OUTER HOUSE, COURT OF SESSION

[2017] CSOH 128

P575/16

OPINION OF SHERIFF R B WEIR QC
(Sitting as a Temporary Judge)

In the Petition of

JMG

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Caskie; Drummond Miller LLP
Respondent: MacIver; Office of the Advocate General

12 October 2017

Background

[1] The petitioner is a citizen of the Gambia. He was born on 15 April 1981. He entered the United Kingdom on a visitors' visa, which was issued on 22 August 2012 and valid until 21 February 2013, for the ostensible purpose of attending a lecture. He did not attend the lecture. He became an overstayer on 5 February 2014. On 16 December 2014 he was convicted at Edinburgh Sheriff Court of being concerned in the supply of controlled drugs. He was sentenced to imprisonment for one year, thereby rendering him liable to mandatory

deportation under section 32 of the UK Borders Act 2007. On 29 January 2015 he was served with the decision to deport letter. He claimed asylum.

[2] On 5 June 2015 the respondent refused the petitioner's claim for asylum. The petitioner submitted an appeal against that decision on 11 June 2015. His criminal sentence ended on 16 June 2015. His first tier appeal was heard on 6 October 2015. In summary, the petitioner's account before the First Tier Tribunal ("the FTT") was that he was a homosexual. He had suffered physical harm in the Gambia by reason of his sexuality, and would be at risk of persecution if he were now returned to the Gambia.

[3] On 28 October 2015 the FTT refused the petitioner's appeal on each of his asylum, humanitarian protection and human rights grounds. In so doing, the immigration judge held that she did not believe the central argument of the petitioner, namely that he was a homosexual and that, accordingly, he would be persecuted if deported to the Gambia. The basis for her decision is, essentially, set out in paragraphs [73] to [77] of the FTT Decision as follows:

> "[73] The appellant states that he came to the UK in fear of his life. He states that he wanted to claim asylum but he did not do so. When his visa expired he remained here illegally, and then committed a serious drug offence. He has said that he was starving and needed money and that is why he committed the drugs offence. I do not believe this. He was staying with and had access to friends and family members in the United Kingdom. He is a foreign criminal and should be deported. It was only when he was caught for the drugs offence that he claimed asylum. This goes against his credibility. This man is not a genuine asylum seeker. Section 8 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 applies, which goes against his credibility.
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> [74] I have considered the background evidence on the Gambia but as I do not believe that the appellant is homosexual I do not find that he will be at risk on return. I have taken account of the medical evidence and the evidence that the appellant has been bullied in prison. It is not clear why he was bullied. The medical report refers to scars from knife wounds but this does not mean he was attacked because of his sexuality. There could be many reasons for these scars.

> [75] I find that the evidence the witnesses gave at the hearing was not true and was given purely to enable this appellant to remain in the United Kingdom where they are now staying illegally. For the appellant's representative to state that there would be no reason for the appellant or witnesses to lie is a nonsense. If the appellant is allowed to remain in the United Kingdom he will be with his family members. They are likely to want him here with them but he has no right to be in the United Kingdom. He is a foreign criminal and as such has to be automatically deported unless he is entitled to asylum or is able to remain on human rights grounds or there is something exceptional about his claim. There is not.
>
> [76] I find that the core of the appellant's claim is lacking credibility. He is not a homosexual and I am dismissing his asylum claim. I do not believe that he will be at any risk on return to the Gambia today.
>
> [77] With regard to articles 2 and 3 his claim stands or falls with his asylum claim…"

[4] The petitioner submitted an application for permission to appeal to the First Tier on 12 November 2015. This application was refused on 25 November 2015. He submitted an application to appeal to the Upper Tier on 9 December 2015. The application for Permission to Appeal to the Upper Tier was refused on 12 January 2016. He became Appeal Rights Exhausted on 14 January 2016.

[5] Following the refusal of permission to appeal to the Upper Tribunal the petitioner lodged a petition with this court seeking review of that refusal. By interlocutor dated 21 June 2016 permission for the petition to proceed was refused. Meantime, by letter dated 2 March 2016, the petitioner's solicitors wrote to the respondent intimating a fresh claim for asylum, humanitarian protection and breach of Article 3 of the Convention (No 6/2 of process). In this letter the petitioner relied on what was contended to be new evidence in the form of a detailed medical report by Dr Katharine Wrigley (No 6/3 of process). The report, it was submitted, contained compelling evidence supportive of the petitioner's account of persecution in the Gambia.

