



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10748/2017

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice
On 11th June 2018

Decision & Reasons Promulgated
On 13 June 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mian, Counsel instructed on behalf of the Appellant

For the Respondent: Ms Z. Ahmed, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan.
2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) 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. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The Appellant with permission, appeals against the decision of the First-tier Tribunal, who, in a determination promulgated on the 8th December 2017, dismissed his claim for protection and on human rights grounds.
4. The basis of the Appellant's claim is set out in the decision letter and summarised in the determination. The Appellant claimed that he had entered the United Kingdom in December 2001 on a false passport and was therefore a minor when he entered the United Kingdom. He had left Pakistan with the help of an agent as a result of violence at the hands of family relatives as a result of a land dispute. It was claimed that he had been taken hostage for two days during which time he had been the subject of ill-treatment. It was asserted that he was the subject of ill-treatment because the relatives wanted to take possession of his share of the proceeds of sale from their father's land which was kept in his mother's account.
5. On 26 July 2017 he was encountered working illegally (although he disputes that he was working at that time) but was arrested and detained. On 31 July 2017 he claimed asylum.
6. The judge heard evidence from the Appellant and also from witnesses called on his behalf. In her determination promulgated on the 8th December 2017, the First-tier Tribunal judge dismissed his appeal having made a number of adverse credibility findings in relation to the factual basis of his claim and having reached the conclusion that he had not been in United Kingdom since 2001 but that he arrived shortly before his first claim to the Home Office made in June 2011 and was thus 22 years old at the time. She disbelieved his account of problems that he had encountered in Pakistan and did not accept that there was any ongoing argument with his brother in an attempt to get the Appellant to sign over the family home as a result of a number of inconsistencies in the evidence which she set out in her findings of fact from paragraphs 62 - 81.
7. The Appellant sought permission to appeal that decision and on the 8th January 2018 permission was refused but on renewal was granted on the 3rd May 2018
8. Thus the matter came before the Upper Tribunal. The Appellant was represented by Mr Mian and the Respondent by Ms Ahmed I have had the benefit of hearing their respective oral submissions in conjunction with the written grounds and the material that was before the First-tier Tribunal. I shall refer to those submission when reaching my conclusions as to whether the decision of the FTTJ discloses the making of an error on a pint of law.
9. Mr Mian in his submission stated that he did not rely on the grounds that related to the delay in claiming asylum. His principal submission related to the Rule 35 report of 9 October 2017 (set out at pages 24 onwards of the Appellant's bundle). He submitted that the report accepted the Appellant to be a victim of torture and had referred to him as an adult at risk, making it plausible that he faced treatment contrary to Articles 2 and 3 of the ECHR. He therefore submitted that the judge failed

to give weight to the Rule 35 report and did not acknowledge it (see paragraph 21 of the grounds).

10. Mr Mian directed the Tribunal to paragraph 64 of the FTT decision where the judge referred to the report and submitted that the judge was in error. He submitted that the Appellant had scars and thus there were no questions of credibility arising. It was also submitted that the judge did not acknowledge that the Respondent accepted that he had been a victim of torture. Thus he submitted it was wrong to give no weight to the report whatsoever without having the Appellant the opportunity to file a further medical report.
11. Ms Ahmed on behalf of the Respondent sought to distinguish the status of the Rule 35 report from other types of medical evidence. She submitted that it was not the equivalent of a medico-legal report and it was not possible to say that the doctor who wrote the report had any expertise in the causation of scars from his own observations. She stated that the judge had given some weight to the report and that the matter of weight attached to a piece of evidence was at the discretion of the judge. She further submitted by reference to the decision in Mibanga v SSHD [2005] EWCA Civ 367 that the judge properly considered all the evidence before reaching a conclusion.
12. By way of reply, Mr Mian made reference to the guidance relevant to Rule 35 reports. He had not produced a copy of the document prior to the hearing but read from his computer. However he provided a copy of that guidance to the Tribunal after the hearing.
13. Having read the determination and the skeleton argument provided before the FTTJ, it does not appear that there were any arguments advanced in relation to the Rule 35 report other than it lent support to the Appellant's account. The guidance now referred to by Mr Mian did not form part of any legal submissions that were made before the FTTJ thus it cannot properly be said that the judge erred in law by any failure to have regard to the guidance when it was not the subject of argument.
14. Nonetheless I have considered the guidance in the context of the grounds and the submissions made.
15. When a person is detained, as this Appellant was, Rule 34 of the Detention Centre Rules 2001 requires that person to be examined both physically and mentally by a medical practitioner within 24 hours unless the person objects. The medical practitioner may produce a report issued pursuant to Rule 35 and sometimes this may constitute independent evidence of torture.
16. Rule 35, so far as relevant, is as follows:

“special illnesses and conditions (including torture claims)

35.(1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injurious to the affected by continued detention or any conditions of detention....

