



**Upper Tribunal
(Immigration and Asylum Chamber)
AA/07518/2014**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 23 January 2018

Promulgated

On 19 February 2018

Before

**THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE
UPPER TRIBUNAL JUDGE D K ALLEN**

Between

**MS MJK
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Radford instructed by Fadiga & Co Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal from the First-tier Tribunal (“the FtT”) to the Upper Tribunal (“the UT”) with the permission of the FtT granted on 30 November 2017. On the appeal the appellant has been represented by Ms Radford and the respondent (“the Secretary of State”) by Mr T Melvin. We are grateful to both representatives for their helpful oral and written submissions. Ms Radford had expected the appellant to be here for the hearing. She did not in the event turn up, but Ms Radford was content for the appeal to proceed in her absence, accepting, as she did, that the appellant had really no role to play in the appeal.

2. The ground on which permission to appeal was given was that it was arguable that in giving little weight to the report of Dr Beeks the FtT “failed to distinguish between permissible expert opinion” about “the types of psychological trauma” that can cause “symptoms of post-traumatic stress disorder (“PTSD”)” and impermissible opinion, going beyond opinion as to the mechanism” by which “particular physical injuries are inflicted”. It was said to be arguable that this was material to the outcome of the appeal. The grounds of appeal on which permission to appeal was refused were not renewed.

The Facts

3. The appellant claims to be a national of Ivory Coast. She was born on 1 January 1984. She claims to have arrived in the United Kingdom in 2006, using a French passport, in the name of ML. She said that her husband gave it to her. She has used, we think, four other pseudonyms. She claimed asylum on 27 August 2013. That claim was refused on 18 September 2014. The FtT gave an account of the appellant’s claim in paragraphs 6 to 16 of the determination and of her immigration history in paragraphs 17 to 21.
4. The appellant married BY in 2000. It was an arranged marriage. She suffered female genital mutilation (“FGM”) before the marriage. The appellant’s husband was a rich man. She worked as a hairdresser. Their daughter was born in 2003. Her husband was violent. He hit and raped her. She told her family but they did not tell the police. Her friend S helped her to leave Ivory Coast. She and her daughter were taken to Ghana on a bus. S gave the appellant a French passport in a false name. S said that she would send the appellant’s daughter to her two days later, but did not do so. The appellant has not seen her daughter since.
5. The appellant was met at the airport by LB. He took her to his house in Lewisham. She lived there until 2012. She married him in 2009 and separated from him in 2012. LB beat the appellant. She has problems with her left shoulder as a result. She takes medication for her pain. She did not report LB to the police as he had said that if she did so she would be removed from the United Kingdom. The appellant was arrested for fighting in 2010. She gave a false name and said she was from Senegal. LB told her to do that. She went to France in 2011 to meet LB’s parents. She tried to enter the United Kingdom using a false passport in the name of G. She was refused entry but managed to enter the United Kingdom later. She has made five applications for leave to remain on the basis of her marriage to LB. The FtT recorded that the Secretary of State had refused the asylum claim.
6. The Secretary of State, in brief, questioned the appellant’s credibility on several points. The Secretary of State did not accept the appellant was from Ivory Coast (see paragraph 23 of the FtT’s determination). She had stated in a previous appeal that she had come to the United Kingdom on a

trade visa which was inconsistent with her current account. There were other discrepancies between her current account and what she had said in earlier appeals. She had not mentioned her fear of return to Ivory Coast. She had submitted applications in the name of someone other than LB. Her account of when she got her Ivory Coast passport was not consistent with other parts of her account. The appellant had asked the Home Office twice in the course of 2014 to return to Ivory Coast because she could not pay for the flight. In the FtT's view that was not consistent with a fear of serious harm on return. The Secretary of State did not accept that the appellant had worked as a prostitute in the United Kingdom or that she would have to work as a prostitute in Ivory Coast. The Secretary of State did not consider that she would be at risk in Ivory Coast or in Senegal.

