



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal no: **DA/00774/2014**

THE IMMIGRATION ACTS

At **Birmingham**
on **08.12.2014**

Decision signed:
08.12.2014
sent out: **09.12.2014**

Before:

Upper Tribunal Judge John FREEMAN

Between:

I K

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Natalie Wilkinson*, (counsel instructed by TRP)
For the respondent: Mr Neville Smart

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Lee North and a lay member), sitting at Stoke-on-Trent on 16 June, to dismiss an asylum and human rights appeal by a citizen of the Ivory Coast, born 15 October 1978, who had been taken by his mother, a native of the Camerouns, to live in that country when he was little more than a year old, and had lived there till he left for France in 2006. The appellant had appealed a deportation order signed on 10 April 2014, following his conviction and sentence of 18 months' imprisonment for blackmail, on 10 May 2013. He claimed to be a homosexual, who had suffered persecution for his sexual orientation before he left the Camerouns, and would face a real risk of doing so again if returned there, or to the Ivory Coast.

2. Permission was given mainly on the ground that the panel had failed to follow the guidelines in *HJ (Iran)* [2010] UKSC 31 on the need, or otherwise for homosexuals (or for that matter anyone else entitled to the protection of the Refugee Convention) to use discretion in the exercise of those rights protected by it. They dealt with this (see paragraph 14) on the basis that the appellant had "... both before and after his arrival in the UK chosen to exercise in homosexual activity, if at all, discreetly".
3. Whether or not there is an arguable case on the ground for which permission was given must depend to a great extent on the panel's findings of fact, and the soundness of them. Miss Wilkinson's first point on this aspect was on the way the panel had dealt at paragraph 16 with the findings in the medical report, made as long ago as 5 September 2006 by Dr Michael Nelki MRCS.
4. Dr Nelki had found 17 separate areas of trauma on the appellant's body, besides a series of stretch marks on his back, which were likely to have been the result of changes in his weight. His general conclusions were that

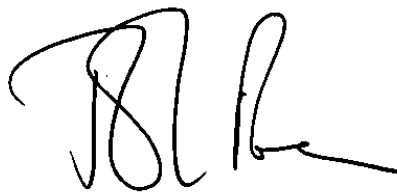
The different types of scars of different shapes and sizes over different parts of the body indicate a variety of trauma which would be difficult to explain other than from different traumas such as from beatings. ... [the] variety of different types of scars ... are entirely consistent with the description he gave for their causes.

Dr Nelki defines his terms at appendix C by reference to the Istanbul Protocol: "consistent with" means that the lesion could have been caused by the trauma described, but is non-specific and there are few other possible causes; "highly consistent" means that it could have been caused by the trauma described, and there are few other possible causes.
5. The panel dealt with this evidence at paragraph 16, by saying that Dr Nelki found the marks on the appellant consistent with the cause given, which from appendix C meant that they "... could have been caused by the trauma described but there are many other possible causes". While it might have been more helpful if Dr Nelki had stuck to the terms in the Istanbul Protocol, in my view the panel needed to look at the substance of what he said.
6. It is clear from Dr Nelki's use of the expression "difficult to explain" that what he actually meant by "entirely consistent" was something at least much closer to "highly consistent" than merely consistent. Probably, without trying to read too much between his lines, his view was that, taken together, the appellant's scars should be seen in this way, whatever view might be taken of each of them individually.
7. Even that would certainly not have been decisive on the issue of whether or not the appellant had suffered persecution as he claimed for his orientation in the Cameroons, so making it less likely that he would adopt discretion as a matter of choice, whether returned there or to the Ivory Coast. The panel rightly pointed out a number of other obstacles he faced

in establishing his credibility about anything, not least his conviction by a jury for blackmail.

8. However, the panel did need to set out Dr Nelki's findings fairly, and to deal with their real effect, as I have tried to do at **4** and **6**. I should not wish for one moment to be taken as suggesting that, in their otherwise very well-reasoned decision, they did not mean to deal entirely fairly with the evidence before them; but, for the reasons I have given, I am not persuaded that they succeeded in this, though it would help if the writers of medical reports did use the Istanbul terms at all times.
9. The result must be an entirely fresh hearing of the whole appeal before another panel, which can most conveniently be arranged in the First-tier Tribunal. **The panel must include a lay member, as in my view the appellant would have a justifiable grievance if he lost the opportunity of having as full a composition of the fresh panel as there was on this occasion.**

Appeal allowed, to be re-heard in the First-tier Tribunal by a panel consisting in a full-time "salaried" judge, and a lay "non-legal" member

A handwritten signature in black ink, appearing to be 'JLR', written in a cursive style.

(a judge of the Upper
Tribunal)