[6] By her decision letter dated 22 March 2016 the respondent decided that the further representations did not amount to a fresh claim in terms of paragraph 353 of the

Immigration Rules. In addressing the letter and medical report the respondent, having addressed what she conceived to be the correct approach to considering whether or not further submissions amount to a fresh claim, concluded as follows:

> "In light of the previous adverse credibility findings and your client's immigration history and conduct in the UK it is not considered that there is any realistic prospect of an Immigration Judge of the First Tier Tribunal accepting your client's previous account as to events in Gambia, of finding that there is a real and continuing risk that your client will be persecuted or his human rights would be breached on return to Gambia."

[7] It is this decision that the petitioner seeks to bring under review. The issues for determination are whether the respondent erred in law in concluding that the further submissions did not amount to a fresh claim, and whether the respondent provided adequate reasoning for her decision.

The Law

[8] In their written submissions both parties addressed the correct approach which the court must adopt in cases involving a refusal to treat further representations as constituting a fresh claim for asylum under Rule 353 of the Immigration Rules. Mr Caskie submitted that that approach was correctly set out in the Opinion of Lord Bannatyne in *ABC* v *Secretary of State for the Home Department* [2013] CSOH 32, at paragraph 11. I did not understand Mr MacIver to demur. The passage merits repetition:

> "…first as regards the approach the court must adopt in cases of this type:
>
> 1. The test to be applied by the court in a judicial review of a refusal to treat further representations as constituting a fresh claim is the *Wednesbury* test (see: *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ. 1495 at para. 9, and *O v Secretary of State for the Home Department* [2010] CSIH 20 at para. 7).
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> 2. The decision remains that of the Secretary of State and the court may not substitute its own decision (see: *Dangol v Secretary of State for the Home Department* [2011] CSIH 20 at para. 7).

3. The court must ask itself two questions:

> 1. Has the Secretary of State asked herself the correct question? – that is, whether there is a realistic chance that an immigration judge, applying the rule of anxious scrutiny, will accept that the petitioner will be exposed to a real risk of persecution on return.
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> 2. In addressing that question has the Secretary of State satisfied the requirement of anxious scrutiny? (see *WM (DRC)* at para. 11; *O* at para. 22 and *Dangol* at para. 7).

Secondly, parties were agreed as to the approach to the issue of anxious scrutiny:

> 1. The Secretary of State's decision will be irrational if it is not taken on the basis of anxious scrutiny (see: *Dangol* at para. 7).
>
> 2. Anxious scrutiny means that the decision letter must demonstrate that no material factor that could conceivably be regarded as favourable to the petitioner has been left out of account in the review of the evidence (see *Dangol* at para. 9).
>
> 3. But anxious scrutiny does not mean the Secretary of State must show undue credulity to the petitioner's account (see *Dangol* at para. 9)."

[9] To that passage I would add only this. First, the test whether there is a realistic prospect of success for the purposes of Rule 353 is a "modest" one (*WM (DRC)* at para 8). Secondly, in considering how to treat the findings of an earlier Tribunal in a case such as the present, parties were in agreement that matters should be approached in accordance with the guidance given in *Darveseelan* v *Secretary of State for the Home Department* [2003] Imm AR 1, particularly at paragraphs 39-41.

The Submissions on behalf of the Petitioner

[10] In his written submissions Mr Caskie submitted that the fresh submissions tendered on behalf of the petitioner raised two material elements. The first of these was the medical report by Dr Wrigley dated 27 January 2016. That report was compliant with the methodology of the Istanbul Protocol in its description of the injuries on the petitioner's

body, and the extent to which the scarring reported by Dr Wrigley was consistent with the petitioner's account of how his injuries were sustained. The second element to the fresh submissions comprised a legal analysis of the significance of the medical evidence by reference to the ECtHR decision in *RC* v *Sweden* (09/03/2010).

