IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06351/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1st February 2016	**On 15th March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR AA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Neville (Counsel)
For the Respondent: Mr L Tarlow (Senior Home Office Presenting Officer)

DECISION AND REASONS ON ERROR OF LAW

1. The appellant's appeal against a decision to remove him from the United Kingdom was dismissed by First-tier Tribunal Judge Graham ("the Judge") in a decision promulgated on 15th August 2015. The appellant claimed to be at risk on return to Pakistan. Part of the evidence he relied upon was a

medical report prepared by Dr A Lohawala, in which an assessment of the scars on the appellant's body and the state of his mental health was made.

2. The Judge found that no weight could be given at all to the conclusions in the medical report regarding the scars or in relation to any support the report might give to the appellant's account. She found material inconsistencies which could not be explained by the appellant's mental ill-health. The Judge went on to find that the appellant could return to Pakistan safely and that his ill-health did not reach the threshold required to show a real risk of ill-treatment in breach of Article 3 of the Human Rights Convention. No Article 8 case was advanced on the appellant's behalf.

3. In an application for permission to appeal, it was contended that the Judge erred in relation to her assessment of the medical report. Although she expressly referred to KV (scarring – medical evidence) [2014] UKUT 230 (IAC) she failed to correctly apply the guidance given in that case and, in particular, erred in finding that no weight could be given to the medical expert's findings in the light of the age of the scars on the appellant's body. Secondly, the Judge erred in rejecting the appellant's factual account, as her assessment in this context was flawed by her finding that little or no weight fell to be given to the medical report.

4. Permission to appeal was given by a Judge of the Upper Tribunal on 4th November 2015. In a Rule 24 response made by the Secretary of State shortly thereafter, the appeal was opposed on the basis that the Judge directed herself appropriately. Dr Lohawala's medical report was properly considered in the light of KV and the grounds amounted to a disagreement with the outcome of the appeal. No material error of law was shown.

Submissions on Error of Law

5. Mr Neville said that paragraph 229 of the judgment in KV contained all that was said in that case about assessing the age of scarring. Having heard substantial evidence, the Upper Tribunal concluded that there is no scientific consensus as to the precise date beyond which it becomes impossible to tell how old scarring is but there is agreement that in the context of injuries caused by torture it is only possible ordinarily to assess the age of scarring within the first six to twelve months. One of the experts gave evidence before the Upper Tribunal indicating that it may sometimes be possible to give a likely date where scarring is up to two years old depending on the particular medical context.

6. The Judge heard a submission from the Presenting Officer that no weight should be given to any report on scarring, as supporting an appellant's account, where the scars were over two years old. However, that submission was simply wrong and wholly unsupported by KV. This may

have contributed to the error made by the Judge at paragraph 43 of the decision, where no weight was given to the report in this context.

7. The Judge's self-direction was, apart from that, correct but the finding that the medical report returned a probative value of nil fatally undermined the Judge's conclusions.

8. The Judge found inconsistencies in the appellant's claims but it was axiomatic that a claimant might, nonetheless, make out his or her case to the necessary lower standard of proof. An important question to be asked was whether the Judge would have been bound to dismiss the appeal, even if she had given the medical report due weight. The clear answer was "no". It was not possible to say that, absent the misdirection regarding the medical report, the Judge would inevitably have found the appellant's account incredible.

9. The importance of medical reports of this type was clearly highlighted by the Upper Tribunal in KV, at paragraph 224 of the judgment. Home Office Policy Instructions state at 3.3 that reports which document and evaluate a claim of torture for asylum proceedings need only provide a relatively low level of proof of torture or serious harm and ought not to be dismissed as having little or no weight when the overall assessment of the credibility of a claim is made. Annex 3, attached to the judgment in KV, shows that clinicians who prepare reports for the Medical Foundation can be assumed to have considered the possibility of a "false allegation" of torture in forming a clinical view, as this is required by the Istanbul Protocol. The expert instructed in the present appeal had the necessary experience and expertise and could be assumed to have considered this possibility.

10. The second ground concerned the Judge's finding that little weight should be given to the report in any event because the expert had not considered the alternative explanations for the appellant's injuries. In fact, looking at the report, it was clear from paragraphs 1.2 and 2.1 that Dr Lohawala expressly referred to the appellant's claims as precisely that and to his "allegedly" having been beaten. He did not take the appellant's account at face value. The body of the report, for example at paragraph 6.15.1 to 6.15.5, showed that Dr Lohawala considered in some detail alternative explanations for the injuries. The cogency of the report could not be reconciled with the Judge's brief assessment at paragraph 43 of the decision. The medical expert did not accept the account without question. Dr Lohawala's findings that some of the scars were "highly consistent" with the appellant's account fell to be given due weight.

11. Moreover, the appellant's demeanour during his examination was also significant evidence. Dr Lohawala noted that he became extremely upset in describing some of his injuries. The Judge was invited to take this aspect into account in submissions but that there was nothing in the decision to show that she had done so.

12. So far as venue is concerned, Mr Neville said that if a material error of law were found, in relation to the weight due to be given to the medical report, the appeal should be remitted to the First-tier Tribunal because the Judge's other findings, regarding the credibility of the account, would be undermined. Proper consideration of the medical report was essential to an assessment of the whole account.

