



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04830/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On 24 January 2019

Decision & Reasons Promulgated
On 04 March 2019

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

SR
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Gardner, instructed by Migrant Legal Project (Cardiff)

For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Introduction

2. The appellant is a citizen of Nigeria who was born on [~] 1987. He arrived in the United Kingdom some time in 2005 with a visit visa issued on 17 October 2005 and valid until 17 October 2007. Following the expiry of that leave, the appellant overstayed.
3. On 1 July 2013, the appellant was convicted of conspiracy to defraud at the Central Criminal Court and on 6 September 2013 was sentenced to 27 months' imprisonment. On 21 October 2013, the appellant was notified that he was liable to deportation under the automatic deportation provisions in the UK Borders Act 2007. On 15 September 2014, the appellant was served with a deportation order.
4. On 16 September 2014, the appellant claimed asylum. On 21 April 2015, that application was refused, together with his human rights claim.
5. The appellant appealed to the First-tier Tribunal. On 14 March 2016, his appeal was dismissed on asylum, humanitarian protection and human rights grounds. He did not appeal against that decision and he became appeal rights exhausted on 18 April 2016.
6. On 12 May 2016, the appellant failed to report and was listed as an absconder until he was arrested and detained on 13 July 2017.
7. On 3 August 2017, the appellant was interviewed by the Nigerian Authorities who confirm his identity and nationality and agreed to issue him with an emergency travel document.
8. On 14 August 2017, a rule 35 report was prepared on the appellant. That report was considered by the Secretary of State on 15 August 2017 and the following day the appellant was notified that his detention was to be maintained.
9. On 16 August 2017, the appellant's representatives made further representation under Art 8. Those representations were rejected as not amounting to a fresh claim under para 353 of the Immigration Rules (HC 395 as amended) on 19 September 2017. Further representations were made on 21 September 2017.
10. On 3 October 2017, the appellant was released from detention on bail.
11. On 13 November 2017, the appellant's legal representative submitted a pre-action Protocol letter challenging the decision of 19 September 2017 that the appellant's further submissions did not amount to a fresh claim. In addition, further supporting evidence in respect of the appellant's Art 8 claim was submitted.
12. In response to that, on 28 November 2017 the Secretary of State agreed to review the decision of 19 September 2017 within three months. On 26 February 2018, a consent order to that effect was sealed in relation to the judicial review proceedings which the appellant had previously commenced.

13. On 21 March 2018, the Secretary of State again refused the appellant's claim for asylum, humanitarian protection and under Art 8 of the ECHR.

The Appeal to the First-tier Tribunal

14. The appellant appealed that decision to the First-tier Tribunal. The appeal was heard by Judge Trevaskis.
15. The appellant's asylum claim was based, principally, upon a claim that he is bisexual; had been subjected to two physical attacks when he was 17 and 18 in Nigeria. In relation to the former, he claimed he had been stabbed with a screwdriver and beaten with sticks and hit on the head. In relation to the latter, he claimed that after he was arrested by the police he was beaten with batons, his hands and ankles were tied and he was beaten by other inmates and raped by two or three inmates.
16. In support of his claim, in addition to his own evidence, the appellant relied upon a rule 35 report in which the appellant's account of those two attacks was given and which identified that scars on his body were consistent with his claimed mistreatment. In addition he relied upon a psychiatric report by Dr Battersby which identified that the appellant was suffering from moderate PTSD and also reflected that the appellant's late disclosure of his claim was culturally related and also might be related to "avoidance" as a result of the trauma he claimed to have suffered.
17. Judge Trevaskis, as had the judge in the appellant's appeal in April 2016, found the appellant's account not to be credible and did not accept that he was bisexual or that he had been attacked, as he claimed, in Nigeria before coming to the UK in 2005. Consequently, Judge Trevaskis dismissed the appellant's appeal on asylum and humanitarian protection grounds and under Art 3 of the ECHR.
18. In relation to Art 8, the appellant relied upon his relationship with a British citizen ("ML"), together with his relationship with her children from previous relationships, as well as their own daughter aged 15 months and the appellant's daughter, aged 10 with a former partner. Judge Trevaskis found that any impact upon those relationships was outweighed by the public interest and that, therefore, the appellant's deportation was a proportionate interference with his private and family life in the UK.