[11] Taken together these material elements created a realistic prospect of an immigration judge reaching a different view to the FTT on the petitioner's credibility. In particular, the medical report recorded scarring to the petitioner "consistent with, highly consistent with and typical of him having suffered" violent injury as he had claimed and as a result of his sexuality. While the FTT did not believe the petitioner's account of being a homosexual, had already considered very limited medical evidence relative to the petitioner (No 7/1 of process, para 74) and found that the evidence of scarring so disclosed could have many explanations and was not determinative of his sexuality, a future immigration judge would take those findings into account in accordance with *Devaseelan*, but only to the extent that the new medical evidence did not provide additional relevant material on the issues before the new Tribunal. Since Dr Wrigley's report impacted on the findings of the FTT, and having regard to the approach taken by the ECtHR to additional medical evidence in *RC* v *Sweden, supra*, those findings required re-appraisal. In any event, the terms of the Decision Letter disclosed that the respondent had failed to appreciate that Dr Wrigley's report would require to form an integral part of any re-assessment of the petitioner's credibility by the hypothetical immigration judge (*Mibanga* v *Secretary of State for the Home Department* [2005] EWCA 367, particularly at paragraphs 20-25).

[12] In the circumstances the respondent was not entitled to conclude that the petitioner's fresh submissions did not amount to a fresh claim. In concluding that there was no realistic prospect of a second immigration judge, adopting the approach in *Devaseelan, supra*, and

taking into account Dr Wrigley's report and the "guidance" in *RC* v *Sweden, supra*, reaching a different assessment of the petitioner's credibility, the respondent erred in law. In any event the Decision Letter failed to provide adequate reasons for rejecting the fresh submissions as amounting to a fresh claim (*Flannery* v *Halifax Estate Agencies Limited (trading as Colley Professional Service)* [2000] 1 WLR 377, at pp 381D-382D).

[13] In amplifying the terms of his written submissions, Mr Caskie did not dispute that, on the face of the Decision Letter, the Secretary of State had asked herself the correct question (whether there was a realistic chance that an immigration judge, applying the rule of anxious scrutiny, will accept that the petitioner will be exposed to a real risk of persecution if returned to the Gambia). Rather, he submitted that, in answering that fundamental question, the terms of the Decision Letter demonstrated that she had not satisfied the requirement of anxious scrutiny in respect that she had left out of account material factors which could conceivably have been regarded as favourable to the petitioner.

[14] Mr Caskie submitted that what the respondent required to do was to ask whether a hypothetical immigration judge, considering both the fresh submissions and the material previously considered by the FTT, could reach a different view (*Home Office Asylum and Human Rights policy instruction: Further Submissions*, version 9, p 20; No 6/4 of process). For the purposes of that exercise the hypothetical immigration judge was one who was as favourable as possible to the applicant without being perverse. Mr Caskie submitted that the contents of Dr Wrigley's report amounted to credible and reliable evidence that the petitioner's account of suffering serious harm in the past as a result of his sexuality was true. There was obviously a realistic prospect that such an immigration judge, applying anxious scrutiny, could conclude that there was a real risk of the petitioner suffering persecution on grounds of sexuality were he to be returned to the Gambia.

[15] *R* v *Sweden*, *supra*, was an example of a very similar case in which there might be thought to have been serious reasons to question the credibility of the applicant. The ECtHR having ordered a medical report which described the injuries of the applicant as being consistent with his having been the victim of torture, the court concluded that the applicant's account was truthfully based. In light of that case, Mr Caskie appeared to submit, the respondent was bound to conclude that Dr Wrigley's report was sufficient to cause her to treat the petitioner's further submissions as a fresh claim for the purposes of Rule 353, and to provide clear reasons in the Decision Letter for not doing so (which she had not done).

[16] Mr Caskie also submitted that the material presented in the fresh submissions now created a realistic prospect of the petitioner being recognised as a refugee under the Refugee Convention, or a person in need of humanitarian protection for the purposes of ECHR, Article 3. In relation to Article 3 in particular, the reasons for the infliction of injury were not relevant to the assessment of the immigration judge who had to decide whether the petitioner was at risk of torture, or inhuman or degrading treatment. That assessment fell to be made with Rule 339K of the Immigration Rules in mind. Rule 339K, read shortly, provides that the fact that a person has been subjected to persecution or serious harm will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or harm will not be repeated.

