



Upper Tribunal
(Immigration and Asylum Chamber)

PA/04439/2018

THE IMMIGRATION ACTS

Heard at Glasgow
On 18 April 2019

Decision and Reasons Promulgated
On 30 April 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

O M B
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Miss L Irvine, Advocate, instructed by Latta & Co, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals to the UT against a determination by FtT Judge Buchanan, promulgated on 24 August 2018, on grounds set out at length in her application for permission dated 23 October 2018.
2. Ground 1 is “error as to treatment of medical, psychological and psychiatric evidence”, sub-divided into error as to evidence of (1) the A & E consultant, (2) the psychiatrist, and (3) the psychologist.

3. Ground 2 is “failure to take into account corroborative objective evidence” about the extent of child abuse, including sexual abuse, in Nigeria.
4. Ground 3 is “error of fact and in any event irrational findings as to appellant’s credibility in terms of the delay in the asylum claim”.
5. On 26 December 2018 UTJ Bruce granted permission on all grounds, observing that, “In particular, it is arguable that the FtT erred in taking a *Mibanga* approach to the medical evidence”.
6. The SHHD filed a response to the grant of permission on 14 February 2019. This submits that the FtT directed itself to the conclusions of the medical experts at 8.8, 8.9, & 8.11; considered the appellant’s diagnosis in relation to inconsistencies at 8.21, 8.25, & 8.41; the references at 9.2-3 were summaries of matters already considered; and although the judge did not refer explicitly to the opinion of the psychiatrist at 8.8-9, regard was had to it at various parts of the fact-finding exercise, such as 8.19 & 8.21.
7. The main points which I noted from the submissions of Miss Irvine were these:
 - (i) The principal complaint is in ground 1.
 - (ii) On ground 1.1, the A & E consultant’s report (item 3, pp.16 – 19 appellant’s first bundle in the FtT) disclosed scarring at level C on the Istanbul Protocol, highly consistent with the trauma described and with few other possible causes. The author also described the appellant’s anxiety, depression and possible PTSD, although not within his area of expertise.
 - (iii) The decision at 8.8 quotes the opinion, but does not consider how the report might bear on credibility.
 - (iv) 8.9 refers to the psychologist’s report [on the bearing of the appellant’s diagnosis on her recall] but there is no equivalent paragraph about the psychiatrist’s report.
 - (v) The decision reaches its essential conclusion on credibility at 8.47, and only thereafter at 9.1 evaluates the medical evidence, which is a crucial error. There is no explanation of why the reports have no bearing on credibility.
 - (vi) This is the error exemplified in *Mibanga* [2005] EWCA Civ 367 at [25].
 - (vii) *MT (Credibility assessment flawed, Virjon B applied) Syria* [2004] UKIAT 00307 is a comparable instance of using adverse credibility findings to reject medical evidence, and of dismissing such evidence on a preemptory and unreasoned basis.
 - (viii) The argument would stand even if the paragraphs of the decision were in a different order, because there was no explanation of how the findings on the Istanbul Protocol were factored in.
 - (ix) On ground 1.2, the psychiatrist’s report (item G, respondent’s FtT bundle) also observed the appellant’s tearful and agitated state, and supported her history of

complex trauma. The decision at 8.21 and 8.41 takes an adverse point from the appellant elsewhere saying that she did not know the cause of her mother's death, yet elaborating an account to the psychiatrist. It was not open to the judge to reject the findings of the psychiatrist without giving a reason.