The Appeal to the Upper Tribunal

19. The appellant sought permission to appeal to the Upper Tribunal on two grounds. First, in assessing the appellant's credibility in relation to his asylum claim based upon his claim to be bisexual, the judge had failed to refer to, or indicate that he had taken into account, the evidence of Dr Battersby. Secondly, in relation to the Art 8 claim, a number of points were made, including that the judge had failed properly to

consider whether the effect of the appellant's deportation would be unduly harsh upon his partner and the children.

20. Permission to appeal was granted by the First-tier Tribunal (Judge O'Brien) on 28 September 2018.
21. On 15 November 2018, the Secretary of State filed a rule 24 notice seeking to uphold Judge Trevaskis' decision.

Discussion

22. At the hearing, I heard oral submissions from Ms Gardner on behalf of the appellant and Mrs Aboni on behalf of the Secretary of State. During the course of those submissions, Mrs Aboni conceded that the judge had materially erred in law in dismissing the appellant's appeal under Art 8. She accepted that the Judge had failed properly to consider whether the appellant's deportation would be "unduly harsh" on both his partner and the children as required by para 399(a) of the Immigration Rules and s.117C(5) of the Nationality, Immigration and Asylum Act 2002 ("the NIA Act 2002"). Mrs Aboni conceded that the appeal should be remitted on that basis for a *de novo*, a rehearing in respect of the appellant's Art 8 claim. Ms Gardner agreed that was the appropriate course.
23. As a result, I need say no more than that I agree that the concession made by Mrs Aboni was properly made and that I am satisfied that the judge materially erred in law in assessing the appellant's Art 8 claim, in particular in considering the application of Exception 2 in s.117C(5) of the NIA Act 2002.
24. Mrs Aboni, however, maintained that Judge Trevaskis's decision in respect of the appellant's asylum claim was legally sound and should stand.
25. Ms Gardner expanded upon the grounds of appeal. She submitted that the judge had failed properly to take into account the rule 35 report which had not been before the previous judge which went, she said, beyond the "scarring issue" to which he made reference in para 75 of his determination, but also set out the appellant's case, in particular that he had been raped during the second attack he relied upon. Further, Ms Gardner relied upon Dr Battersby's report. She accepted that Judge Trevaskis had referred to Dr Battersby's report at paras 37-39 of his determination but had made no reference to it when reaching his adverse credibility finding in paras 72-79. In particular, Ms Gardner relied upon Dr Battersby's opinion that the appellant's PTSD might result in "avoidance" of the stresses and so explain his late disclosure of the sexual attacks and also that reluctance to disclose may be culturally driven.
26. Mrs Aboni, relying upon the rule 24 response, submitted that the judge had adequately dealt with the new evidence in the rule 35 report and in Dr Battersby's

report. She submitted that the judge had considered the late disclose of this evidence and had reached findings that were adequately reasoned and legally sustainable.

27. The background to the appeal before Judge Trevaskis was, of course, that the appellant had previously made an asylum claim in 2014 based upon his claim to be bisexual. That was immediately after the deportation decision was made against him. The appellant appealed the rejection of that claim to the First-tier Tribunal. The decision of Judge Rodger (sent on 1 April 2016) is contained within the respondent's bundle and was relied on by the Secretary of State before Judge Trevaskis. In that determination, Judge Rodger made an adverse credibility finding against the appellant and rejected his claim to be bisexual and at risk on return to Nigeria as a consequence. He rejected the appellant's claim that he had had a two year relationship with a man in Nigeria and had been subject to ill-treatment as a consequence by his family in Nigeria. He rejected the appellant's account that he had witnessed one of his partners being killed in Nigeria.
28. Judge Rodger's decision and findings were correctly taken by Judge Trevaskis in the present appeal as the "starting point" for his assessment of the appellant's claim which, in essence, turned upon his credibility (see Devaseelan [2003] Imm AR 1). The judge set that position out in para 69 of his determination.
29. Of course, and Judge Trevaskis recognised this, he was required to assess the appellant's credibility on the basis of all the evidence that was before him. In essence, the new evidence was the rule 35 report and Dr Battersby's report. In the former, the appellant for the first time raised the two claimed attacks upon him in Nigeria when he was 17 and 18, including in the latter case when detained by the police that he had been raped by inmates in detention.
30. Judge Trevaskis dealt with Dr Battersby's report at paras 37-39 of his determination as follows:

"Psychiatric report by Doctor Battersby dated 13 August 2018

37. In the author's opinion the appellant is suffering from moderate PTSD. He was considered to have low vulnerability to mental health problems. He disclosed suffering from nightmares ever since watching the murder of his partner when he was a teenager. He also got visibly distressed when talking about being raped in a cell in Nigeria as well as physically assaulted.
38. The classification of the appellant for PTSD was based upon persistent remembering or "reliving" the stressor: the appellant reported nightmares and flashbacks of traumatic experiences; actual or preferred avoidance of circumstances resembling or associated with the stressor: the appellant was avoidant of giving details about his experiences and looked visibly upset when he talked about them; persistent symptoms of increased psychological sensitivity and arousal: the appellant looked tired, he was irritable at times, he reported feeling constantly on edge and stated that he startles easily, and dislikes fireworks.