[17] Finally, Mr Caskie sought to demonstrate, by reference to the Decision Letter itself, that the respondent had failed properly to address the second question in Rule 353, namely whether the content of the submissions, taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection. He criticised

references in the Decision Letter to the "weight" to be attached to the conclusions of Dr Wrigley and also to the adverse credibility findings of the FTT. In particular, the conclusion of the respondent (on p 3 of the Decision Letter) that "general factors raised by Dr Wrigley in relation to her experience, as a GP, with asylum seekers are not considered to be sufficiently weighty to revisit the immigration judge's assessment of your client" evidenced a failure to consider the position from the perspective of the hypothetical immigration judge. The respondent glossed over the importance of the medical evidence of injuries by inaccurately referring to them as injuries which "are or might be" consistent with the petitioner's account of persecution. When she then asserted that the marks on the petitioner could equally well be consistent with accidental injuries or even arising from altercations for different reasons that revealed the respondent's own thinking rather than an analysis of how the evidence might be viewed by the hypothetical immigration judge taking account of Dr Wrigley's actual conclusions.

[18] The respondent pointed out that the petitioner's appeal before the FTT was not dismissed because of a lack of corroborative evidence and that "the panel considered many credibility points before finding that your client lacked credibility". Mr Caskie made the point that the credibility finding was made at a point in time when Dr Wrigley's report was not available and the FTT had had access to only limited medical information (the terms and scope of which was not before me). That the medical report now impacted on the issue of the petitioner's credibility (or at least might do so) was disregarded.

Reply on behalf of the Respondent

[19] It was submitted on behalf of the respondent that the petition raised one issue, namely whether the respondent was entitled to refuse to accept the fresh submissions by the

petitioner as a fresh claim in terms of Rule 353 of the Immigration Rules. The question for the court was whether the respondent materially erred in law in deciding that the fresh submissions did not create a realistic prospect of success before an immigration judge. I was reminded that it was not for the court itself to undertake an assessment of the report and to decide whether its findings created a realistic prospect of success. Rather the court was restricted to scrutinising the decision-making process.

[20] While the petition argued that the medical report by Dr Wrigley created a realistic prospect of an immigration judge reaching a different view on the credibility of the petitioner, it was significant that no issue was taken in the petition with the decision-making process beyond a criticism of the adequacy of the reasons given (statement 10). That issue aside, the petition amounted to no more than a disagreement with the conclusions of the respondent. Accordingly, the petitioner could only succeed if the conclusion reached by the respondent was "of the order of perversity"; only then would it amount to an error of law. Not only was there no averment that the conclusions of the Decision Letter were perverse, the analysis undertaken by the respondent, as set out in the Decision Letter, ruled out any question of perversity.

[21] In any event, the FTT had already considered medical evidence submitted by the petitioner (No 7/1 of process, para 74). It found that the medical evidence of scarring could have many explanations. It was not determinative of his sexuality. It did not believe that the petitioner was a homosexual. A future immigration judge would take into account those findings (*WM (DRC); Devaseelan*), which were not, in any event, contradicted by Dr Wrigley's report.

[22] Contrary to the submission of the petitioner, it was plain from the terms of the Decision Letter that the respondent *had* considered matters from the perspective of an

immigration judge. The correct test was set out at length in the Decision Letter (under reference to *WM (DRC)*). The Decision Letter set out the respondent's conclusion by reference to what findings an immigration judge would make, taking into consideration both the issue of the petitioner's credibility and the findings of Dr Wrigley.

[23] It was equally plain that the respondent did apply anxious scrutiny to the import of the fresh submissions on the petitioner's position. The Decision Letter dealt at length with the findings in the medical report. The respondent did not reject them. She did, however, recognise (as she was entitled to do) that it relied on the account of the infliction of the injuries found given by the petitioner to Dr Wrigley. Accordingly, she took into account the contents of the report – and its limitations – and came to a conclusion on the separate question of the prospects of success before an immigration judge for which she provided ample reasoning.