7. The decision of the FtT in this case was the third decision on an appeal in relation to the appellant. There are also other determinations dated 4 October 2010 and 15 March 2013.

The Report of Dr Beeks

8. Dr Beeks had provided a report dated 22 March 2016. She interviewed the appellant, with an interpreter present. Dr Beeks described the appellant's account in paragraphs 1 to 29 of her report. In paragraph 12 she mentioned the appellant's account that her husband BY had been violent to her and had pushed her into the edge of a piece of corrugated iron roof, that this had cut her skin on the left shoulder and that she has a scar there. In paragraph 24 she summarised the appellant's account of an attack on her by LB, the man she married in the United Kingdom. The appellant said that he had kicked her against a wall from the front and she had fallen onto the floor. She had gone to Lewisham Hospital and had had more than one operation. She had a scar on the front of her left shoulder.
9. In paragraphs 63 and 64 of her report Dr Beeks described two scars on the appellant's left shoulder. Dr Beeks said in paragraph 67 of her report that the scar on the left side of the shoulder was "consistent" with the appellant's account of being pushed into the edge of a corrugated iron roof and that the absence of stitches was also consistent with the appellant's account that she was not allowed to go to hospital for treatment so that the wound healed on its own. Dr Beeks gave other possible causes of the scar in the same paragraph of her report. In paragraph 68 Dr Beeks said that the scar on the front of the appellant's left shoulder was "highly consistent with the history given of surgery to the shoulder following the injury" which the appellant had suffered. Dr Beeks said that there were stitch marks showing, that the appellant had had treatment. The scar was not in a prominent part of the shoulder which was consistent with the account the appellant had given of an operation. An accidental fall would not be likely to cause an injury in that non-prominent position.
10. In paragraph 70 Dr Beeks said that the appellant's account (reliving of painful events), flashbacks to being assaulted and nightmares, and her

startle response to loud noise pointed to a diagnosis of PTSD. Dr Beeks said in paragraph 71 that the appellant's "tearful flat affect, her sleep problems, her concentration problems and suicidal ideation pointed to a significant depression". In paragraph 73 of her report Dr Beeks said this:

"[The appellant] said that she is not sure whether or not she was a victim of trafficking although one judge thought that she may have been trafficked. If she was exaggerating her problems I would not expect her to say that she was not sure about her being trafficked but to take every opportunity to claim that she was such a victim."

In paragraph 75 of her report Dr Beeks said this:

"[The appellant] told me that she had never been to school and could not read or write and could not read or understand documents which she handled. I believe her inability to read or write in any language may explain some of the confusion in her story. The elements of confusion may also be explained by the deleterious effect on memory caused by the traumatic past events reported by [the appellant] such as the rapes, the female genital mutilation, the domestic violence and the disappearance of her daughter in the hands of someone she trusted who herself has disappeared. [cf Juliet Cohen on memory problems and traumatic past events. 'Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be Said to Undermine Credibility of Testimony Dr Juliet Cohen']."

In paragraph 76 of the report Dr Beeks said this:

"The overall picture of past traumatic events with consequent post-traumatic stress disorder, evidence of female genital mutilation and of assaults causing scars is highly consistent with the history given of childhood abuse, genital mutilation, rape and domestic violence."

The reasoning of the FtT

11. The appellant gave evidence with the help of a court-appointed interpreter. She was cross-examined. The FtT said that it had applied a holistic approach to the claim. The FtT in paragraph 53 of the determination quoted paragraph 35 of the Court of Appeal in **KV (Sri Lanka) v Secretary of State for the Home Department [2017] EWCA Civ 119; [2017] 1 WLR 88**. In that case the Court of Appeal rejected the submission by the appellant that the Istanbul Protocol required an expert to express an opinion on the wider question of whether he believes a complainant's story about whether they had been tortured or not. The Court of Appeal said that paragraph 187 of the Istanbul Protocol focuses on what is the likely immediate cause of a lesion or wound which is the proper subject of expert evidence. A medical expert should confine his/her report to topics properly within the scope of his/her expertise rather than expressing views on wider questions about the

assessment of facts and evidence overall which is not within his/her expertise but are for the Tribunal to assess. The FtT also quoted paragraph 39 of **KV (Sri Lanka)** which makes the point that medical evidence may not be able to resolve issues of causation. In paragraph 55 the FtT directed itself correctly about the burden of proof.