(3) The medical practitioner shall report to the manager on the case of any detained person who is concerned may have been the victim of torture.

(4) The manager shall send a copy of any report under paragraphs (1) (2) or (3) to the Secretary of State without delay."

17. There is a pro forma document which is typically used to provide the report and it has in part boxes which the medical practitioner is expected to tick where appropriate.
18. There is a Detention Services Order 9/2016 which provides further guidance on the application of Rule 35; this has been provided by Mr Mian. The Order sets out the approach which medical practitioners should take when preparing and writing reports under Rule 35. This is set out in the section entitled "Preparing and submitting a Rule 35 report: concerns a detainee may have been the victim of torture 35 (3)". It specifically states that "A Rule 35 report is a mechanism for a medical practitioner to refer on concerns, rather than an expert medicolegal report and so there is no need for medical practitioners to apply the terms or methodology set out in the Istanbul Protocol. Medical practitioners are not required to apply the Istanbul protocol or apply probability levels or assess the relative likelihood of different causes but if they have a view, they should express it".
19. Therefore it is plain that a medical practitioner should always make a Rule 35 (3) report if he or she has cause for concern that the detainee may (my emphasis) have been tortured. A medical practitioner may have such concerns even where there is no independent medical evidence supporting the count of torture. The medical practitioner should say if possible whether the account is consistent with visible scarring but also the extent to which scarring may have other obvious causes and should identify medical evidence which is inconsistent with the detainees account.
20. The guidance goes on to set out that because each case is different, it is not possible to provide definitive guidance on when a Rule 35 report will constitute independent evidence of torture. However it must have some corroborative potential that a detainee has been tortured but it need not definitively prove the alleged torture. A number of pointers are set out:
 - A report which simply repeats the allegation of torture will not be independent evidence of torture;
 - A report which raises a concern of torture with little reasoning or support which mentions nothing more than common injuries or scarring for which there are other obvious causes is unlikely to constitute independent evidence of torture;
 - A report which details clear physical or mental evidence of injuries which would normally arise only as a result of torture (e.g. numerous cards with the

appearance of cigarette burns to legs; marks with the appearance of whipping scars), and which records a credible account of torture, is likely to constitute independent evidence of torture.

21. It is thus plain from the guidance that no definitive guidance can be provided as to when a report is independent evidence of torture because the issue is fact sensitive.
22. The Rule 35 report in respect of this Appellant is set out at pages 24 of the Appellant's bundle. At section 4 the detainees account is given: "he was attacked in Pakistan in 2000. There was a land dispute and he was taken by his older brother some cousins who took him to a room. He had acid poured over his body and was burned with hot iron bolts and beaten with rods. He was cut with a knife. He was beaten with sticks. He was attacked for two days. He was taken to hospital - he does not recall the name." At section 5 under the heading "relevant clinical observation findings" the report makes reference to "burn scars on arms/hands and chest and left foot. Incision scar on left upper thigh". There is a diagram to show the location of those scars. At section 6: assessment the following is stated "on examination he has scars which may be due to the history given. He has been having difficulty sleeping since the attack."
23. Contrary to the grounds, the judge did not fail to take into account the content of that report and in fact made express reference to it at paragraph 64 of her decision. The judge stated as follows:

"64. The Appellant does have scars on his body. However, the prison doctor's report only states that these "may be due to the history given." The doctor provided no other analysis of the Appellant's scars. Therefore I afford it little weight as stand-alone evidence in establishing how the scars were come by."

Later on in her findings of fact she found that the Appellant had been inconsistent as to who was responsible for the ill-treatment he said he had suffered and gave reasons at paragraph 69 (page 11 of the determination).

24. Furthermore I do not accept the submission made that the judge failed to give any weight to that report. The judge having considered its contents stated that she gave it little weight (rather than no weight) as stand-alone evidence in establishing the causation of the scars. In my judgment, the judge was entitled to reach that view on the contents of the Rule 35 report. The report itself recorded in brief terms the Appellant's assertion of torture and the presence of some burn scars as noted. There was no medical opinion as to the causation or any connection between the scars identified and the Appellant's assertions. At paragraph 64, the judge properly accepted that there were scars on the Appellant's body but was entitled to take into account the deficiencies in the report and in particular that whilst he stated that it "may be due to the history given", the doctor provided no other analysis of the scars or provide any analysis of causation. Notwithstanding the reference made by the Respondent that " in relation to your claim of ill-treatment , your account does meet the above definition of torture" (see letter maintaining detention dated 9th October

2017), it was open to the judge to consider the report in the light of the totality of the evidence to reach a conclusion as to whether in fact he had been the subject of ill-treatment in the factual circumstances alleged.