- (x) The absence of even a narration of the psychiatrist's opinion at G5 was a significant omission.
 - (xi) All 3 reports bore upon how the appellant presented herself, and at a minimum there had to be an explanation for rejecting that.
 - (xii) On ground 1.3, the psychologist's report (item 4, pp.29-53 appellant's first bundle in the FtT) reached significant conclusions: at 4.30, 5.1, and 6, symptoms of depression, anxiety and PTSD.
 - (xiii) The decision erred by summarising that opinion at 8.9, but evaluating it only at 9.3, after the adverse conclusion at 8.47.
 - (xiv) There was nothing to add to ground 2, and only a little to add to ground 3.
 - (xv) The appellant explained her delay in claiming asylum. The judge misapprehended her explanation at 8.35, as the woman with whom he thought she might have discussed matters was not a friend, but a woman whom her boyfriend had made pregnant, and whose company was forced upon her.
 - (xvi) It was irrational at 8.37 to find that the appellant might have claimed while in Edinburgh and in contact with medical professionals, when her situation was a life-threatening medical emergency.
 - (xvii) All the errors went to the credibility assessment, so the case should be remitted to the FtT.
8. I observed that the respondent's decision dated 19 March 2018 rejected the claim on the alternative grounds that, even if the appellant had been abused by her father in Nigeria, (a) there is legal sufficiency of protection in that country, and (b) internal relocation is available. If the case fell to be resolved by either or both of those criteria, it did not obviously need to go back to the FtT, even if the credibility findings were set aside. Miss Irvine said that those two issues were dealt with in the appellant's evidence and written submissions to the FtT, but are not mentioned in its decision. She submitted that they could only be dealt with as part of a remitted hearing.
9. Mr Govan advanced the following points:
- (i) The judge reached a clear and sustainable finding on credibility. It might have been an error not to state conclusions on sufficiency of protection and on internal relocation, but that was immaterial.
 - (ii) If it did become necessary to resolve these issues, the UT should do so, based on the cases put by the parties to the FtT.
 - (iii) The judge was clearly aware of all the medical evidence, setting out its salient features at 4, 8.9, 8.11. 8.19. 8.21 and 8.25, all in advance of his credibility conclusion.

- (iv) The appellant's complaint was one of form over substance, going only to the order of treatment. It was recognised in *Mibanga* at [24] that all ingredients of a case had to be considered. This was not a case such as described there, of reaching a conclusion "only by reference to the appellant's evidence and then asking whether it was shifted by expert evidence".
- (v) There was no separate sub-paragraph under the heading "opinion evidence" on the psychiatric report, but it was referenced elsewhere. The judge plainly read it and took it into account.
- (vi) The psychiatric report was dealt with in less detail because it was of lesser medical significance. The psychiatrist recorded "complex trauma" but that was the acceptance of a history, not a diagnosis. The psychologist's report was a much longer and more detailed document. It was obtained later by the appellant with a view to further advancing the mental health aspect of the case, and in effect superseded the psychiatric report. There was nothing in it which might have changed the decision.
- (vii) The decision was consistent with the approach set out in *JL* (medical reports-credibility) China [2013] UKUT 00145 (IAC).
- (viii) Ground 2 only set out uncontentious background evidence. There was no reason to think the judge was not aware of that evidence, and nothing in it which was specific to this case.
- (ix) The 3 points in ground 3 were narrow and selective. The decision explained clearly why it was not found credible that from 2012 to 2016 the appellant had no knowledge of the availability of asylum, and why it was held that she had given a vague and unreliable history of herself over that time.
- (x) The appeal should be dismissed.

10. I reserved my decision.

11. *Mibanga*, [24 - 25]:

"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'. Furthermore she said that she considered that the evidence did not assist her because of her belief that the scars could well be reflective only of illness or disease. Although I accept that the fact that the appellant had identified only two of the scars as being thus reflective did not establish that the others were inflicted in the course of torture, it does -- and here I choose my words with care in the light of what I will be proposing to my Lords as the proper disposal of the appeal -- seem at first a little unlikely that, to take one example, the scars underneath the penis were the result of illness or disease rather than of the torture of the genitals, with which, by reference to a book on the medical documentation of torture, the doctor had regarded them as consistent. Unusually the adjudicator's determination had not included the usual express reminder to herself of the requisite standard of proof. Had she had the standard even more in the forefront of her mind; had she in particular considered the scars on the penis and also, perhaps, the multiple linear scars on the back; and above all, had she conducted her reference to the doctor's evidence at the right forensic time; then it is at least possible that she would have come to a different conclusion."

12. *JL*, headnote:

"(1) Those writing medical reports for use in immigration and asylum appeals should ensure where possible that, before forming their opinions, they study any assessments that have already been made of the appellant's credibility by the immigration authorities and/or a tribunal judge (SS (Sri Lanka) [2012] EWCA Civ 155 [30]; BN (psychiatric evidence discrepancies) Albania [2010] UKUT 279 (IAC) at [49], [53]). When the materials to which they should have regard include previous determinations by a judge, they should not conduct a running commentary on the reasoning of the judge who has made such findings, but should concentrate on describing and evaluating the medical evidence (IY (Turkey) [2012] EWCA Civ 1560 [37]).