12. The FtT considered the report of Dr Beeks in paragraphs 57 to 64 of the determination. The FtT said in paragraph 73 that Dr Beeks had strayed into an assessment of credibility by opining that Dr Beeks would not have expected the appellant to express doubt about being trafficked if she was exaggerating her problems and in paragraph 75 where Dr Beeks had opined that the appellant's inability to read and write in any language may explain some of the confusion in her story. The FtT did not in that paragraph of the determination criticise the whole of paragraph 75 of Dr Beeks' report which we have already read.
13. In paragraph 59 the FtT accepted Dr Beeks' evidence that the appellant had suffered from FGM. The FtT said, "I accept the doctor's evidence in this regard as this is from a medical examination of" the appellant. The FtT referred to Dr Beeks' comments on the appellant's shoulder scar. The FtT observed correctly that the most the doctor could legitimately say was that the scar provided support to confirm that the appellant had had a surgical procedure to her shoulder and not that the account behind the injury was as the appellant claimed to be. We observe in passing that that is exactly what Dr Beeks did do in relation to the appellant's scars.
14. In paragraph 61 the FtT referred to Dr Beeks' view that the scar on the side of the appellant's left shoulder was consistent with being pushed into a sharp object of a corrugated iron roof. The FtT said that Dr Beeks noted that the scar could have other causes such as a fall onto a sharp object or a collision with a sharp twig. This the FtT said indicated that the scar "could have been caused in other ways which cannot be excluded rather than the way in which the appellant claimed it was caused". The FtT here was doing no more than to endorse Dr Beeks' own analysis of the significance of that scar.
15. In paragraph 62 the FtT quoted Dr Beeks' conclusion in paragraph 76 of her report which we have quoted above. In paragraph 63 the FtT noted that Dr Beeks' report had details from the appellant's account which were not found in other sources. In paragraph 64 the FtT said that it had noted the comments of the Court of Appeal in **KV** above. The FtT said:

"I consider that the doctor has used the terminology of the Istanbul protocol to comments upon the credibility of the account and has trespassed beyond her remit. In all the circumstances therefore I give limited weight to this report."

We indicate at this point that the extent to which the FtT gave weight to the report appears to be firstly in accepting that the appellant had suffered FGM which we observe on the evidence was incontrovertible, and

secondly, in accepting Dr Beeks', we would observe, uncontentious, and correct, analysis of the significance of the appellant's scars.

16. The FtT dealt with the medical evidence and with two other expert reports in paragraphs 65 to 71 and with the appellant's evidence in paragraphs 72 to 84. In summary the FtT noted that KM, a potentially important witness, had not given evidence. The FtT noted that none of the authors of letters of support had given evidence at the hearing, that they included people living in France which was said to be curious because the appellant claimed not to have left the United Kingdom since 2011. These people did not say how they knew the appellant or for how long they had known her.
17. In paragraph 74 the FtT rejected the appellant's account that a friend, L, who had never met the appellant's daughter, had nonetheless spotted the appellant's daughter in Mali in about 2012. The appellant's photographs of her daughter dated from 2006. In paragraph 75 the FtT recorded that the appellant had been asked about her evidence in the hearing of the appeal against the refusal of her EEA application. LB had told the judge that the appellant had arrived in the United Kingdom in 2009 whereas her evidence was she had arrived in 2006. She had given evidence then that her parents had arranged her marriage to LB. She had explained that by saying that LB had told her to say that. The FtT observed that if that was right it was obvious LB had not given instructions about basic details such as when the appellant arrived in the United Kingdom. She had used false identities because she was in a controlling relationship. It made no sense, the FtT said, if that was right that LB would, after the EEA appeal draw attention to the appellant and himself by using false identities. The FtT recorded that the appellant denied giving instructions for solicitors to apply for a residence card in 2012. It made no sense for LB to do that if the appellant had left him and had run away and was living on the street. She denied having received a decision on the 2013 EEA application and denied knowledge of the March 2013 appeal. She accepted telling the Secretary of State that she wanted to return in 2014. The FtT did not accept that she would have done that if she had had a genuine fear.
18. In paragraph 82 the FtT described the appellant's use of the identities G and FS. The database note from 2014 records FS returning to the United Kingdom in 2014. The FtT took into account as damaging the appellant's credibility her use of multiple identities in the United Kingdom and her provision of false information to the authorities (paragraph 84).
19. In paragraph 85 the FtT concluded that the appellant had been "party to various frauds and attempted frauds in the use of false identity documents". Having looked at the application's account in the round, applying the lower standard of proof, the FtT did not accept the appellant's account "at all" and decided that she had "fabricated a claim of asylum in order to stay in the United Kingdom".
20. The FtT did accept that the appellant had suffered FGM but that was the only aspect the FtT accepted (paragraph 87). Many women suffered FGM.