[24] Expanding on his written submissions Mr McIver took issue with Mr Caskie's proposition that, even if the claim for asylum failed because it had not been established that his injuries were the result of persecution on grounds of his sexuality, the petitioner would still qualify for protection under Article 3. Describing such a position as illusory, Mr McIver submitted that it was not open to the petitioner to establish a basis for protection on some inchoate or unexplained basis. Rule 339K of the Immigration Rules did not alter that position. Both the petitioner's claim for asylum and his Article 3 claim depended on the petitioner establishing that there had been a particular course of events in the Gambia. Rule 339K had to be understood in that context. The FTT's adverse finding on the matter of the petitioner's credibility was reached in the context of both medical evidence and evidence of the background in the Gambia, and the respondent had taken that into account in the Decision Letter (cf *HK and others* v *Secretary of State for the Home Department* [2010] CSIH 30).

The petitioner had put forward an account but it had been comprehensibly rejected by the FTT.

[25] Turning to the test for further submissions, Mr McIver rejected the need for Mr Caskie's characterisation of the hypothetical immigration judge, for the purposes of Rule 353, as one who was as favourable as possible to the petitioner without being perverse. He reiterated that the correct test was whether there was a realistic chance that an immigration judge, applying the rule of anxious scrutiny, will accept that the petitioner will be exposed to a real risk of persecution on return (*ABC; WM (DRC); KD Nepal* v *Secretary of State for the Home Department* 2011 SC 560, at para 7). The requirement to apply anxious scrutiny cut both ways. It was not restricted to taking into account all factors favourable to the petitioner. By that I understood Mr McIver to submit that the hypothetical immigration judge would also take into account the adverse credibility findings of the FTT.

[26] Mr McIver rejected the petitioner's criticisms of the Decision Letter. He reiterated that it was clear from its terms that the respondent had taken full account of Dr Wrigley's report, its conclusions and also its limitations (*S (Ethiopia)* v *Secretary of State for the Home Department* [2007] INLR 60). Absent irrationality, that was all that was required to meet the requirements of *ABC* and *WM (DRC)*. The respondent's decision was entirely rational. There was no element of perversity. *R* v *Sweden*, *supra*, fell to be distinguished on its facts. It was clear from the decision that the Swedish authorities already had a medical report, the findings of which strongly indicated that the applicant in that case had been tortured (see paragraph [53]), and that was the context in which an independent expert report had been ordered by the ECtHR.

[27] Adopting the reasoning of the court which had initially refused the petitioner permission to proceed, Mr McIver submitted, in summary, that the petition should be refused because:

- the medical report by Dr Wrigley did not bear on or undermine the core finding that the petitioner is not homosexual;
- the respondent had properly taken into account the medical report, including the possibility that the injuries found on the petitioner were accidental, and
- the respondent had properly noted that the medical report relied upon an account given by the petitioner already found to be incredible.

Discussion

[28] The context in which this case falls to be decided is Rule 353 of the Immigration Rules. I have earlier set out the test which parties were agreed should be applied to applications considered by the respondent in terms of Rule 353. For the reasons which follow, I have decided that the respondent's determination that the further representations in the letter of 2 March 2016, and accompanying medical report, do not amount to a fresh claim should be reduced.

[29] There was no dispute that the respondent identified in the Decision Letter the correct approach to considering whether or not a further submission amounted to a fresh claim for the purposes of Rule 353. That approach was set out in appropriate detail, and by reference to legal authority, on p 2 of the Decision Letter. The substantial criticism of the Decision Letter advanced by Mr Caskie was that it failed to demonstrate that the respondent, in considering the terms of the letter of 2 March 2016 and Dr Wrigley's medical report, had satisfied the requirement for anxious scrutiny.

[30] In support of that submission, Mr Caskie placed much emphasis on the significance of the circumstances of *R* v *Sweden*, *supra*, to the point of elevating that case (which was not a Rule 353 case) to an authority for the proposition that, a medical report having been produced and there being no alternative expert medical evidence to suggest to the contrary, the petitioner should be found credible. I am not convinced that the decision in *R* v *Sweden*, *supra*, bears the weight which Mr Caskie sought to apply to it. In situations like this it is inevitable that each case will depend, as Mr McIver pointed out, on its individual facts. However, the case does illustrate, if nothing else, that a medical report by an appropriately qualified medical expert, *could* be instructive when considering whether the explanation proffered by a particular asylum applicant for the existence of certain injuries was, or at least could be, credible. In the context of a Rule 353 submission, the impact of the findings in such a report could be significant, especially because, as both parties accept, the test of whether further representations should be treated as a fresh claim for the purposes of Rule 353 is a modest one.

