



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

Appeal Number: **PA/00269/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On 3 July 2019**

**Decision & Reasons Promulgated
On 24 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**K G
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Lester of Luqmani Thompson & Partners.
For the Respondent: Ms Jones, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of the Ivory Coast born on 30 December 1975. He appealed against the decision of the respondent on 6 December 2018 to refuse his protection and human rights claim. His appeal came before Judge of the First-tier Tribunal S Meah and Judge of the First tier Tribunal Bibi (“the panel”) who, in a decision promulgated on 26 February 2019, dismissed his appeal on protection grounds, allowing his appeal on Article 3 medical grounds.
2. Permission to appeal was granted, out of time, by First-tier Tribunal Judge S P J Buchanan in the following terms:

“... ”

3. The Grounds of Appeal [GOA] contend that the FTTJs arguably erred because they “[failed] to consider relevant evidence, [failed] to make material findings/give appropriate reasons and [failed] to take the correct approach to an Istanbul Protocol compliant medico-legal report (as per KV (Sri Lanka) v SSHD [2019] UKSC 10)

4. As contended in GOA, in assessing “Medical Circumstances – article 3 claim”, the FTTJS carefully considered the medico-legal report from Dr Benjamin Robinson of the Helen Bamber Foundation. It is noted at [34]: “the report includes a detailed consideration of the appellant’s scars alongside his explanation of how these were caused is considered with possible alternative explanations. (sic) ... We can place reliance upon his report.” At [35] the expert is noted to have reported “The scar is typical of this kind of wound (as described and attributed by the appellant): and at [36] the expert is noted to have reported “the scar ... [is] typical of the scars which would be caused by surgery for a hernia as described by the appellant following the blows to his abdomen”.

5. As contended in the GOA, in the assessment of the asylum claim at [13]-[30] there is no mention of consideration of the report from Dr Robinson; which as discussed above includes evidence supportive of the appellant’s claims. Although there is a discussion of medical records at [25] within the reasons given for dismissing the asylum/humanitarian protection claims, there is nothing said about the detailed report from Dr Robinson.

6. For these reasons, I conclude that it is arguable by reference to the Grounds of Appeal that there may have been error of law in the Decision as identified in the application. I grant permission to appeal.”

3. Hence the matter came before me.
4. Ms Jones confirmed that the appellant had been granted three years’ discretionary leave to remain in the light of the panel’s decision that the respondent’s decision had placed the UK in breach of Article 3 on medical grounds.
5. At the outset of the hearing I indicated to the parties that, as in the grant of permission, I had been unable to identify any reference to Dr Robinson’s expert medical report in the panel’s analysis of the credibility of the appellant for the purpose of deciding his protection appeal. Both representatives agreed that was the case. Ms Jones agreed that the panel had not rejected the expert evidence in that analysis; she accepted the panel had been required to undertake a fuller analysis because Dr Robinson’s report had been accepted in the analysis of the appellant’s Article 3 claim.
6. Mr Lester, for the appellant, adopted his detailed skeleton argument. In summary, the appellant had relied, before the panel, on the comprehensive medical report of Dr Robinson of the Helen Bamber Association which corroborated his account of ill-treatment and persecution and provided a medical explanation for the inconsistencies in his account. Despite its clear relevance, the panel did not refer to the report in its decision to dismiss the protection elements of the appeal. This was despite placing reliance on the expert’s evidence in the analysis of the Article 3 medical claim. Mr Lester submitted that the panel’s failure to consider the report in relation to the protection element of the appeal was a clear error of law. Alternatively, if the panel did not consider the report in that respect but decided to place no weight on it, it was required to make that decision explicitly and to give reasons for so doing, given the clear materiality of the report.
7. Mr Lester also applied to amend the grounds of appeal to include a submission that the panel had failed to have regard to the Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance in the analysis of credibility and to record

that this had been done. Ms Jones told me the respondent did not object to the appellant's grounds of appeal being amended to include this additional submission. I allowed the appellant to make that amendment, it being in the interests of justice to do so and there being no prejudice to the respondent as a result.