It did not mean that the appellant was at risk on return to Ivory Coast or to Senegal (paragraph 87).

21. We note that there is no discussion of, or finding about Dr Beeks' views in relation to PTSD or significant depression.
22. The FtT also dismissed the Article 3 claim, the claim to humanitarian protection and the appellant's article 8 claim.

The arguments in the application for Permission to Appeal

23. Ms Radford argued that in the passage criticised by the FtT Dr Beeks was combining her psychological observations with her analysis of the lesions to give an overall assessment of the consistency of the appellant's clinical presentation with her overall account. This, it is argued, is not a misuse of the Istanbul Protocol. It is said that the Istanbul Protocol positively requires such an overall assessment. The grounds of appeal quote paragraphs 177-8 and paragraph 288 of the Istanbul Protocol. Those show that a medical expert is required to consider the consistency not of each lesion but of the overall pattern of lesions with the applicant's account of torture and the consistency of the psychological findings and the extent to which they correlate with the alleged abuse. The relationship of consistency between events and symptoms should be evaluated and described.
24. The Annex to the Istanbul Protocol says that the conclusion should include:

“A statement of opinion on the consistency between all sources of evidence cited above (physical and psychological findings, historical information, photographic findings, diagnostic test results, knowledge of regional practices of torture, consultation reports etc.) and the allegations of torture or ill-treatment.”
25. It is said that the FtT wrongly interpreted the Court of Appeal's decision in **KV**, if it thought that the Court of Appeal “proscribe[d] this aspect of the Istanbul Protocol”. It is submitted that the FtT “thus removed weight from Dr Beeks' report on an erroneous basis”. The FtT failed to give “proper effect to Dr Beeks' conclusions about the appellant's vulnerability, effect of trauma on her evidence and the consistency of her presentation with a history of severe sexual torture”.
26. Ms Radford amplified the arguments in the grounds of appeal in her oral submissions. She accepted that the FtT was entitled to ensure that an expert who expresses a view does no more than to express a view about topics which that expert's expertise entitles him/or to express a view about, but she submitted Dr Beeks' opinion amounted to her fulfilling the duties imposed on her as an expert by the Istanbul Protocol and yet the FtT had criticised Dr Beeks for doing that. An expert, she submitted, is required by the Istanbul Protocol to consider additional facts and the relationship of consistency between an applicant's account and his/her

symptoms. She accepted that the Istanbul Protocol did not tell the FtT how to make its decision but submitted that the expert's opinion should not be discounted on the grounds that the expert has done what the Istanbul Protocol requires. The expert must evaluate the consistency of an allegation with an applicant's symptoms, taking into account the relevant circumstances. She submitted that what the expert, Dr Beeks, had done in this case, was precisely to evaluate the consistency of the allegations with the psychological symptoms, physical symptoms and in the light of additional factors such as the appellant's illiteracy. By doing all of that the expert was not seeking to usurp the function of the FtT but was simply doing what the Istanbul Protocol required her to do.

