



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11805/2017

THE IMMIGRATION ACTS

Heard at Field House
On 28th September 2018

Decision and Reason Promulgated
On 23rd October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[A A]

~~(ANONYMITY DIRECTION NOT MADE)~~

Respondent

Representation:

For the appellant: Ms S Vidyadharan, Senior Presenting Officer

For the respondent: Mr Keith Haywood of Counsel

DECISION AND REASONS

1. The appellant is the Secretary of State for the Home Department and the respondent is a citizen of Sierra Leone born on [~] 1977. However, for convenience, I refer below to Mr [A] as the appellant and to the Secretary of State as the respondent, which are the designations they had before the First-tier Tribunal.
2. The Secretary of State appeals with permission to the Upper Tribunal against the decision of First-tier Tribunal Judge PGS White promulgated on 5 July 2018, allowing the appellant's appeal pursuant to Article 3 against the decision of the Secretary of

State in which he refused the appellant's claim for asylum and humanitarian protection in the United Kingdom.

The First-tier Tribunal Judge's findings

3. First-tier Tribunal Judge gave the following reasons for allowing the appellant's appeal pursuant to Article 3.
 - i. The six reports and assessments prepared by Prof Katona in 2014 have been given consideration. The appellant was detained in this country following his arrest in January 2012 and he remained detained under criminal investigation and under immigration powers until September 2013 of which for 3 ½ months he was in a psychiatric hospital. He subsequently brought a claim through his litigation friend for damages for false imprisonment. In late 2016 his claim was settled with an agreed amount of £100,000 to be paid to the appellant as damages. Given the appellant's mental health and ability to manage the sum of money, it was agreed that the sum be held in trust for the appellant by the solicitor who had acted in those proceedings.
 - ii. The appellant suffers from schizophrenia, and illness of a fluctuating nature. He has a significant degree of cognitive impairment, and is a significant contributor to his learning disability and is a potential contributor. He was most recently assessed as significantly depressed. Prof Madden believed that there was limited scope for nonpharmacological components of care because the appellant's mental state has responded only partially to medication and remains grossly impaired. His decision-making capacity is likely to have fluctuated but on a "good day" he might have or have had capacity to instruct his solicitors for his immigration case. He has already suffered severe psychiatric damage prior to his immigration detention which was exacerbated by him not taking his medication during two periods of detention.
 - iii. The joint expert reports focuses on the appellant's claim for damages, but it does not address the possible risk to the appellant on return to Sierra Leone. Prof Katona's earlier reports had expressed the view about other aspects of the appellant's prognosis, and at Prof Madden at paragraphs 211 - 221 of the report she commented on some of this. She agreed that the appellant's mental health is likely to deteriorate without the support he receives from his half-brother and the mental health team in this country.
 - iv. The most recent evidence of the appellant's condition comes from a further report of Prof Katona dated 16 April 2018. It turned out when the appellant refused to attend an appointment with Prof Katona and had refused his medication for three months and his condition had deteriorated. One symptom of this deterioration is a complete neglect of personal hygiene. This failure was not life-threatening because of the support of his half-brother and his mental health team.