39. Throughout his interview, his non-verbal and verbal behaviours were consistent with someone who has moderate PTSD.”
31. Then, having set out a number of relevant legal issues and self-directions including a detailed approach to assessing credibility at paras 61-68, the judge turned to make his findings in relation to the appellant’s asylum claim at paras 71-79 as follows:
- “71. I have summarised the evidence in the preceding paragraphs of this decision, and I have also referred to the bundles provided; I have had regard, and given anxious scrutiny, to all of the evidence, including the evidence contained in those bundles which I have not summarised in detail; when considering this decision, reference should be made to those bundles. I have considered the evidence as it is at the date of the hearing of this appeal.

Asylum

72. The fresh aspect of this claim raised by the appellant relates to scarring which he claims was inflicted in the course of mistreatment in Nigeria because of his sexual orientation. All other aspects of his asylum claim have been previously considered by the respondent and rejected, and dismissed on appeal. I have had the benefit of reading the determination of the judge who dismissed that appeal, and I note that, although the appellant has sought to criticise the fairness of the hearing, no attempt was made to appeal against that decision, and the appellant’s appeal rights became exhausted on 18 April 2016.
73. The appellant gave an otherwise detailed account of his difficulties in Nigeria associated with his claimed sexuality, including reference to being attacked a couple of times when he was 17 and 18 years old. He made no mention whatsoever of any injuries caused by such attacks, despite the fact that these might have been supportive of his claims. In accordance with the above authority, I am required to treat with circumspection such evidence which existed at the time of the original claim, but which was not revealed by the appellant.
74. The appellant is clearly an intelligent man, and has made significant efforts to secure his continued presence in the United Kingdom. I do not accept as credible his claim that he declined to mention these injuries out of embarrassment or reluctance, because I am satisfied that he would have recognised the potential importance of such evidence.
75. In the rule 35 report the history given by the appellant to the author of that report was that when he was 17 he was attacked by 5 – 10 persons; he was stabbed, including with a screwdriver and beaten with sticks and that he was hit on the head with wood. When he was 18 he was arrested by the police when he was being assaulted; he was beaten with batons in the van; his hands and ankles were tied together with rope; he was beaten by other inmates and raped by 2 – 3 other inmates. The injuries found were multiple scars and they raised a hard lump on the top of his head, as well as to other scars which the appellant said did not relate to the incidents described. The report concludes that the injuries revealed are consistent with the account given by the appellant as to how they were caused.

76. Of the rule 35 report, it is not suggested that the injuries observed on the appellant could only have been caused by the way he claims to have been mistreated. In other words, they are not diagnostic, but merely consistent, and could therefore have been caused by other means; indeed, the appellant identified two scars which had been caused by other means. I therefore find as a fact that the rule 35 report is not of itself probative of the causes of the appellant's injuries. That evidence must be considered in conjunction with an assessment of the overall credibility of the appellant. His credibility was considered at length and in detail by the judge at his earlier appeal, and the findings about his credibility are set out in great detail in the determination. In short, the judge found the appellant not to be credible in relation to the asylum claim.
77. It is submitted on behalf of the appellant that, had the judge had the benefit of the evidence of the rule 35 report, a different conclusion may have been reached with regard to credibility. However, the absence of that evidence at the earlier hearing was due to the failure of the appellant to adduce it. I am obliged to treat with circumspection the excuses offered for the failure to adduce such evidence, and I also have regard to the fact that its probative value is largely dependent upon the credibility of the appellant as to the causation of the injuries. I have heard no evidence from the appellant at this hearing which leads me to conclude that the previous judge made any error in the assessment of the appellant's credibility, or lack thereof, for the reasons stated in the earlier decision.
78. As a result, I am drawn to the conclusion, as identified in the authority referred to above, that the issues raised regarding the asylum claim in the earlier appeal and in this appeal are the same, and therefore should be treated as having been decided at that earlier hearing, and are not to be re-litigated.
79. Accordingly I dismiss the appeal on asylum grounds."
32. I do not accept Ms Gardner's submissions that the judge failed properly to consider either the rule 35 report or Dr Battersby's report.
33. First, it is plain that at paras 75-77, the judge set out the appellant's claim (raised for the first time) in the rule 35 report. That included the allegation of sexual assault on the second occasion when he was 18 (see para 75). These were matters that had not even been raised in the appellant's previous appeal. They were undoubtedly raised late. They were also matters which the appellant could have raised in the earlier appeal. In para 77, properly relying upon the guidance in Devaseelan, the judge had regard to the fact that evidence which could have been raised in the earlier appeal but when raised now had to be treated with some circumspection. Of course, the appellant sought to explain why these matters were raised late because, and this is set out at para 64 of the judge's determination, he found it difficult to talk about these matters. The judge was clearly aware of the appellant's explanation. The "new" evidence did not, of course, raise for the first time the sensitive issue of the appellant's claimed sexual orientation. That had previously been raised, albeit only in 2014, by the time of the earlier appeal. Indeed, his delay in disclosing his sexual orientation was not, of course, accepted as a valid excuse by Judge Rodger in the