[31] For the purposes of this discussion the following passages from the Decision Letter are particularly significant:

> "(No 6/1 of process, p 2)…In this context consideration has been given to the report provided by Dr Wrigley. It is noted that the report relies heavily on the account given to her by your client. That does not mean that the report lacks status as independent evidence, although it may reduce very considerably the weight that can be attached to it…
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> At the asylum/deportation appeal held on 6 October 2015 the Immigration Judge found at point 76:
>
> *"I find that the core of this Appellant's claim is lacking in credibility. He is not a homosexual and I am dismissing his asylum appeal. I do not believe he will be at any risk on return to the Gambia today."*
>
> Your client's account and evidence has therefore been rejected by an independent tribunal as lacking in credibility. The assessment was made having seen your client

> give evidence. It is right that considerable weight should be attached to the findings of an expert tribunal…
>
> …It is not suggested that Dr Wrigley probed or challenged your client's account, or purports to have expertise in relation to the situation in Gambia. In these circumstances, general factors raised by Dr Wrigley in relation to her experience, as a GP, with asylum seekers are not considered to be sufficiently weighty to revisit the Immigration Judge's assessment of your client. Indeed, it is considered that [sic.] expert Immigration Judge would be able to call on significant experience as to the manner in which asylum seekers give evidence in relation to their experiences. There is therefore no realistic prospect of a second Immigration Judge, applying *Devaseelan* principles, reaching a different assessment of your client's credibility on the basis of Dr Wrigley's generalised comments.
>
> In reaching this decision consideration has been given to the fact that the medical evidence suggests that your client has injuries that are *or might be*[my emphasis] consistent with his account of ill treatment. It should be recognised that the marks on your client could equally well be consistent with accidental injuries or even arising from altercations for different reasons…"

[32] Mr Caskie in effect suggested that the wording employed, particularly the references to the weight to be attached to Dr Wrigley's conclusions and her experience with asylum seekers, demonstrated that the respondent was making her own assessment of the significance of Dr Wrigley's report, rather than approaching matters through the eyes of the hypothetical immigration judge. Given the references, in the passages just quoted, to the "expert" or "second Immigration Judge", that perhaps overstates the position. However, I consider the submissions of the petitioner to be well founded in their criticism of the adequacy of the reasons given for the respondent's conclusion that the further submissions did not create a realistic prospect of success before an immigration judge applying the rule of anxious scrutiny.

[33] The tenor of the Decision Letter is that, since the petitioner's account of being a homosexual had been disbelieved, and the injuries present were explicable by other reasons for infliction, those injuries should be disregarded for the purposes of a fresh claim. In my

view, in the circumstances disclosed in the FTT decision and Decision Letter, such reasoning is inadequate. Paragraphs 8.68 and 8.69 are worth narrating in full:

> "8.68. Ultimately it is the overall impression of scarring and not the consistency of individual lesions that is important in assessing the trauma story (Istanbul Protocol paragraph 187). In total, [JMG] has over 32 scars on his body, more than I would expect from a normal upbringing and adulthood, even if this were a rough or sporting upbringing.
> 8.69. The number of scars and the variety of scar positions and morphology would be unusual to have been sustained in ordinary daily life and suggests violent attack. The overall pattern of scarring is in my opinion highly consistent with violent injury and closely concords with [JMG]'s account of his injuries."

[34] The FTT appeared to have had before it some limited medical evidence, the pattern and extent of which is not elaborated upon in its findings. The detail of that evidence is not before me either. It is touched on in the Decision Letter but only to the extent of appearing in a quotation from paragraph 74 of the FTT decision. The Decision Letter contains no evaluation of the difference between what was before the FTT and the findings of Dr Wrigley. It is, therefore, impossible to know how significant the findings of Dr Wrigley might have been if available to the FTT. That makes the task of determining how the new material might be approached by a second immigration judge all the more difficult. It underlines why, for the purposes of such an exercise, the Decision Letter ought to have, but does not, set out clearly why the findings and conclusions of Dr Wrigley could not provide a basis for re-assessment of the petitioner's credibility where apparently only limited medical evidence of scarring and wounding was taken into account by the FTT.