- v. The medical evidence presents a broadly a consistent and uncontroversial position. The appellant suffers from a disabling mental illness and has done so for many years. Although it fluctuates as severe and even at its best even below the level of mental health and functioning. Without his medication the appellant's condition is likely and rapidly to deteriorate, given his lack of insight, and indeed failing or refusing medication, he needs external help and support to avoid such deterioration. The appellant suffers from apathy, which means that even if his condition remained stable he needs help to support his basic needs. There is force to the observation that his recent serious relapse, after a lengthy period (when his damages claim settled), makes it inherently less likely that his condition will remain stable.
- vi. In the past the appellant has had auditory hallucinations urging suicide. There is no evidence that suicide has in fact been a real risk in the past and it is now nearly 11 years since he was diagnosed and therefore his present risk is low. Therefore, he is not at risk of suicide on return but that is not the only risk alleged.
- vii. More than 700,000 people have had severe mental health problems in Sierra Leone needing medical treatment. There is evidence from a psychiatric nurse, from Kissy Mental Hospital that there are psychiatric patients roaming the streets, but nobody cares because they are insufficient drugs in the hospital. The Judge was not persuaded that the treatment that the appellant requires would be available to him in Sierra Leone.
- viii. Consideration has been given to Dr Hopwood's report who has worked in mental health care in Sierra Leone. The report indicates that there are three psychiatrists who are halfway through their training and have to go abroad for three years to complete it. There is one hospital for psychiatric inpatients in Freetown. Staffing levels are a problem. Patients see a doctor once a week and will spend most of the time in bed. Around 80% of patients are chained to their beds. This policy of being chained was initially supposed to only apply to patients who were aggressive, but there was no way of monitoring whether they were properly so categorised. When patient's behaviour is problematic they may be beaten. Discharge from hospital is dependent on the availability of care either from family, or possibly from the community, and without it, patients may stay in hospital for years. Although the hospital has capacity of 250 patients in practice there are only slightly over 100. Generally, patients need family to pay for admission and supply patients with food and essentials while in hospital, otherwise they may be refused admission, or if they stop paying, they may be discharged. It is entirely clear the possibility of early discharge from lack of family funding and support links. There is the possibility of being detained for years because of a lack of family support on discharge.

- ix. Apart from Hospital in Freetown there are 14 district mental health units covering almost every district in the country. The total staff of these 14 units are 17 people. They see perhaps 2 to 4 patients per month and have little or no capacity for assertive outreach, the proactive approach mentioned by Prof Madden. Patients who do not actively seek and engage in treatment will not get it.
- x. There are also issues in hospital units over medication. There is no reliable source of antipsychotic medication, particularly the long acting intramuscular injections the appellant currently receives, and often medication which are available expired or sometimes counterfeit.
- xi. It was also observed by Dr Hopwood that people with mental health issues are heavily stigmatised. Families may refuse to accept back a member with mental health issues and can be beaten. The police will not offer any protection, but it was suggested by Dr Hopwood that they were joining in the beatings. Where people are perceived as having mental health problems and needing treatment that treatment is likely to be traditional and religious healing, such treatment may vary from actions which simply have no positive effect to treatments which may actively cause harm.
- xii. Dr Hopwood next reference, both in general terms in her report and more specifically in the conclusions about what may happen to the appellant due to his lack of family support in Sierra Leone. There are problems arising from the need to pay for treatment for medication and for food when in hospital and sometimes for to the need to pay bribes in order to receive treatment at all, at rates clearly beyond the reach of someone earning the average wage in Sierra Leone.
- xiii. In Prof Katona's report, she does not appear to comment on the fact that the appellant would not necessarily be dependent on the typical wage in Sierra Leone because he has a fund of a £100,000 to support him. I appreciate that there may be significant practical difficulties in his trustee ensuring that the money is safely dispersed in Sierra Leone for the appellant's benefit, rather than being sent out and either wasted by him or stolen from him. One thing which might be possible would be to arrange a supply from abroad of appropriate medication but ensuring that the appellant took it might be another matter.
- xiv. The refusal letter records that the appellant has a mother, sister and half-brother in Sierra Leone presumably on the basis of details given by him in his initial claim. The Judge stated that he has no direct evidence either way. He did not think he can simply assume as Dr Hopwood does that he will be unable to make contact with them; said "I simply do not know". Again, whether the fact of his mental illness will cause them or refuse to help the appellant is a separate question.

