad's medical report."
- 19 Most observers would take the way that the judge expressed himself there, and considering the structure of the decision overall, to indicate that the judge had simply not believed the appellant's account, which then caused the judge doubt the content of the psychiatric report.
- 20 Acknowledging the view expressed HH (medical evidence; effect of Mibanga) that one cannot throw all the ingredients of a cake into the bowl same time, and that it is not necessarily an error of law if the judge does not consider medical evidence first, it seems to me that the judge had fully concluded his credibility assessment before turning to the medical evidence in this case.

- 21 Further, whereas the judge notes that the doctor's report 'was not consistent with the rest of the appellant's case', the appropriate approach would be to assess the credibility of the appellant's account alongside the report, not to draw a sharp contrast one section of the evidence, and the doctors report, given in particular that the doctor had expressed an opinion that the appellant might come across vague or inconsistent in his recall of some of the events, this being a very common presentation in people suffering PTSD.
- 22 Further, whereas the judge thought that the doctor might have been 'duped' by the appellant (last line of [31] and see also [39]), the judge errs in law in failing to have specific regard, on the issue of the appellant having potentially feigned or exaggerated his symptoms to the doctor, to para 17.4 of the doctor's report as set out above, which specifically considered that possibility, and rejected it.
- 23 Further, it is not clear in what 'previous proceedings' the judge would have expected the appellant to have referred to his psychiatric problems. Even if the appellant claimed asylum late, the present appeal represented the first 'proceedings' relating to his asylum claim. Further, insofar as the judge attached less weight to the report on the basis that the appellant spoke in English to the doctor, no rational reason is given as to why that would diminish the weight that should be attached to the report. Further, the fact that the report was introduced 'relatively late' is also not in itself a sufficient reason, without more, for placing little weight on a report.
- 24 I find that the way in which the judge considered the medical evidence undermined the whole of the judge's credibility assessment.
- 25 I find that those are sufficient reason for setting aside the judge's decision. I do not need to consider the appellant's grounds (iv)-(vi) as I have summarised them above.
- 26 The decision needs to be remade. The extent of fact finding which is required in remaking the decision is such that it is appropriate for the matter to be remitted to the First-tier Tribunal, with no findings retained from the judge's decision.
- 27 My finding that the judge erred in law in the way that he approached the medical evidence in this case should not be taken as a suggestion that the appellant has good prospects of ultimately succeeding in his appeal. In fairness to the judge, he identified many serious issues with the credibility of the appellant's evidence. However, I am unable to say that the errors outlined above would have made no difference to the outcome of the appeal, and the appellant is entitled for his appeal to be considered again by the First tier.

Decision

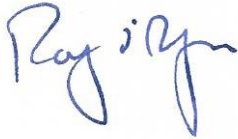
- 28 The judge's decision involved the making of a material error of law.

I set aside the judge's decision.

I allow the appellant's appeal, to the extent that the appeal is remitted to the First-tier Tribunal, to be heard by a judge other than Judge Tobin.

Signed:

Date: 27.6.18

A handwritten signature in blue ink, appearing to read 'Ray O'Ryan', written in a cursive style.

Deputy Upper Tribunal Judge O'Ryan

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

This is a protection appeal. Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their families. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.