earlier appeal which had not been challenged. I am unable to discern any error in the judge's consideration of the rule 35 report and the issues it raised.

34. Secondly, Ms Gardner relied upon Dr Battersby's report to explain the non-disclosure. To the extent that Dr Battersby sought to explain the non-disclosure on the basis of "cultural" inhibitions, she is not an expert. Her expertise is in psychiatry. She did, however, raise the issue of "avoidance" in the context of her diagnosis that the appellant suffered from moderate PTSD. At pages 20-21 of her report she acknowledged that the appellant had been exposed to stressful events and noted in respect of his response:

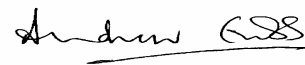
"[a]ctual or preferred avoidance of circumstances resembling or associated with the stressor, which was not present before exposure to the stressor. (He was avoidant of giving details about his experiences and looked visibly upset when he talked about them)".

35. Judge Trevaskis made specific reference to Dr Battersby's report, including her diagnosis of moderate PTSD and of the appellant's "avoidance of circumstances" associated with describing the stressful event (at para 38 set out above). Whilst Judge Trevaskis did not make specific reference to Dr Battersby's report in the findings section of his determination at paras 71-79, it would, in my judgment, be an unduly myopic reading of his determination to conclude that the detailed evidence that he set out in his determination (and to which he specifically said he had regard in para 71 of his determination) was not part of his consideration when reaching his findings in paras 71-79 and his conclusion that the appellant's account was not credible.
36. Neither Dr Battersby's report nor the rule 35 report required Judge Trevaskis to accept the appellant's account. The judge accepted that the appellant suffered from moderate PTSD but the precise cause of that PTSD (and whether it arose as a result of attacks motivated by his sexual orientation) was properly a matter for the judge on the basis of all the evidence. Likewise, the rule 35 report, as the judge points out in para 76, identified that the appellant had scars that were consistent with his account but that they could have been caused by other means. This evidence also did not require the judge to accept the appellant's account of the attacks and injuries which were caused because of his sexual orientation.
37. Standing back, and reading Judge's Trevaskis's determination as a whole, the judge fairly set out all the relevant evidence and, taking the earlier adverse decision as his starting point, did, in my judgment, fully and properly take into account the "new" evidence in Dr Battersby's report and the rule 35 report. I am satisfied that the judge gave adequate reasons at para 71-79 of his determination for reaching his adverse credibility finding and rejecting the appellant's account based upon his sexual orientation and so dismissing his appeal on asylum, humanitarian protection and Art 3 grounds. The judge's decision to dismiss the appellant's appeal on those grounds did not involve the making of an error of law.

Decision

38. For the above reasons, the judge materially erred in law in dismissing the appellant's appeal under Art 8. The First-tier Tribunal's decision is, to that extent, set aside.
39. The judge did not, however, materially err in law in dismissing the appeal on asylum and humanitarian protection grounds and under Art 3 of the ECHR. The decision to dismiss the appeal on asylum and humanitarian protection grounds and under Art 3 of the ECHR shall stand.
40. The appeal is remitted to the First-tier Tribunal for a *de novo* rehearing in respect of Art 8 alone.

Signed



A Grubb
Judge of the Upper Tribunal
26 February 2019