- xv. The WHO report of mental illness which was referred by Dr Hopwood has been considered. This report dates from 2012 but certainly confirms as of that date the picture provided by Dr Hopwood more recently and makes reference to the general stigmatisation of mental illness. It includes a list of psychotropic medications regarded by WHO as essential medicines for mental disorders, none of which were then available government health facilities.
- xvi. The mentally ill in Sierra Leone are viewed by society as different from and inferior to the majority and they face discrimination, stigma, and sometimes worse, because of that illness. Mental illness is an innate characteristic which they cannot change if it is not curable. The Judge concluded that the mentally ill people in Sierra Leone form a particular social group for the purposes of the Refugee Convention.
- xvii. The Judge found that the appellant is liable to be subjected to traditional forms of treatment, which will vary from the harmless to the actively harmful. They are undoubtedly at some risk, although it is difficult to estimate how serious, of being chained and beaten by their families or by their local communities. They are unlikely to find work, which will inevitably impact on their ability to support or house themselves, and some certainly may be at risk of destitution. There are likely not to be able to access appropriate treatment. For the very few who can be treated at the country's only psychiatric hospital they are at high risk of being chained to their beds. The Judge found that such ill-treatment can properly be characterised as inhuman and degrading, and as persecution.
- xviii. The appellant will cease to receive the treatment which he currently needs and receives in this country. He will, on the medical evidence, lack the capacity to get it for himself and the overstretched facilities there will not have the capacity to reach out to him. The medication he needs is not in fact not available, and while it is possible that his money could be used to arrange a supply from this country seems to be overwhelmingly improbable that he will in practice be able to take advantage of such a supply: he will need, as he does here, some medical facility to receive the drugs and administer it and whether he will have any support from relatives is unclear, and on one view the absence is something he has not proved, but in this country even the existence of support from his half-brother is not sufficient. In the absence of medical treatment his condition will rapidly deteriorate. Although the appellant's condition is in itself not life-threatening or there is a real risk of suicide, but his history in this country suggests that deterioration will not only increase the frequency and force of his former auditory hallucinations, it will also lead to an inability to care for himself in any way, and to erratic, aggressive and potentially criminal behaviour.

- xix. One consequence of suffering from untreated or untreatable mental illness in Sierra Leone is plainly a risk of being reduced to destitution. The appellant has available to him £100,000 this country but from the evidence it is clear that he lacks the capacity to manage his money or use the money for his own benefit.
- xx. The Judge concluded that there is a real risk that the appellant will be subject to ill-treatment which amounts to persecution by reason of his membership to a particular social group of the mentally ill in Sierra Leone and his claim for asylum succeeds as does his claim under Article 3, paragraph 276 ADE and Article 8 grounds.

Grounds of appeal

- 4. The respondent's grounds of appeal which I summarise are the following. It is not contested that the appellant suffers from mental health problems, namely schizophrenia and it is accepted that this is a long-term condition for which he is receiving treatment in the United Kingdom.
- 5. The Judge found that the Convention reason was that the appellant had an immutable characteristic. Mental health problems cannot be an immutable characteristic. The fact that treatment mitigates and changes the manifestations of the condition means the condition cannot be immutable. It is therefore outside the scope of the Refugee Convention.
- 6. This case therefore can only come within the scope of the Human Rights Convention. In this case the key issue is the availability of treatment for the appellant Sierra Leone. The appellant provided significant objective evidence to show that current treatment is severely restricted Sierra Leone. However, the appellant is in the unusual position of having £100,000 available to him. By Sierra Leone standards this is the average earnings of two decades of income. While treatment in Sierra Leone may be restricted, it is questionable that treatment may be available for someone with significant resources.
- 7. Furthermore, it is not clear why the appellant United Kingdom representatives have not explained why they cannot setup some care programme scheme under Sierra Leone equivalent of the power of attorney. In such cases it is hard to conceive that this is not some form of adequate treatment available and it is therefore submitted that the Tribunal erred in allowing this appeal.

The hearing

- 8. At the hearing both parties make submissions whether there is an error of law.

Findings as to whether there is an error of law

- 9. There was no dispute that the appellant suffers from mental health problems and is being treated in the United Kingdom with medication and other interventions as required by his medical team. There was also no dispute that the appellant has

£100,000 which was awarded to him in damages for unlawful imprisonment in this country. There can also be no dispute that this would translate into two decades or more of income for an average person in Sierra Leone as evidenced by the background evidence. There is therefore a substantial amount of money by Sierra Leone standards available to the appellant on his return.