27. She further submitted that the expert was required to consider whether an applicant was exaggerating his/her symptoms and where such symptoms include psychological symptoms it can be difficult to draw the line between symptoms and "problems" - see in particular paragraph 73 of Dr Beeks' report and paragraph 58 of the FtT's determination.
28. Finally, in this context, she submitted that the expert was required to evaluate the consistency of an account with observed symptoms but not the overall credibility of an applicant's account. She submitted that in the passages criticised by the FtT Dr Beeks was doing no more than what the Istanbul Protocol required. Some of that material was relevant also to the FtT's task but in doing that Dr Beeks was not usurping that task of making the overall assessment of credibility.
29. Mr Melvin in his submissions relied on the Rule 24 response dated 22 January 2018 which we and Ms Radford were provided with today. In particular, he submitted, in paragraph 58 of the determination, the FtT was entitled to criticise Dr Beeks for acting as an advocate for the appellant, not as an impartial expert. The FtT was entitled to conclude that Dr Beeks had strayed beyond her legitimate remit and had attempted to assess aspects of the claim, namely overall credibility, which it was not open to her to assess. He submitted further that there was a plethora of points which damaged the appellant's credibility and that the FtT was entitled to conclude that it did not accept her account.

Discussion

30. The FtT said that it would take a holistic approach to the appellant's factual account. It purported to take such an approach and did not accept that account. We consider that there is some force in the FtT's criticism that Dr Beeks had overstepped the mark in some aspects of her report, by passing judgment on matters which affected the appellant's credibility - see in particular paragraph 8 - rather than by making an objective diagnosis. The FtT did not reject the conclusions of the report altogether but only accepted them in so far as the report was based on incontrovertible physical evidence, that is the diagnosis of FGM, and to the extent that the report coincided with the FtT's analysis in relation to the scars. The FtT was entitled, of course, to conclude that all Dr Beeks could

say about the appellant's scars was that one had been caused by surgery and the other by a wound made by a sharp object which had not been treated promptly. Neither scar corroborated the appellant's account to any significant extent but, as we have already observed, Dr Beeks was careful in those sections of her report not to go any further than this. In that regard Dr Beeks was being objective and complying with the Istanbul Protocol. That is not acknowledged by the FtT.

31. Moreover we are troubled by the FtT's overall approach to Dr Beeks' report. The FtT does not seem to have appreciated that the Istanbul Protocol required Dr Beeks to express a view about the consistency of the appellant's symptoms with the appellant's account. That led the FtT, except to the extent that we have described above, wholly to discount Dr Beeks' report including those parts of the report which did not in any way suffer from the vice identified by the FtT. Moreover, as we have pointed out, there is no finding about potential diagnoses of PTSD and depression which are potentially significant to the FtT's task. The FtT, if it dismissed those aspects of the report, in our submission gave flawed reasons for doing so. Those aspects of the report are not in any way an example of the expert trespassing on the proper territory of the FtT.
32. We of course accept that there was a formidable array of points which damaged the appellant's credibility. However, a proper analysis of Dr Beeks' report might well have revealed material which reduced the impact of some, if not all, of those points. We are very far from saying that the FtT, properly directing itself, was bound to find the appellant credible. Nonetheless, we do consider that even in an apparently open and shut case which the FtT considered this to be, every point which weighs in the balance in favour of the appellant should be properly considered. We are not satisfied that the FtT was entitled, for the reasons which it gave, almost entirely to discount the report of Dr Beeks. In that situation we allow this appeal and we remit the appeal to the FtT.

Notice of Decision

The appeal is allowed.

No anonymity direction is made.

Signed Elisabeth Laing Date 13.02.2018

Mrs Justice Elisabeth Laing DBE

TO THE RESPONDENT **FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed Elisabeth Laing Date 13.02.2018

Mrs Justice Elisabeth Laing DBE