Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/11026/2018**

THE IMMIGRATION ACTS

Heard at Civil Justice Centre, Cardiff	**Decision & Reasons Promulgated**
On 30 August 2019	**On 24 September 2019**

Before

MR C. M. G. OCKELTON, VICE PRESIDENT

Between

NTP
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Hulse, Counsel, instructed by Qualified Legal Solicitors
For the Respondent: Ms S Rushforth, Senior Home Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Vietnam. She came to the United Kingdom apparently in March 2010 illegally. She claimed asylum. She then absconded and the claim was treated as withdrawn. Four or five years later she was arrested for being concerned in the production of cannabis. She was convicted on 29 June 2015 and sentenced to eighteen months' imprisonment. She was then served with a notice of a decision to deport her on the basis of being a foreign criminal. A deportation order was served on her on 10 September 2015. She then made further submissions and as they involved an assertion that she had been trafficked she was interviewed by the National Referral Mechanism. There was a positive reasonable grounds decision

following which the appellant withdrew her asylum claim. Following a further interview there was a conclusive grounds decision that she had not been trafficked. The appellant was then detained with a view to her deportation; but she made further submissions which were refused and carry a right of appeal. She exercised that right of appeal and her appeal was heard by Judge Wilson in the First-tier Tribunal in March of this year.

2. Judge Wilson had before him the appellant's oral evidence and the various accounts that she had given at various times of her previous history. Judge Wilson also had access to a country report by Dr Anh and a medical report by Professor Graham. Judge Wilson dismissed the appellant's appeal. There are a considerable number of strands to Judge Wilson's reasoning but it would, I think, not be inappropriate to begin with his conclusion that although the various accounts the appellant had given of her history were plausible in the context of circumstances in Vietnam, she had been so inconsistent in her own account of her own history that there was not a proper basis derived from her evidence for finding fact in her favour. That is to say, that although no doubt the things she described could have happened to her and did happen to some people there was no reason to suppose on her evidence that they had happened to her. If they had, she would have been able to be more consistent in her description of them. That as it seems to me is the principal reason why Judge Wilson determined that she was not credible as to her history. However, that is a summary of a complex consideration running to about 60 paragraphs in total in Judge Wilson's judgment. The conclusion that she was not worthy of credit and therefore that, to put it very shortly, her appal could not succeed, is criticised in grounds of appal which have been described by Ms Hulse who presents her case today as on a 'narrow point'. The grounds of appal relate solely to the medical evidence that was before the judge. There are three grounds. The first is headed "Failing to determine whether Professor Graham is an expert". The second is headed "Failing to make findings as to the basis of the Appellant's scars unreasonably dismisses Professor Graham's findings as to the scars" and the third is "Erred in the approach to credibility".

3. Permission was granted by Judge Coker on the basis that it was arguable that given that the appellant certainly has scars the failure to refer to them might be an error of law, but that even if it were it might not be that it could be shown to have been material. Although I am not confident that Judge Coker intended to allow argument on each of the grounds, I will deal with all of them in the light of the submissions made by Ms Hulse. The first, as I have indicated, relates to the failure to determine whether Professor Graham is an expert. That ground is with the greatest respect one which it is barely applicable to proceedings in a tribunal. The process of determining whether a witness is an expert is a process which is strictly speaking confined to proceedings in which the strict rules of evidence apply. In circumstances in which the strict rules of evidence apply, opinion evidence is simply inadmissible unless it is shown to derive from a person who has such expertise that his or her opinion ought to be admitted. Those circumstances do not apply in tribunal proceedings where the strict rules of evidence have no application at all. The only question in tribunal proceedings is not whether opinion evidence is admissible but whether it is reliable;

and that depends not on whether the person is or is not an expert but on the level of expertise shown by any person who gives an opinion on any matter.

4. Looking at the first ground in that context it is perfectly clear that the judge brought a mature and correct approach to the determination of Professor Graham's expertise. The position is that at paragraph 40 the judge wrote this:

> "40. It is for an expert to establish that he has the appropriate expertise to opine upon the matters contained within his report. Dr Graham does not provide a detailed summary of his experience in assessing PTSD, anxiety or injuries caused by abuse and torture. Whilst Dr Graham provides a list of his qualifications and memberships [it] is not clear that these qualifications and memberships are relevant to the matters upon which he opines in his report and Dr Graham provides no explanation as to how he is appropriately qualified."

5. Paragraphs 41 and 42 note Dr Graham's apparent departures from the requirements of the Istanbul Protocol. In [43] the judge writes this:

> "43. The Appellant advised Dr Graham that she had self-inflicted knife injuries caused in 2008 and other injuries caused by traffickers including wounds inflicted by a concrete floor and being stabbed with a sharp stick. Dr Graham opines that a number of the injuries are diagnostic of being caused in the manner that the Appellant describes most others are consistent. [It] is implicit within the Istanbul protocol, practice direction and case law that consideration should be given to other potential causes of scarring. There is no such consideration of alternative causes within Dr Graham's report. I find that the lack of consideration of other possible causes within the medical report is contrary to the guidance set out in **KV Sri Lanka** [in the Court of Appeal at that time] and the Istanbul protocol. Accordingly, this significantly affects the weight that I attach to Prof Graham's report."