25. The judge did consider that the evidence in the Rule 35 report did have some corroborative potential (in line with the guidance although not put before the judge) but that she could attach little weight to it overall for the reasons that she expressed. There was no reasonable explanation as to how the scarring was consistent with his account. As the guidance sets out a Rule 35 report is not an expert medico-legal report therefore there is no need for medical practitioners to apply the test set out in the Istanbul Protocol or assess the likelihood of different causes.
26. As the decision itself reflects, the judge went on to make a number of factual findings concerning the evidence of the Appellant and his witnesses and set out the areas where that evidence was implausible, not credible and inconsistent. At paragraph 66 - 81 the judge set out those findings of fact by reference to his factual account as to the date of his arrival, the evidence relating to the issue of education in the UK, the inconsistent evidence given by him and his family members and the inconsistent and implausible evidence as to the events in Pakistan. At paragraph 69, the judge found also he was inconsistent as to evidence as to who was responsible for the alleged ill-treatment/torture. At paragraph 71 - 81 the judge set out other inconsistencies in the evidence. It is not been demonstrated that any of those findings were not open to the judge on the evidence that was before her.
27. At paragraph 83, the judge then drew together all of those findings of fact, including the weight that she could attach to the Rule 35 report to reach final conclusions as to the core issues. As submitted by Ms Ahmed, she properly applied the approach in the decision of Mibanga and did not consider the medical evidence in isolation but part of the totality of the evidence before reaching her final conclusions at paragraph 83.
28. I do not accept the submission made by Mr Mian that the judge should have informed the parties of her view of the Rule 35 report so that the Appellant could obtain further evidence. As set out above, it is plain that a Rule 35 report has limited evidential value and as Miss Ahmed submitted, does not have the status of a medico-legal report. It must also have been plain that the report did not seek to attribute the scars to the way the Appellant claims to have been ill treated. It has always been open to the Appellant's representatives to seek to instruct a medical expert and have had the opportunity to do so since the rule 35 report was provided in October 2017.
29. Consequently I find no error of law in the approach of the FTTJ to the issue of the Rule 35 report.
30. The grounds also challenge the judges' assessment of Article 8. The grounds assert that the judge failed properly to consider the Article 8 rights of the Appellant (see grounds paragraphs 22 - 33).

31. It is plain from reading those grounds that they are based on the assertion that the Appellant had been resident in the United Kingdom since 2001 and therefore had accrued 16 years residence. However that fails to take into account the findings of fact made by the judge that relate expressly to his arrival date and the length of his residence in the UK.
32. The judge made the following findings of fact from the totality of the evidence before her, including the oral evidence of two witnesses called on behalf of the Appellant. The judge found that the Appellant had been inconsistent as to his arrival date in the UK; in the witness statement oral evidence he had said that it was at the end of 2001 whereas in his asylum interview (Q 12) he stated that he left Pakistan in the year 2000 by plane and flew to London Heathrow (Q3 .3 SI) but it was not possible that he could have left by plane in 2000 and arrived in 2001 as claimed. The judge found that he was inconsistent as to when he stated he had attended college between the years 2000 - 2003 which is not possible if he had arrived in the UK 2001 and was inconsistent with the evidence of his brother that he had attended college in 2002. The judge rejected his account as to his education at paragraph 68 and recorded that in any event, the Appellant's evidence was inconsistent with the answers in interview and the evidence given by his brother. A number of other inconsistencies were set out by the judge at paragraph 70 - 81 of the determination which related to his claim that he had been taken to the solicitors for advice in 2002 (see paragraph 71 - 72), that he had provided no evidence of his presence in the United Kingdom before his application for leave to remain in 2011 and that it was reasonable for the Appellant to have been able to produce some documentary evidence showing his enrolment at Lewisham College even if he only attended lessons for a short period. The judge also found it implausible that if he were on a school register age 14 in 2002 and then disappeared, the education authorities would not have enquired or investigated which school he moved on to given that he was below the school leaving age. Other findings of fact were made at paragraph 77 - 81. The grounds assert that it was not possible for him to obtain supporting information to demonstrate his length of residence but the judge gave adequate and sustainable reasons for rejecting that submission as out above.
33. Consequently the judge reached the overall conclusion that she did not accept the Appellant's account of having been in the UK since 2001 and found as a fact that he had arrived in the UK shortly before his first claim made to the Home Office on 22 June 2011 when aged 22. Thus the findings of fact made in the earlier part of the determination were the starting point of the Article 8 assessment.
34. Mr Mian in his submissions did not make reference to any evidence to support the claim made that the Appellant faced very significant obstacles to his reintegration to Pakistan (see Paragraph 276ADE(1)vi)). On the factual findings made by the FTTJ, the Appellant had been resident in the UK since 2011 and the age of 22. The judge found that he retained the language of his country of nationality and was familiar with the customs and social background given the length of his previous residence. The judge found that he had family members there and that was consistent with his interview (see Q10) where he stated he had a mother, two sisters and two brothers