10. The Judge found that the appellant belongs to a particular social group for the purposes of the Refugee Convention as a mentally ill person in Sierra Leone. He stated that mental illness of the appellant is an innate characteristic, and the case of those who are incurable, one they cannot change. Given that treatment mitigates and changes the manifestations of the condition means that the condition cannot be immutable. The evidence was that the appellant has gone through lucid moments as he has been able to instruct lawyers for his case for unlawful imprisonment by the respondent for which he was awarded £100,000 damages. The Judge noted that "his decision-making capacity is likely to have fluctuated but on a "good day" he might have or have had capacity to instruct his solicitors for his immigration case.
11. The Judge materially erred by finding that the appellant is a member of a particular social group and by allowing his appeal under the Refugee Convention.
12. The Regulations. The Refugee or Person in Need of International Protection (Qualification) Regulations 2006. Regulation 6 states:
 - (1) In deciding whether a person is a refugee....
 - (d) a group shall be considered to form a particular social group where, for example:
 - (i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
 - (ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;
 - (e) a particular social group might include a group based on a common characteristic of sexual orientation but sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the United Kingdom;
13. In **Minister voor Immigratie en Aisiel v X, Y and Z C-199/12 and C-201/12 CFEU Fourth Chamber** it was held that the definition of "a particular social group" in Article 10(1) of the Qualification Directive required that two conditions were met. First, members of such a group had to share an innate characteristic or belief, so fundamental to identity or conscience that they should not be forced to renounce it. Secondly, it was necessary for the group to possess a distinct identity in the relevant country because members were perceived as different by the surrounding society.
14. In **SSHD v K and Fornah v SSHD 2006 UKHL 46 and IAS 16.11.06** Lord Bingham derived the following principles from the legal authorities, including the Qualification Directive. (1) The Refugee Convention was not concerned with all cases

of discrimination, only with persecution based on discrimination, the making of distinctions which principles of fundamental human rights regarded as inconsistent with the right of every human being. (2) To identify a social group the society of which it formed part had to first be identified; a particular social group might be recognisable as such in one country but not in another. (3) A social group need not be cohesive to be recognised as such. (4) There could only be a particular social group if it existed independently of the persecution to which it was subject.

15. Lord Bingham indicated that a particular social group may be formed either because its members share a characteristic which cannot or should not be changed (the protected characteristics approach) or because they are perceived as having a distinct identity by the surrounding society (the social perception approach). Lord Bingham noted EU Council Directive 2004/83/EC Article 10(d) (i) and (ii) which are effectively reproduced at Regulation 6(d) (i) and (ii) of the Qualification Regs but said that if (i) and (ii) both had to be satisfied then the test in the Regulations was more stringent than was warranted by international authorities. He said that the Qualification Directive should not be read as requiring both features to be present in order for there to be a social group for the purposes of the Refugee Convention. Either will do. It appears therefore that this decision goes beyond what the HL said in **Shah and Islam**.
16. Lord Rodger of Earlsferry (in **SSHD v K and Fornah v SSHD**) adopted an Australian proposition that, while it is not necessary that all the members of a social group be persecuted before one can say that people are being persecuted for reasons of their membership of that group, it is generally necessary that all the members of the group should be susceptible to persecution. It was also said that there was no requirement that the persecution be carried out by persons who were not members of the social group.
17. In **Shah and Islam and Others v SSHD HL (1999) INLR 144** Steyn LJ said that "A particular social group consisted of a group of persons who share a common immutable characteristic that either was beyond the power of an individual to change or was so fundamental to an individual's identity or conscience that it ought not to be required to be changed". The existence of such a group did not depend on an element of cohesiveness, co-operation or interdependence amongst group members, but the group must exist independently of the persecution. Hoffman LJ said that "It is a fallacy to say that, because not all members of a class are being persecuted, that it follows that persecution of a few cannot be on grounds of membership of that class". Hope LJ said that the word "social" means that we are being asked to identify a group that is recognised as a particular group by society and as social customs and attitudes differ from one country to the next, the context of enquiry has to be the applicant's country of nationality. He pointed out that discrimination may set the group apart and the concept of discrimination does not offend against the rule that the group must exist independently of persecution because people can be discriminated against without being persecuted.