[35] It is also clear from the decision of the FTT that there was available, to the immigration judge, background evidence about the Gambia. That evidence was also not elaborated upon, it can be inferred, because the FTT disbelieved the petitioner on the issue of his sexuality. But it can equally be said that the significance of Dr Wrigley's findings

relative to whatever background evidence was available cannot be known. It was certainly not commented on in the Decision Letter.

[36] In the final analysis, the Decision Letter must disclose that no material factor that could conceivably be regarded as favourable to the petitioner has been left out of account in the review of the evidence (see *Dangol* at para 9). In my opinion the Decision Letter has not done so. Coupled with the absence of clarity as to the nature and extent of the medical evidence originally presented to the FTT and the background evidence relative to the Gambia, Dr Wrigley's conclusions (i) that the overall pattern of scarring is highly consistent with violent injury, and (ii) that the pattern of scarring closely concords with the petitioner's account of his injuries, are, in my opinion, potentially material factors. It is more than likely true that, in addressing issues of credibility, an "expert Immigration Judge would be able to call on significant experience as to the manner in which asylum seekers give evidence". However, it does not follow that there is no realistic prospect of such an immigration judge, advised by the terms of Dr Wrigley's findings and given her background training with Medical Justice, doing other than find in the same way as did the FTT. Nor, more importantly, is there any explanation in the Decision Letter as to why such a result should follow. Mr Caskie was, in my view, correct in his submission that none of the passages quoted above appears to take proper account of the actual language of those findings in the medical report which speak of injuries as either "typical" or "highly consistent" with the infliction of violent injury (see paragraphs 8.9, 8.19, 8.25, 8.33, 8.35, 8.41 and 8.55). I agree with Mr Caskie that a second immigration judge, following the guidance in *Devaseelan*, while he would have to take the FTT's credibility findings into account, would not be bound by them if he considered that the report of Dr Wrigley's findings justified a re-appraisal. The Decision Letter is flawed in that it offers no reasoned assessment of the weight such an

immigration judge, treating the medical report as an integral part of the process of re-assessment of the petitioner's credibility (*Mibanga*, paragraph 24), might attach to Dr Wrigley's findings.

[37] The view I have reached is sufficient to dispose of this petition. However, I should record that I agreed with Mr McIver that it was undesirable to place a gloss on the test for fresh submissions by characterising the hypothetical immigration judge, applying the rule of anxious scrutiny, as "one who was as favourable as possible to the applicant without being perverse". Nor was I persuaded by Mr Caskie's further submission that, for the purposes of his Article 3 claim, it was unnecessary for the petitioner to demonstrate that the injuries disclosed in the new medical report were inflicted as a result of his sexuality. As I understood the submission, all that the petitioner required to establish, in order for him to be entitled to humanitarian protection, was that he had been the victim of persecution or serious harm. The new medical report evidenced that he had been such a victim. The effect of Rule 339K of the Immigration Rules was that that was a serious indication of the petitioner's well-founded fear of persecution or real risk of suffering serious harm, and there were no good reasons to consider that such persecution or serious harm would not be repeated.

[38] This submission appeared to go considerably beyond the terms of both the petition and the petitioner's note of argument. In any event, I agree with Mr McIver that, for his Rule 353 claim to succeed, it cannot be sufficient for the petitioner to fall back on (to use Mr McIver's apposite phrase), an inchoate or uncertain basis for the injuries with which he now presents, especially in circumstances where an explanation for his injuries has been proffered but disbelieved. While not having heard full argument on the matter, it does not seem to me that Rule 339K is intended to derogate from the position that it is still for the

person seeking to substantiate an asylum or human rights claim, or to establish that he is eligible for humanitarian protection, to substantiate the basis for those claims or that protection (cf Rule 339L). Were the position as Mr Caskie suggests, it is difficult to see how the mere existence of injuries, otherwise unexplained, could operate as a "serious indication" of a well-founded fear of persecution or real risk of suffering serious harm (for the purposes of Rule 339K).

[39] However, in the view I have taken on the terms of the Decision Letter and the inadequacy of its reasoning, my view on this aspect of the petitioner's submissions does not alter the conclusion which I have reached.

Decision

[40] For the reasons I have given I shall grant the petition to the extent of reducing the determination by the respondent in the Decision Letter dated 22 March 2016 that the submissions set out in the letter of 2 March 2016, and the accompanying medical report dated 27 January 2016, do not amount to a fresh claim.