remaining. The judge found that he was not at risk from any family members in Pakistan. The judge also found that there were family members in the UK who visited Pakistan regularly. Therefore the conclusion reached by the judge at paragraph 86 that there were no very significant obstacles to his reintegration were open to the judge to make.

35. Mr Mian submitted that the judge failed to consider his relationship with his family relatives and that the judge was wrong to reach the conclusion she did at paragraph 87. At that paragraph the judge considered the evidence but found that his relationships with his family United Kingdom were no more closer than the normal bonds of such relationships. She further found that in any event, his family members had the right to travel to Pakistan and return to the UK and so could maintain their relationships with him through normal family visits. The judge referred to his brother's evidence that he returned to Pakistan every 12 to 18 months.
36. By way of reply, Ms Ahmed submitted that the findings of fact were open to the judge to make. She provided general case law which related to the establishment of family life between adults (see ECO v Kopoi [2017] EWCA civ 1511).
37. As the case law set out, there is no presumption that a person has a family life even with members of their immediate family and that family life is not established between an adult child and his siblings (as in this case) unless something more exists than the normal emotional ties such as dependency (see decision in Kopoi which refers to the earlier decision of Kugathas at paragraphs [17]-[19]). The Appellant himself did not refer to any dependency upon his family relatives in his interview. At question 84 he was asked if his relatives were dependent upon him in any way. He replied "no they are not reliant on me for money. Obviously they want me to stay in the country none of them are reliant on me." He made reference to having had a girlfriend but that the relationship broken up. In his witness statement he made reference having two sisters in the UK who we saw regularly and had spent time with them. He made reference to having looked after his niece upon arrival (although that had to be read in the light of the finding of fact that he entered in 2011) and that his siblings in the UK had given him support and that he had attended family events (see paragraph 21). His brother provided a witness statement that said that the Appellant had lived with him since his arrival in the UK as a minor and that he had supported him financially. There was reference to him as having been a father figure to him. However that evidence has to be seen in the light of the findings of fact made by the judge that he had not entered the United Kingdom as a minor as asserted but had entered as a man aged 22 in the year 2011.
38. The only ground upon which the appeal could be brought to the First-tier Tribunal (other than on protection grounds) was that the decision to remove the Appellant was unlawful under Section 6 of the Human Rights Act 1998 that is, it was contrary to Article 8 of the ECHR. The judge determined that he could not meet the Immigration Rules (relevant to under Article 8) and this was a matter of weight in determining the proportionality of removal. The Immigration Rules reflect the Secretary of State's view as to where the public interest lies in the proportionality

assessment under Article 8. Looking at the evidence as a whole, it was open to the judge to reach the conclusion that his relationships with family members were no more close than the normal bonds of such relationships between siblings and that no real issues of dependency had been established beyond financial dependency. Even if the judge had found that family life was established, the judge reached the conclusion that any such relationships could be maintained from Pakistan given that the evidence before the judge was that his brother returned there every 12 to 18 months. The judge had found that they were no very significant obstacles to his reintegration taking into account as length of residence since 2011 and that he retained language, cultural and family ties to Pakistan. He had entered the United Kingdom unlawfully and had established his private life and family life at the time when he had no lawful presence. Consequently the decision she reached that the decision was proportionate in maintaining immigration control and not in breach of Section 6 of the Human Rights Act 1998 was a conclusion that was open to her on the evidence.

39. Accordingly, I am not satisfied that it has been demonstrated that the decision of the First-tier Tribunal judge involved the making of an error on a point of law.

Decision:

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and the appeal is dismissed. The decision of the FTTJ stands.

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. 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: 12/6/2018

Upper Tribunal Judge Reeds