6. It seems to me that that approach to the expertise of the person writing the report is absolutely in accordance with the law. The judge was faced with an opinion given by a person in written evidence before the tribunal, and it was for the judge to decide what weight to give to that evidence. The crucial question about the scars is the extent, if any, to which they support the appellant's case. In that context I move on to the second ground of appeal. The comments on the scars are, I think, confined to those I have already read out in [43] of the judge's decision. What is summarised there is that the appellant's assertion that she has on her body scars caused by a sharp stick and in addition by a concrete floor are described by Dr Graham in the vocabulary of the Istanbul Protocol albeit without examining other possible causes.

7. Before me today Ms Rushforth has taken the point of the failure to look at alternative means of causing the injuries. But the point, particularly in the context of KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10, is that it is important to see precisely what a person opining on the causation of lesions on the body says and does not say. In that case the appellant's evidence was that he had been injured by hot rods when he was unconscious. The opinion not only said that the scars were diagnostic of injury by hot rods, but also that they could not have been caused whilst the victim was conscious. That was of course because if he had been

conscious he would have flinched, and the scars would not have been so precisely delineated as they were found to be. In most cases the lesions which are found cannot be so closely attributed to any *circumstances* in which they are caused merely by examination. What Dr Graham in fact said in the present case is that the injuries which the appellant attributed to having been poked with a sharp stick were diagnostic of having been caused, and I quote, "by a sharp object such as a sharp stick", and that the injury which she said was caused by her being dragged along a concrete floor was consistent with contact with sharp stones in a floor. In other words, what is being said by the author of the report, taking the opinion at its highest, is that the injuries on the appellant's body to which reference is made in these terms are consistent with some contact at some time with a sharp object which might or might not have been a sharp stick and consistent with contact at some time with a concrete floor: and that is as far as it goes. This is not, I repeat, a case like KV (Sri Lanka) where the injuries themselves are such as to show some sort of activity by others.

8. The injuries are not even (by comparison for example with cigarette burns) injuries of the sort that by their nature indicate hostile activity by others. Encounter with sharp objects and with concrete floors is part of the normal circumstances of life, and the effect that a person has injuries of this sort does not necessarily take an asylum claim very much further. It is clear that the judge had those findings in mind because they are, as I have indicated, summarised in [43]. I cannot see that the judge was required to give them any further consideration, nor, despite Ms Hulse's best endeavours, can I see that if the judge had mentioned again the fact that the appellant had been in contact with a sharp object such as a stick and a concrete floor some time during her life that would demonstrate whether either of the two completely different accounts she had given, or some other account, was in fact the account of her history.

9. That takes me on to ground 3. Ground 3 asserts the Mibanga error (Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367). It sometimes happens that judges fail to take into account all the evidence at once when reaching a judgment on credibility. Sometimes in such circumstances a judge may listen to an appellant's oral evidence and decide that it is not credible and that in those circumstances it is not necessary to look at medical evidence which might otherwise have supported it. The assertion that a judge has fallen into that error is sometimes based simply on the fact that a judge who has properly taken all the evidence into account has dealt with one area of the evidence in a decision before another area, which of course is necessary in any properly structured decision. It does not appear to me here that there is any basis for saying that this judge made the Mibanga error. In particular, I notice that the judge's extensive consideration of the medical evidence precedes what the judge says about the appellant's own story and its inconsistencies. When the judge writes in paragraph 63 that the evidence has been considered as a whole and in the round there is no basis either in the decision itself as I read it or identified in the grounds for thinking that was not so. The point here is simply that the medical evidence going to the appellant's injuries is as, I have said in relation to ground 2, simply not sufficient to show that her account of the injuries is worthy of credit, in the context of the rest of her extensive circumstantial account, which was evidently not worthy of credit. Those are the matters raised by the grounds and they

are the matters upon which Ms Hulse made her substantive submissions. It seems to me that the grounds are not made out.

10. This was a case where the judge was entitled to attribute the weight that he did to the evidence before him, was entitled to reach the views that he did about the credibility of the appellant's evidence, was entitled to conclude as he did that the assessment to be made was the risk to the appellant on return. I quote from paragraph 64:

> "The risk to the appellant on return against the background of a 37 year old woman who has not previously been trafficked or subject to domestic violence and who has family and other contacts within Vietnam but who suffers from mental health issues including PTSD, anxiety and depression."

11. Very properly no complaint is made about the judge's assessment of the rest of the evidence in that context. It follows that this appeal to the Upper Tribunal falls to be dismissed. The judgment of Judge Wilson stands.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 19 September 2019