18. The Judge did not consider all the jurisprudence set out above when deciding whether the appellant is a member of the particular social group and had he done so he might have come to a different conclusion. I find that there was not sufficient evidence before the Judge to conclude that mentally ill people in Sierra Leone form a particular social group.
19. The Judge considered the position of the appellant on his return to Sierra Leone and came to the conclusion after taking into account objective evidence and reports by experts that there is insufficiency of medical treatment for mental illness in Sierra Leone. However, the expert reports and the objective evidence does not say that there is no medical treatment available but that it is not sufficient for everyone and the conditions under which mental patients are held are considered inhumane as there is a possibility that they are chained to their beds if deemed to be aggressive.
20. The objective evidence suggests that if a person has resources, medical attention is available although it is not to the high standards available in this country. Objective evidence also suggests that there are many cases of mentally ill persons in Sierra Leone and those who are disfranchised without financial and family support face hardship. The Judge noted that Prof Katona does not take into account that the appellant has available to him £100,000 on his return in his expert report.
21. The Judge said he does not know whether the appellant has family who can assist him in Sierra Leone. The respondent stated that the appellant when he made his claim for asylum indicated that he has his mother, sister and half-brother in Sierra Leone. Despite this evidence, the Judge found that he does not know whether the appellant has family in Sierra Leone. The appellant's evidence at his asylum interview clearly was that he has family Sierra Leone including his mother. There was no evidence upon which the Judge could have concluded that the appellant does not have family but instead stated that he does not know. As the appellant has stated that he has family Sierra Leone at his asylum claim, there was no reason for the Judge to say that he does not know.
22. The Judge did not properly assess that evidence including the fact that the appellant has £100,000 available to him which would make him an attractive proposition for his family who will have an incentive to look after him. Prof Katona in her report did not refer to the sum of money available to the appellant in her expert report and whether that would make a difference to the care that the appellant will receive. The Judge failed to consider that the level of financial resources available to the appellant would go a long way in ensuring the appellant's proper care. Background evidence also makes it clear that those who have money are able to get treatment.
23. The Judge noted that Prof Madden in her report stated that the appellant "might sometimes exaggerate his symptoms, as it is common for this condition, they were in any event the severe end of the spectrum". The Judge did not consider that the appellant who was able to instruct lawyers for his suit for damages, will be able to with the help of the family to receive adequate treatment even if it is not to the standards of this country.

24. Therefore, the objective evidence does not say that there is no treatment available but states that it is not available to everybody. However objective evidence makes clear that if a mentally ill person has family and financial resources, he has the ability to receive mental health treatment.
25. In **HM (Mental Health) Sierra Leone CG [2002] UKIAT 04459** the appellant had been a victim of rape. Her father and her husband had been murdered. She suffered from depression and post-traumatic stress disorder. The doctor recommended anti-depressants and counselling, the latter over a period of 12 months. There was evidence concerning the availability of mental healthcare in Freetown. It was said that the Kissy Mental Hospital in Freetown was the only hospital providing mental health care in Sierra Leone and it was said to be managed by the only Sierra Leonian psychiatrist in the country. However, a report entitled War Related Sexual Violence in Sierra Leone by Physicians for Human Rights referred to anecdotal evidence suggesting that existing psychosocial services, provided almost exclusively by NGOs, was proving to be very valuable inside IDP camps in larger towns such as Freetown and Kenema. It was also noted that recently the World Health Organisation had begun to assist the government of Sierra Leone in coordinating their mental health response to the crisis. The Tribunal noted that mental healthcare in Freetown was limited. However, there was a psychiatrist there and there was no indication that he or she was not able to prescribe anti-depressants, nor unable to provide counselling. In all the circumstances, the appeal was refused.
26. Since the date of this decision, background evidence evidences that mental health services have improved but still lacking. There is a hospital for mentally ill patients and those with financial resources are able to receive treatment. The appellant has his mother and other relatives in Sierra Leone to assist him.
27. I find that there is a material error of law in the decision for the reasons set out above. Consequential to my finding that there is a material error of law, I set aside the decision of Judge this P.J.S. White. I remake the decision taking into account all the evidence and dismiss the appellant's appeal.

Decision

28. The appeal by the Secretary of State is allowed and the decision of First-tier Tribunal Judge is set aside. I remake the decision and dismiss the appellant's appeal.

Signed by

A Deputy Judge of the Upper Tribunal Judge
Ms S Chana

Dated this 19th day of October 2018