8. For the respondent, Ms Jones submitted there was a brief reference at [16] to the existence of "medical evidence" submitted for the appellant. This brief reference could be cross-referred to paragraph 141 of the report itself which referred to a significant inconsistency in the appellant's evidence. She noted the panel's credibility findings at [19]-[22] which accorded with the expert's evidence at [141] and [142] of his report. She submitted that [19]-[21] related to the reliability of documentary evidence. These were not, she submitted, explained by his trauma or characteristics or disorder. She referred to the adverse finding at [21] regarding the police court summons as being unexplained by the report or trauma. She submitted that the panel had appropriately taken issue as regards the translation of documentary evidence; the expert had not been in a position to take a view. Similarly, at [22] the panel had made an adverse finding as regards the picture of a banner, that picture having been produced by the appellant. Ms Jones noted the panel had concerns about the content of the picture; those concerns could not be explained by the appellant's mental health. This was also the case as regards the appellant's documents which were analysed at [23], [24] and [27]. Indeed, the expert accepted this, in part, at [147] of his report. Ms Jones submitted the panel was entitled to make findings which were independent of the medical evidence and what the appellant believed subjectively or objectively. In summary she submitted that the findings of the panel as regards the reliability of the documentary evidence could stand irrespective of the content of the expert report.

Discussion

9. The appellant's skeleton argument before the panel acknowledged the existence of a previous appeal determination which was the starting point for the panel's analysis of the evidence (**Devaseelan v SSHD [2002] UKIAT**). The skeleton argument identified the existence of new evidence, including that of Dr Robinson as being relevant to the appellant's renewed protection claim. It was submitted that the new evidence, including the scarring and psychiatric evidence of Dr Robinson, warranted departure from the previous Judge's findings. Thus the existence of this expert evidence was a live issue to be addressed and taken into account in the panel's assessment of the appeal on protection grounds.
10. Dr Robinson's report noted the scarring of the appellant and concluded inter alia that a scar on the appellant's leg was typical of the cause attributed to it by the appellant, namely a stab wound to the foot. Dr Robinson also concluded that the scar on the appellant's abdomen was typical of scars caused by surgery for a hernia as described by the appellant following blows to the abdomen. Dr Robinson also diagnosed the appellant with post-traumatic stress disorder ("PTSD") and major depression. He reported inter alia at [176] that the appellant was a "highly vulnerable man, depressed, traumatised ...". Dr Robinson refers to the appellant as being "mistrustful of authorities, and afraid". He concludes at [179] that there is "a coherent clinical picture which is plausible from a medical, psychiatric and psychodynamic (i.e. causal) point of view". This report is compliant with the Istanbul Protocol and with the Presidential Practice Directions updated on 18 December 2018. It warranted consideration in the context of the appellant's protection appeal.

