

from another person; intention to pervert the course of justice, and possession of class A drugs (cocaine). He was sentenced to ten months' and four months' imprisonment to run consecutively. He did not appeal against his conviction. The Secretary of State, by a decision dated 6 June 2016, refused the appellant's protection claim having, on 2 February 2015, made a decision to deport the appellant. The appellant had made his protection claim (that he could not return to Namibia on account of his sexual orientation) having earlier signed a deportation disclaimer notice indicating that he was willing to return voluntarily to Namibia.

2. The appellant appealed against the decision to refuse his protection claim on the grounds of his sexual orientation to the First-tier Tribunal (Judge Mensah) which, in a determination promulgated on 26 January 2017, allowed the appeal. I note from the decision [34] that the respondent had accepted that, if he were to prove that he was homosexual, the appellant had established that he would be risk of serious harm or mistreatment in Namibia.
3. Judge Mensah considered the evidence and found there were a number of reasons for rejecting the appellant's claim to be homosexual. First, she did not consider the appellant's signing of the deportation disclaimer as consistent with his claim to be a genuine refugee. Secondly, she noted that the appellant had not claimed asylum on arrival at the airport but had entered the United Kingdom as a visitor and thereafter had overstayed. Even at this point, the appellant did not claim asylum, behaviour which the judge did not consider consistent "with a person who is genuinely in fear of serious harm in their own country". Thirdly, the appellant had committed serious offences whilst in the United Kingdom. The judge did not consider that this behaviour was consistent with the appellant's fear of returning to Namibia given that his criminality would increase the risk of his removal. Fourthly, the appellant had, before the First-tier Tribunal, sought to go behind his conviction to argue that he had in fact been innocent, conduct which the judge did not consider consistent with his claim to be a witness of truth.
4. The appellant claimed to have had gay relationships in Namibia and that he had been discovered as a homosexual and beaten by a number of assailants. The appellant had obtained a medical report from Dr Katherine Wrigley. It is clear that Judge Mensah was impressed by this report which recorded that the appellant had over 50 scars on his body which correlated "highly" with his account of "repeated attacks, using blunt instruments and sharp weapons". The judge accepted that the medical report supported the appellant's claim that he had been attacked. However, the judge did note that Dr Wrigley had not been informed of the appellant's conviction and imprisonment at the time she wrote her report. Furthermore, at [29] the judge recorded that the appellant had been attacked whilst in prison in the United Kingdom on 1 April 2016 (that is before he was examined by Dr Wrigley) and that he had been hit "... with a metal bar and a fight had broken out". Dr Wrigley's report is silent as to

this incident which the appellant had chosen not to refer to her. The judge recorded that,

“This [failure of the appellant to notify the doctor of the assault in prison] has cast some doubt over the medical report and what the appellant told the doctor. However, it does not appear to account for all the scars and the surgery in Namibia.”

5. At [35] the judge concluded that, whilst she was concerned by the appellant’s criminality in the UK, she was “impressed by the medico-legal report”. She states that she was persuaded by this report that the appellant had proved that he is homosexual and had been attacked as described. Judge Mensah wrote,

“I have taken very seriously his behaviour in the UK but the medico-legal report is independent corroboration and the extent of the scars, the number of highly consistent scars and the overall credibility has in my view been enough to establish the facts as claimed.”

6. I find Judge Mensah’s analysis problematic. The very basis of this appellant’s claim is that he is homosexual. The only part of the appellant’s claim for which the medico-legal report might be regarded as providing “independent corroboration” is the appellant’s claim that he had been attacked and assaulted with a blunt instrument. Other than observing that homosexual men in Namibia may be violently mistreated, I do not see why the conclusions of Dr Wrigley should have led the judge to conclude that the appellant is homosexual as claimed whilst the remainder of the evidence indicated that his claim was false (see my summary above). Medical evidence, of course, often plays an important role in the fact-finding exercise (see *Mibanga [2005] EWCA Civ 367*). However, it remains important for judges to focus upon what medical evidence may actually prove in a case; in this instance, it only supported the appellant’s claim that he had been assaulted. Dr Wrigley’s report does not prove that the appellant is homosexual. Judge Mensah has not considered or discounted the possibility that the appellant had been assaulted in Namibia for reasons unconnected with his sexuality. Indeed, as Judge Mensah herself notes, the appellant has refrained from reporting an attack in prison in April 2016 which may have left him with scars which Dr Wrigley, deprived of the full facts, has concluded could be consistent with his claim to have been attacked in Namibia.

7. The Upper Tribunal should hesitate before interfering with a robust fact-finding exercise conducted by the First-tier Tribunal. However, I find that the decision of the judge should be set aside. First, I find that the judge has attached too much weight to Dr Wrigley’s report as corroborative evidence of the appellant’s claim that he is homosexual. Secondly, I find that the judge has not explained why the limited assistance provided by Dr Wrigley’s report is sufficient to outweigh the several negative credibility findings which the judge herself has made. Thirdly, I find that the judge has not taken proper account of the fact that the appellant has withheld from Dr Wrigley an important element of his history which, had she been

aware of it, may have led her to alter her opinion. Finally, I am troubled by the final sentence of the judge's decision at [36]:

"This [the judge's finding that the appellant is homosexual] would not prevent another judge in the future coming to a different decision if there is further criminality which may tip his credibility the other way."

8. I am at a loss to understand why the judge's findings of credibility in this appeal should be conditional upon the appellant refraining from further criminal conduct. The judge appears to suggest that she might reverse her finding that the appellant is homosexual if the appellant were convicted of further criminal offences whilst in the United Kingdom. It is not easy to fathom the logic of that comment.
9. There will need to be a new fact-finding exercise in the First-tier Tribunal. I therefore set aside Judge Mensah's decision and return the appeal to the First-tier Tribunal for that Tribunal to re-make the decision.

Notice of Decision

10. The decision of the First-tier Tribunal which was promulgated on 26 January 2016 is set aside. None of the findings of fact shall stand. The appeal is returned to the First-tier Tribunal (not Judge Mensah) for that Tribunal to re-make the decision.
11. No anonymity direction is made.

Signed

Date 9 August 2017

Upper Tribunal Judge Clive Lane

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

Signed

Date 9 August 2017

Upper Tribunal Judge Clive Lane