(2) They should also bear in mind that when an advocate wishes to rely on their medical report to support the credibility of an appellant's account, they will be expected to identify what about it affords support to what the appellant has said and which is not dependent on what the appellant has said to the doctor (HE (DRC, credibility and psychiatric reports) Democratic Republic of Congo [2004] UKAIT 000321). The more a diagnosis is dependent on assuming that the account given by the appellant was to be believed, the less likely it is that significant weight will be attached to it (HH (Ethiopia) [2007] EWCA Civ 306 [23]).

(3) The authors of such medical reports also need to understand that what is expected of them is a critical and objective analysis of the injuries and/or symptoms displayed. They need to be vigilant that ultimately whether an appellant's account of the underlying events is or is not credible and plausible is a question of legal appraisal and a matter for the tribunal judge, not the expert doctors (IY [47]; see also HH (Ethiopia) [2007] EWCA Civ 306 [17]-[18]).

(4) For their part, judges should be aware that, whilst the overall assessment of credibility is for them, medical reports may well involve assessments of the compatibility of the appellant's account with physical marks or symptoms, or mental condition: (SA (Somalia) [2006] EWCA Civ 1302). If the position were otherwise, the central tenets of the Istanbul Protocol would be misconceived, whenever there was a dispute about claimed causation of scars, and judges could not apply its guidance, contrary to what they are enjoined to do by SA (Somalia). Even where medical experts rely heavily on the account given by the person concerned, that does not mean their reports lack or lose their status as independent evidence, although it may reduce very considerably the weight that can be attached to them."

13. Ground 1 does not fairly represent the FtT's decision.
14. Although it was suggested that the judge gave no reasons for rejecting the medical findings of consistency on the Istanbul Protocol, he did not purport to reject those findings. The essence of the A & E report is set out at 8.8 to show exactly how far it takes the appellant's case. That was her point on the physical aspect of the medical evidence. The decision expresses no disagreement. Nowhere does it "dismiss the report as a whole", as the ground puts it. The report is not rejected, but is taken as advancing the appellant's case, as far as it was capable of doing so.
15. The decision at 8.9 then sets out the essence of how the appellant sought to advance her case by the psychologist's report, which was to explain discrepancies in her reporting over time.
16. The need to take account of the appellant's circumstances and vulnerability is mentioned more than once, e.g. at 4 and at 8.11.
17. The judge goes on to analyse the appellant's credibility under various headings (taking account of whether her vulnerability might account for apparent problems in her evidence not only generally but also specifically, e.g. at 8.25) from 8.12 up to the conclusion at 8.47. Those are 11 pages of detailed and careful explanation, very little of which is challenged by any of the 3 grounds.
18. The judge's point in reverting to the medical reports at 9.3 is that the concerns of the psychologist do not reflect on his reasons for reaching an adverse credibility finding.
19. Mr Govan advanced a good explanation of why the psychiatric report features only to a limited extent.
20. On a fair reading of the whole decision, the judge has kept carefully in mind throughout whether anything in the reports explains away the difficulties which

might otherwise be found in accepting the appellant's evidence, or her latest version of it.

21. The judge's conclusions are based on surveying all the evidence, not on finding the appellant incredible and then looking to see if anything might displace that.
22. Ground 2 is also unfair. The background is summarised at 8.10, beginning with the facts that domestic violence against women is widespread, underreported and often considered socially acceptable. It is not shown that the judge "failed to take objective evidence into account".
23. Ground 3 is highly selective. It does not undermine the full analysis at 8.34 - 8.38 under the heading "ignorance of procedure for claiming asylum in the UK". The appellant's opportunities to find out about asylum over a 4-year period did not occur only while she was with a woman with whom she had no reason to be friendly, or while she was receiving emergency medical treatment. The ground says nothing about the well justified finding that the appellant was remarkably vague about how she spent her time over years, not just over moments.
24. The judge should have reached conclusions on sufficiency of protection and on internal relocation, but those matters are not now material, and need not be resolved any further.
25. The decision of the First-tier Tribunal shall stand.
26. The FtT made an anonymity direction, which is maintained herein.



24 April 2019
UT Judge Macleman