11. Either the panel did not consider this report in the context of protection or it considered it and rejected it in that context (albeit it was accepted in the context of the appellant's Article 3 appeal).
12. I am mindful that the panel (albeit in the first person singular) referred at [9] to having taken into account the appellant's documents; in that context the panel referred to "a medical report from the Helen Bamber Foundation dated 12 July 2018". In fact the report is dated 4 July 2018. The panel also noted the report of Dr Robinson under the heading "The hearing" in the context of the decision that the appellant should not give oral evidence; he attended the hearing accompanied by a support worker from the Helen Bamber Foundation. Reference is made in the panel decision to the expert opinion of Dr Robinson as regards the appellant's vulnerability. The panel noted the appellant's representative's submission that the hearing should proceed on submissions only given the appellant's vulnerability.
13. There is a passing reference to Dr Robinson's report, in connection with the protection decision, at [17] which summarises the submissions made for the appellant to the panel.
14. I am mindful that these references, taken together with the detailed analysis of the report in connection with the Article 3 claim, indicate that the panel was well aware of the existence and content of Dr Robinson's report. However, I am unable to draw an inference from these references, that the panel had regard to the expert evidence of Dr Robinson when assessing the credibility of the appellant's account of the events which led him to seek protection. Nor am I able to find, in the absence of any analysis in relation to the protection issue, that the panel decided the expert's report merited no evidential weight. It is clear from the subsequent Article 3 findings, which are almost wholly based on the evidence of Dr Robinson, that the panel gave considerable weight to this expert's professionalism, skill and expertise. They found his expert evidence to be reliable as regards the appellant's diagnosis. The panel concluded the report was compliant with the Istanbul Protocol (at [34]). It noted Dr Robinson "carefully considers each scar on the appellant's body and categorises them according to the usual definitions, and considers alternative causes including self-infliction. We can place reliance upon this report". In the face of this finding, it cannot be said that the panel had considered the report in connection with the protection claim and had rejected it. To have done so would have been wholly inconsistent with the later Article 3 findings. Furthermore, there is no explicit rejection of Dr Robinson's opinion as regards the protection claim or any reasons for it.
15. I draw the almost inevitable conclusion that the panel simply failed to have regard to the existence of Dr Robinson's report when considering the credibility of the appellant's account of past persecution and indeed his appeal on protection grounds generally.
16. Ms Jones argued vigorously that this failure would not have a material impact on the outcome of the appeal on protection grounds because of numerous inconsistencies in the documentary evidence which were unexplained by the expert evidence. I am unable to accept that submission. There are various instances in the panel's assessment of the documentary evidence when they have rejected the appellant's account. By way of example, at [22] the panel considers the appellant's account that his mother had found a blood-stained banner on the front of the family house in September-October 2017. A picture of this banner had been produced. The panel found the face in the picture did not resemble the appellant's face; "at best it is a generic hand drawn picture of a face which is not of great quality and not a high-quality artistic picture of the appellant, and it is not clear whose face it was on the banner." The panel went on to state "We have no credible evidence before us which

demonstrates who is responsible for making and sending the banner to his mother's address". In assessing the quality of this evidence, the panel failed to have regard to the medical evidence as regards the ability of the appellant to give a coherent explanation for the panel's concerns.

17. The panel refers at [23] to photographs of a burnt-out building. It is concerned that the appellant has not provided any evidence which identifies that this was his residence in the Ivory Coast. Thus the panel has drawn an adverse inference from that failure without taking into account the psychiatric evidence which is that the appellant is prone to relapse if reminded of events in the Ivory Coast. Arguably this could explain why such evidence has not been provided. Similarly, the panel is critical that the appellant has failed to provide verification of his having used a PO box in his entry clearance application. It is critical of the failure of the appellant to provide "additional evidence". Again there is no consideration of the expert evidence which has some relevance to the ability of the appellant to engage in such activities in the light of his mental health. In passing I note the panel states it cannot "accept the oral testimony alone on this crucial point given our doubts about his credibility and the veracity of the overall claim": this is despite the fact that the appellant did not give oral evidence at the hearing. Furthermore, the panel's misgivings about the veracity of the claim were formed in the absence of consideration of the medical evidence which is highly relevant in an analysis of the reliability of his account of past events in the Ivory Coast.
18. The panel finds it surprising, at [26], that the appellant had failed to refer earlier to having been sexually assaulted and raped. It is noted that "he has had ample opportunity to raise this and failed to mention this in his screening/asylum interview and at his previous appeal hearing hence this seriously undermines his credibility". Dr Robinson's evidence at [128] of his report is that the appellant's symptoms "did not fully emerge after the attack in the Cote d'Ivoire, but only after the surgery in the UK. This is an entirely medically plausible sequence of events and would suggest that [the appellant] is not exaggerating his symptoms. Were that the case then one might expect him to describe the onset of symptoms soon repressed, but a second event which reminds the patient of the first, causes a re-experiencing of the first event which is in itself traumatic." This observation by Dr Robinson could have explained the failure of the appellant to disclose sexual trauma earlier yet has not been taken into account by the panel in its assessment of the reliability of the claim that he had been sexually assaulted and raped.
19. Dr Robinson deals specifically in his report with the appellant having withheld information from the Home Office. He concludes at [136] of his report that the appellant has "a form of hypervigilance (Criterion D) in the PTSD criteria. Thus, in sum, [the appellant] has before withheld information from the Home Office due to his PTSD which prevents him stating facts which, because of his mental health problems, he wrongly fears will led to his own harm or the harm of others." He goes on to state at [140] that the appellant's "PTSD is severely impairing his ability to trust". This is highly relevant to the panel's assessment of his credibility yet has not been taken into account by the panel.
20. While Dr Robinson has not addressed all the discrepancies which were identified by the Home Office or indeed those of concern to the panel, his evidence as to the appellant's vulnerability and the impact of his mental health issues on his ability to function warranted consideration throughout the assessment of the credibility of the account. Even if no weight were placed on the appellant's documents, as the panel decided, it was incumbent on the panel to assess the evidence overall, both documentary and witness, in the light of the expert medical evidence as regards his complex psychiatric and personality conditions and disorders.