13. The appellant's grounds of appeal might require amendment as there has been a rapprochement with his partner and a renewed relationship with his young daughter, such that an Article 8 assessment would inevitably have to take into account section 117B(6) of the 2002 Act.

14. Mr Tarlow said that the decision was sustainable. He relied upon the Rule 24 response from the Secretary of State. At paragraph 43 of the decision the Judge came to conclusions on the medical evidence that she was entitled to reach. It was not for the medical expert to question the appellant's account or conclude whether it was incredible or not. That was the Judge's task. At paragraph 44 of the decision, the Judge found that there were inconsistencies which could not be explained by the state of the appellant's mental health. She dismissed the account in its entirety.

15. If, on the other hand, an error of law were found, in the light of the submission regarding changed family circumstances, the Secretary of State would not object if the appeal were sent to the First-tier Tribunal to be remade.

16. In a brief reply, Mr Neville said that the inconsistencies found by the Judge were undermined by her finding that the medical report had no value. If it were given due weight, a different conclusion might have been reached on the overall credibility of the appellant's claims.

Conclusion on Error of Law

17. The Judge accepted Dr Lohawala as an expert witness, at paragraph 37 of the decision. It is clear that she carefully avoided reaching a conclusion on the credibility of the appellant's core claims without first taking into account, as part of the assessment, Dr Lohawala's report. She was satisfied that discrepancies relating to the timing of threats claimed to have been made by the Taliban could not be explained by reference to the appellant's mental health. At paragraph 43 of the decision, she focused on the scarring on the appellant's body.

18. As Mr Neville submitted, the Judge's finding that no weight could be given to Dr Lohawala's conclusions regarding the scars is inextricably linked to their age. The appellant claimed that he was detained by the Taliban in 2007 or 2008, so that the scarring on his body must be seven or eight years old. The Judge drew attention to the Upper Tribunal's finding in KV that there is some basis for considering, in relation to certain types of case, that the age of scarring can be determined up to two years. There

is, however, nothing at all in KV suggesting that little or no weight can be given to a medical report in a case where scars are considerably older than that. The Upper Tribunal's comment is confined narrowly to medical opinion regarding the age of scars.

19. It is readily apparent that the medical report, prepared by an expert, was relied upon as evidence showing that the scars themselves were capable of supporting the appellant's claims regarding the injuries that gave rise to them. That particular role is not undermined at all by the mere fact that the scars are seven or eight years old. Dr Lohawala was entitled to find, as a medical expert, that some at least of the scars were "highly consistent" with the appellant's account of the injuries he suffered. As such, the report was capable of having weight, perhaps substantial weight, in support of the appellant's case. The Judge's finding that the age of the scars has the consequence that no weight may be given to the conclusions in the medical report is unsupported by KV or any other authority and amounts to a material error of law.

20. Similarly, in finding that Dr Lohawala failed to consider whether the appellant's injuries could have been caused by playing cricket or his work in restaurants, the Judge has apparently failed to take into account the medical expert's assessment at paragraphs 6.15.1 to 6.15.5. In that part of the report, Dr Lohawala expressly considered alternative explanations for the injuries. He was aware of the appellant's leisure activities and his work in restaurants, took into account the appellant's denial that he suffered injuries in the course of these activities and, having found alternative explanations of the injuries unlikely, Dr Lohawala drew a broad conclusion that there was a high degree of consistency between the appellant's account and the scars on his body.

21. Some criticism might well be made of the report, as it is not always apparent whether Dr Lohawala is reciting part of the appellant's account or making a finding of his own. An example is at paragraph 6.15.1, where the finding that it was likely that the appellant's injuries were caused by torture is followed by the words "by the Taliban and, thereafter by the Pakistani army officers". Mr Neville correctly pointed to Dr Lohawala's introduction, in which he referred to the appellant's "claims" but the inclusion in the report of the apparent identity of the agents of ill-treatment ought to give rise to some caution. Overall, however, I accept Mr Neville's submission that paragraph 43 of the decision contains an error of law in this context, as Dr Lohawala did in fact consider alternative causes for the injuries.

22. I have considered whether the decision might be sustained in the light of the inconsistencies found by the Judge but I conclude that this is not possible. The medical report was a salient part of the evidence and an assessment in the round, of all the evidence before the Tribunal, required the report to be given due weight, rather than no weight.

23. I conclude that the decision of the First-tier Tribunal contains a material error of law, in relation to the assessment of the medical report, and that it must set aside and remade in the First-tier Tribunal. I find that the First-tier Tribunal is the appropriate venue in the light of the Senior President's Practice Statement and the extent of the fact-finding that will be required on remaking. As Mr Tarlow said, there is the additional factor of the changed family circumstances. Mr Neville suggested that the grounds might require amendment, which will require an application (there were no draft amended grounds before me).

Notice of Decision

The decision of the First-tier Tribunal is set aside. It shall be remade in the First-tier Tribunal, at Birmingham, before a Judge other than First-tier Tribunal Judge Graham.

Anonymity

I maintain and continue the anonymity direction made by the Judge.

Signed Date

Deputy Upper Tribunal Judge R C Campbell