



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004238

First-tier Tribunal No: RP/50105/2001

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 August 2023

Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE COTTON

Between

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Appellant

and

JN
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Wain, Senior Home Office Presenting Officer

For the Respondent: Ms Nicolaou, counsel instructed by Duncan Lewis Solicitors

Heard at Field House on 16 June 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the respondent, likely to lead members of the public to identify the respondent. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Secretary of State appeals against a decision of Judge Loke ('the Judge') dated 26 July 2022. For ease, we refer to the parties as they were in the First-tier Tribunal ("FtT"). The appellant, a citizen of Uganda, arrived in the UK on 21 December 2003 and claimed asylum on 23 December 2003. The respondent refused her claim on 12 February 2004 and, following an appeal to the FtT she became 'appeal rights exhausted' on 15 November 2004.
2. The appellant made further representations to the respondent in February 2008, March 2010, May 2015 and March 2019. None of these were successful.
3. She made further representations on 9 February 2021, which were refused by the respondent on 30 September 2021. That led to the appeal which was heard by the Judge.

In the First-tier Tribunal

4. The Judge had available to her the FtT decision of 6 July 2004. In addition, the Judge had evidence in addition to that provided to the 2004 Tribunal. This includes:
 - a. Psychiatric medico-legal report by Dr Hawes dated 24 Jun 2020;
 - b. Injuries (scars) medico-legal report by Dr Turvill dated 19 November 2020;
 - c. Medical records of the appellant;
 - d. Letters from the IAPT (talking therapy) service;
 - e. Country expert report from Karen O'Reilly dated 21 January 2022.
5. The Judge stated that she took the 2004 decision as her starting point, but departed from it having considered the country expert report and the medical evidence. The Judge concluded that the appellant was credible in her evidence of her past treatment and considered whether the appellant would face adverse attention from the authorities should she be returned – by then some 20 years after her previous mistreatment. The Judge concluded that the country expert report, combined with the appellant's evidence, proved that there remained a risk on return. The Judge allowed the appeal on the asylum ground and on art 2 and 3 ECHR grounds.

In the Upper Tribunal

6. The respondent appealed on the basis that the Judge made a material error of law and permission was granted on 27 October 2022. The grounds of appeal advanced that:

- a. There was a *“Lack of anxious scrutiny / misunderstanding of evidence / inadequacy of reason / misdirection of law”* in relation to the country expert report:
 - i. The Judge concluded that the 2004 Tribunal formed their own opinion about the plausibility that the appellant’s husband was released after 11 months, when in fact the 2004 Tribunal had background country information;
 - ii. The 2004 Tribunal had found the appellant to be inconsistent. The Judge failed to take this into consideration and concluded that the appellant had been consistent (and failed to give reasons for this);
 - iii. The Judge failed to address submissions made by the respondent on the risk on return. The submissions had been that the Judge should not depart from the 2004 decision that the evidence on risk on return was not credible.
- b. There was a *“Failure to take in to account/address PO submission”*:
 - i. The Judge gave weight to medico legal reports despite concluding they were not particularly pertinent and less persuasive.
 - ii. The expert reports should have considered that the first GP-recorded episode of mental health problems happened only after the appellant had an application for refugee status declined.
 - iii. The Judge failed to address the respondent’s submission that the medical report on the appellant’s scarring only referred to one of her scars as being consistent with her claim of mistreatment.
7. In the hearing before us, the respondent confirmed that the appeal is a ‘reasons challenge’ and that the respondent agreed she would have to meet the high test of showing it was an irrational decision (one that no reasonable judge could make).
8. The appellant submitted that the Judge properly took the 2004 decision as a starting point and was entitled to depart from in line with Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702.
9. Further, said the appellant, the respondent’s argument that the Judge was wrong to say the 2004 Tribunal formed its own opinion should be seen in the light of the terms of the objective evidence the respondent refers to. This is a CIPU (“Uganda Assessment April 2001 Country Information and Policy Unit”) which makes it clear that arbitrary

detention was within a range of 2-3 years. The Judge also had available to her an expert report (by Karen O'Reilly dated 21 January 2022) which enabled the Judge to depart from the 2004 Tribunal's decision – in fact the Judge notes that if this evidence had been made available to the 2004 Tribunal, that might have resulted in a different outcome.

10. The appellant submitted that it is ill-founded to say that the report writer accepted the appellant's account at face value. Ms O'Reilly is in fact dealing with the *perception of risk by the appellant*. The Judge fact considers this in the context of the gap in time since the appellant came to the UK and the lack of apparent threat during that time and draws her conclusions on the objective risk based on the profile of the appellant's husband and the country evidence. The expert report gives evidence on the heightened risk on return at the time the report was written.
11. The appellant submitted that the respondent's second ground of appeal is nothing more than an attempt to re-litigate matters that were decided in the FtT. The Judge was not bound to record every single submission made by the respondent. In fact, the report carefully lists all of her scars, and that the appellant only attributes one to mistreatment. The respondent takes issue with the psychiatric report of Dr Hawes but chose not to request the expert be cross-examined in the FtT. The psychiatric report itself is clear that the doctor is expressing views on the *clinical* plausibility of the account given by the appellant. It is appropriate for the Judge to take this into consideration on determining the facts and the judge made no error in acknowledging that the *clinical* opinion is that the appellant has been consistent in her story.