21. The appellant is undeniably highly vulnerable. Despite this, the panel did not apply, in the assessment of the evidence overall, the vulnerable witness guidance contrary to **AM (Afghanistan) v SSHD & Or [2017] EWCA Civ 1123**. This too is an error of law, particularly given the panel's reliance on Dr Robinson's conclusions insofar as the Article 3 medical claim was concerned.
22. In summary, I am satisfied that the failure to take into account Dr Robinson's expert opinion in the assessment of the credibility of the appellant's account is a material error of law. Had it been taken into account, the outcome might have been different notwithstanding the earlier refusal of his asylum claim and the guidance in **Devaseelan**.
23. I reserved my decision at the hearing but indicated to the parties that, if I found one or material error of law, my inclination was to remake the decision. I invited submissions on the issue.
24. Mr Lester told me he had recently taken over conduct of this matter from another organisation. He had not drafted the skeleton argument which had been before the panel in the First-tier Tribunal. He confirmed it was unlikely the appellant would be called to give oral evidence were the matter to be remitted to the First-tier Tribunal but observed that medical conditions could change and he was unsure on this. Mr Lester submitted that it was clear from Dr Robinson's account that the appellant's ill health impacted adversely on his ability to obtain further evidence, a failure for which he had been criticised by the First-tier Tribunal. The appellant's ill-health impacted also on his ability to give a coherent account. He wanted to take instructions, if possible, from the appellant and to make fresh submissions in support of the appellant's protection appeal, rather than relying on the skeleton argument of the appellant's former representatives. He was not in a position to make submissions before me on the substantive issues and would not be in such a position for some time due to the appellant's mental health condition. He did not consider it would be appropriate to rely on the submissions of the appellant's previous representatives alone; he had noted some deficiencies in the conduct of the case and he considered it was in the best interests of the appellant, who was very vulnerable, for the matter to be decided afresh in the First-tier Tribunal on the protection issue. He would then be able to take instructions from the appellant in advance of the hearing. That may take some time given his vulnerability.
25. Ms Jones agreed that, in the light of these submissions for the appellant, the matter should be remitted to the First-tier Tribunal for a proper analysis of the evidence relating to the protection claim; it should be taken in the round with the remaining evidence, including the documentary evidence and any additional evidence which the appellant adduced in support of his protection claim.
26. I was persuaded by Mr Lester, in the light of the appellant's vulnerability and the change of representative, to remit this matter to the First-tier Tribunal for a fresh hearing.

Decision

27. The making of the decision of the First-tier Tribunal involved material errors on points of law. The panel's decision on the appellant's appeal on asylum and humanitarian protection grounds is set aside. The findings pursuant to Article 3, on health grounds, at [31] to [41] of the panel's decision are preserved, as is the panel's decision that the appeal is allowed on Article 3 health grounds.

28. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal Courts and Enforcement Act 2007 and Practice Statement 7.2(v), before any judge aside from FTTJ S Meah and FTTJ Bibi.
29. Given the nature of this appeal, the appellant is entitled to anonymity in these proceedings.

A M Black

Deputy Upper Tribunal Judge

Dated: 17 July 2019

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 their 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.

A M Black

Deputy Upper Tribunal Judge

Dated: 17 July 2019

DIRECTIONS

1. Any further documentary and/or witness evidence relied upon by either party is to be filed with the Tribunal and served upon the other party by no later than 28 days before the date of the hearing in the First Tier Tribunal.
2. The appeal is listed at Taylor House with a time estimate of three hours to be heard at 10.00 am on
3. No interpreter is required.

A M Black

Deputy Upper Tribunal Judge

Dated: 17 July 2019