Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10820/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 April 2019	**On 14 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

FH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms. A. Bhachu, Counsel instructed by Duncan Lewis & Co
For the Respondent: Mr. N. Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge O'Hagan, promulgated on 19 February 2019, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse a grant of asylum.
2. As this is an asylum appeal I have made an anonymity direction.

3. Permission to appeal was granted as follows:

> "At para 5 & 6 the grounds challenge the Judge's decision not to accept diagnoses of PTSD by both Dr Sinha and Dr Hoare. The reasons given at para 6 of the grounds why the Judge erred by doing so are arguable. They may be further substantiated by the recent decision of KV (Sri Lanka) v SSHD [2019] UKSC 10 as to the relevance of reports being compliant (as the Judge found that these were) with the Istanbul Protocol.
>
> Given that the Judge would have considered all the evidence in the round, all grounds may be argued".

4. I heard submissions from both representatives following which I reserved my decision.

Error of Law

5. At the hearing Mr. Bramble conceded that there was an error in the Judge's approach to the medical evidence, in particular with reference to the last sentence of [39]. This sentence states as follows:

> "From the advice received from medical members in my capacity as a Judge in the Social Entitlement Chamber, I am aware that amitriptyline has to be prescribed at a dose of at least 75 mg, and ideally much higher, to function as an antidepressant".

6. It was accepted that the Judge had gone beyond his remit in making this finding. There was no objective evidence to support this statement. It was accepted by Mr. Bramble that this was an error of law, and that this affected the Judge's consideration of the Appellant's PTSD and mental health. Mr. Bramble also acknowledged that the Respondent had accepted that the Appellant suffered from PTSD in the reasons for refusal letter (see [76] and [143]). At [76] it states:

> "On viewing the report and analysing its contents with regard to the expert involved and the details within the report, it is accepted that you have PTSD and severe depressive episodes".

7. There is no reference in the decision to the Judge having said at the hearing that he intended to go behind this concession.

8. Mr. Bramble also accepted that the Judge had erred in failing to take into account, and give weight to, the evidence of the witness, having found him to be reliable. At [68], the account given by Mr. L was accepted. "Although this evidence was brief I see no reason to doubt Mr. L's integrity. I accept his account." He accepted that this evidence went to the Appellant's claim under Articles 3 and 8 on medical grounds.

9. However, while Mr. Bramble accepted that the approach under Articles 3 and 8 on medical grounds would be materially affected by the Judge's errors in his consideration of the medical evidence and the evidence of the witness, he submitted that the asylum decision remained intact, and

should stand. He submitted that the appeal should be retained in the Upper Tribunal to be remade on Articles 3 and 8.

10. Given this concession, I have considered whether the error in the consideration of the medical evidence also affects the asylum decision, or whether they can be separated in the manner submitted by Mr. Bramble. I have had regard to the skeleton argument and also the case of KV.

11. Credibility findings must be made having considered the evidence in the round. Therefore, any finding by the Judge that he cannot rely on the medical evidence regarding PTSD and depression must have an impact on his assessment of the asylum appeal. I find that the medical evidence goes to the Appellant's credibility, insofar as it goes to his mental state, in particular his diagnosis of PTSD. I therefore find that the error also affects the asylum decision.

12. Further I have given careful consideration to the issue of alternative causes following the case of KV. At [47] the Judge states:

> "It is not unreasonable to conclude from the scarring that the appellant could have been mistreated by Sunni Muslims in Pakistan as he claims. Equally, however, he might have been harmed by other people, and in different circumstances, from those he claims. Viewed in isolation, either is possible. It seems to me that the safest approach is to view the evidence of physical mistreatment in the context of the evidence as a whole".

13. Ms. Bhachu submitted that the Judge had erred in putting forward two alternative causes for the scarring and torture, and in failing to come to a conclusion. She submitted that, if two alternative considerations were put forward, one needed to be adopted and one needed to be rejected. The two different alternatives had to be considered and the likelihood of one versus the other had to be compared. She referred to [31] of KV which states:

> "The third point arises out of the tribunal's final conclusion that there were only two real possibilities, namely that KV had been tortured and that his wounding was SIBP. The point is that the likelihood of both possibilities had to be compared with each other before either of them could be discounted. And the contention is that, when it came to compile the final section of its determination entitled "Assessment of the Appellant's Appeal", and in particular the final subsection, entitled "Conclusion", in which it discounted the possibility of torture, the tribunal made no reference to the likelihood, or rather on any view the unlikelihood, that the wounding was SIBP."

14. Ms. Bhachu submitted that this decision was "on all fours" with that referred to in KV. Two alternatives had been put forward by the Judge at [47] but he had not come to any conclusion in the following paragraphs as to which of those was more likely. She submitted that the Judge had to

assess both alternatives and if he was rejecting the medical evidence, it had to be clear on what basis that had been done.

15. I have carefully considered whether the Judge gives any consideration to the alternatives put forward at [47], and I find that he does not. Following KV, I find that this is a material error of law.

16. I have also considered the reasons given for attaching less weight to the scarring report which supports the Appellant's account. The Judge found that Dr. Sinha's report was Istanbul Protocol compliant at [33]. However, at [41] he found that the report carried "substantially less weight than might otherwise have been the case" for reasons given from [34] to [40]. These reasons include the statement at [39] where the Judge went beyond his remit and made findings based on his matters deemed to be within his own knowledge.

17. At [46] the Judge considers Dr. Sinha's evidence of the scarring. He states:

> "There is, of course, the evidence of Dr Sinha that he found the scarring on the appellant's (sic) to be consistent or highly consistent with his account. That is, on the face of it, supportive of the appellant's case. It needs to be treated with caution, however. What Dr Sinha found was that the scarring was consistent with the appellant having been physically mistreated as claimed. I do not seek to look behind that conclusion. What Dr Sinha did not find, because he could not have that knowledge, was that the physical mistreatment happened in the circumstances that the appellant claims. This is significant in the context of this case. Dr Sinha was examining a man who, in February 2018, was 54 and who was 30 at the time of the alleged events. There is much about his life that is not reliably known. It is known that he entered the United Kingdom illegally, having made the journey across Europe through illicit means. It is also known that he has had contact with some level of criminality in this country since he had a false passport".

18. The Judge found that in Dr. Sinha's opinion the scarring was consistent or highly consistent with the Appellant's account. However, while stating that he did not seek to look behind the conclusion that "the scarring was consistent with the appellant having been physically mistreated as claimed", he then does exactly that.

19. I find that the Judge has erred in his treatment of the medical evidence, in relation to scarring as well as mental health. He did not give adequate or proper reasons for rejecting the finding of Dr. Sinha that the scarring was consistent with the Appellant's claimed account. I find that the credibility findings are infected by these errors. He then raised two alternatives, but failed to compare the likelihood of one with the other, contrary to the case of KV.

20. I find that the decision involves the making of material errors of law. I have taken account of the Practice Statement dated 10 February 2010, paragraph 7.2. This contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. Given the nature and extent of the fact-finding necessary to enable this appeal to be remade, given that the credibility findings cannot stand, and having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

Notice of Decision

21. The decision of the First-tier Tribunal involves the making of material errors of law and I set the decision aside. No findings are preserved.

22. The appeal is remitted to the First-tier Tribunal to be re-made.

23. The appeal is not to be listed before Judge O'Hagan.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 10 May 2019

Deputy Upper Tribunal Judge Chamberlain