Analysis and conclusions

12. We find it convenient to remind ourselves of the guidance in Riley v Silver [2023] EWCA Civ 71 at [13]:

It is therefore relevant to note the general approach to appeals of this kind. The overarching point is that an appeal is a review and not a re-run of the trial. To win on appeal the appellant has to show that there was some serious flaw in the judgment that calls for a change in the result or a retrial. When it comes to findings of fact, there are five points to make:

- (1) The court will treat the factual findings of a trial judge with a generous degree of deference. To uphold an appeal on the basis of criticisms of this kind the appeal court will need to be satisfied that there was a critical finding of fact that was either unsupported by the evidence before the judge or a finding that no reasonable judge could have reached.
- (2) This approach applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them.
- (3) The court will bear in mind that the trial judge has a whole "sea of evidence" instead of "island-hopping" as appellants are prone to do when seeking to challenge findings at first instance.

(4) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into her consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that she overlooked it.

(5) The same applies with even greater force to matters of argument. A judge is not bound to mention and address every single argument advanced

13. We also remind ourselves of the guidance offered in Devaseelan at [39-42].

14. In respect of the first ground of appeal, we note that the Judge opens the ‘findings’ section of the determination with “*I take as my starting point the decision of [the 2004 Tribunal]*”. The Judge then goes on to identify that the appellant’s new evidence consists of country and medical evidence that was not available to the 2004 Tribunal. The Judge further directs herself in line with Devaseelan when considering how to approach such evidence. She reminds herself that facts not brought to the 2004 Tribunal’s attention should be treated with circumspection, but that expert evidence is treated with caution [14 and 15]. She then considers the expert’s field of experience and decides how to treat the expert evidence itself.

15. We have the benefit of seeing the documentary evidence available to the Judge and are irresistibly drawn to the conclusion that points 3-5 at [13] of Riley v Silver are directly relevant here. The Judge’s determination is focussed and economically expressed. She has approached the 2004 decision in line with Devaseelan and was entitled to depart from it in as much as she has.

16. With regards to the submission that the Judge was incorrect to comment that the 2004 Tribunal had reached its own opinion on the release of the appellant’s husband after 11 months, the respondent asserted that the 2004 Tribunal in fact had objective evidence on this aspect (the CIPU). The respondent did not provide us with a copy of the CIPU, but it was not in dispute between the parties that the CIPU did indeed give an average of 2-3 years for arbitrary detention. We note in passing that without knowing the mode or median period, it is dangerous to conclude that a shorter than average period is inconsistent with the evidence. On the evidence available to the Judge, hers was a view that she was entitled to hold, and fits within her wider analysis of the question of whether she should depart from the 2004 decision.

17. The respondent’s submissions on the Judge’s approach to the appellant’s consistency or inconsistency, and the use of the 2004 decision in this regard are unpersuasive. We give the Judge the deference she deserves on those findings. The respondent does not come near showing that the Judge made a decision that no reasonable

judge would make in assessing the evidence available to her and in her treatment of it in light of the 2004 decision.

18. The judge did give weight to the medico-legal reports after concluding they were not particularly pertinent and less persuasive. She does this in a very specific way at [19] of the decision. She concludes that the diagnosis of PTSD and anxiety are unsurprising given the proven mistreatment, and are therefore less pertinent. However, she finds that they are of assistance in assessing the appellant's consistency and credibility - especially as the authors are highly experienced individuals who would be well placed to identify individuals who are clearly exaggerating symptoms or lying. We find that the Judge has carried out her assessment of the evidence as she should - taking a nuanced approach to what she accepts from the evidence of the experts, and how much weight to give it, in light of the evidence as a whole.
19. Dr Hawes' conclusions about the appellant's mental health are reached at the end of a 249 paragraph report, within which she outlines the medical history of the appellant, including that she presented to her GP with mental health issues after her asylum claim was refused. Dr Hawes sets out both a broad outline of the appellant's immigration history (at paragraphs 58 to 65 as part of the history of the appellant's time in the UK) and the relevant part of the appellant's medical records (at paragraphs 111 to 117). On the face of the report, Dr Hawes has taken into consideration the appellant's whole history. This includes the timing of her reporting symptoms to her GP as part of a wider, plainly careful, outline of the appellant's history. It is only after this is done that Dr Hawes begins to give an assessment of the appellant's psychological state. We do not find that that Dr Hawes did not take into account how the appellant's medical and immigration history related to one another. Had the respondent wished to test to what extent this had been done beyond what is on the face of the report, the respondent's opportunity to do so was in the FtT and not on appeal.
20. The report on the appellant's scarring by Dr Turvill is clearly set out. When considering the appellant's scars, each scar is detailed in a paragraph, with the appellant's explanation of its origin, and the expert's view on whether the scar is consistent with that account. The Judge is not expected to address every single argument advanced by a party and this is an example of where doing so would serve no purpose other than to repeat a submission, which itself is a repeat of the evidence of the expert. There is no compelling reason to think that the Judge has not taken the whole of the evidence and submissions into consideration.
21. Keeping in mind that the Judge had all the evidence before her, that she is not required to address every submission made to her, and combining this with how clear the report is in identifying that only one of the scars is claimed (and assessed) as being related to the mistreatment, we conclude that the respondent's submission on this point is without merit. The respondent, in our judgement, is bordering on misidentifying

what the Judge and the evidence says about the scarring. The report does not say that all of the scars are consistent with the appellant's account, only the scar she claims is from mistreatment. The Judge does not say that the report supports all of the appellant's account, only that Dr Turvill considers the appellant's physical state consistent with the appellant's account. The respondent, it seems to us, is "island hopping", a practice criticised in Riley v Silver.

22. For all of these reasons, we conclude that the grounds are not made out and we uphold the decision.

Notice of Decision

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and we uphold it.

D Cotton
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 July 2023