Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06211/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 November 2019	**On 02nd December 2019**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

A I
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E King, Counsel instructed by Duncan Lewis & Co
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria. His date of birth is 24 February 1980.

2. On 24 January 2018 the Secretary of State refused the Appellant's claim for asylum and humanitarian protection. The Appellant appealed against the decision. His appeal was dismissed by First-tier Tribunal Judge A Khawar, in a decision that was dated and promulgated on 14 August 2019 (following a hearing at Taylor House on 22 May 2019).

3. The Appellant was granted permission by First-tier Tribunal Judge Povey on 27 September 2019. Thus, the matter came before me to decide whether the First-tier Tribunal made an error of law.

4. The Appellant's immigration history is set out at paragraph 3 of Judge Khawar's decision. The Appellant and his wife, LI, have five children. Their dates of birth range from 30 December 2007 to 12 June 2018.

5. The judge heard evidence from the Appellant and LI. The substance of the claim was that the Appellant on return to Nigeria would be at risk from the Ogbu cult because he had refused to become a member. He gave evidence of mistreatment at the hands of members of the cult which involved being branded with the use of a heated metal rod.

6. In support of the claim the Appellant relied on a medical report prepared by Dr Alick Munro. Dr Munro had examined the Appellant's scars and considered his account of the circumstances in which they were inflicted. There was no suggestion by the Respondent that the report was not compliant with the Istanbul Protocol. There is no need for me to set out the findings of Dr Munro in full. Suffice to say that he concluded that the Appellant's injuries were highly consistent with his account of how they were caused.

7. In respect of the evidence of Dr Munro the judge stated as follows at paragraph 31:-

> "Similarly, in my judgment, the Scarring Report (Dr. Alick Munro), does not assist the Appellant's case in view of the fact that the Medical Expert cannot possibly comment on the claimed circumstances of the cause of such scars".

8. Ground 1 asserts that the judge materially erred when considering this evidence because it was not open to the judge to dismiss the report on the basis that the doctor could not comment on the circumstances of the cause of the scars.

9. The Appellant in the grounds relies on the case of **KV (Sri Lanka) v SSHD [2019] UKSC 10** at [20]:-

> "In their supremely difficult and important task, exemplified by the present case, of analysing whether scars have been established to be the result of torture, decision-makers can legitimately receive assistance, often valuable, from medical experts who feel able, within their expertise, to offer an opinion about the consistency of their findings with the asylum-seeker's account of the circumstances in which the scarring was sustained, not limited to the mechanism by which it was sustained".

10. I heard submissions from the parties relating to this issue only because it was not necessary for me to determine the other grounds of appeal. Mr Lindsay relied on the Rule 24 response to submit that on the face of it paragraph 31 appears problematic, however reading it in the context of the decision as a whole, he said that the judge's conclusion was open to

him. Mr Lindsay in oral submissions drew a distinction between cause and consistency, saying in this case the judge accepted consistency but did not accept causation and it was this that he referred to at [31]. He argued that this conclusion was open to the judge on the evidence. The findings should be considered in the context of the judge having rejected the existence of the cult.

Error of law

11. The only conclusion that can be drawn from what the judge says at [31] is that he did not attach any weight to the report of Dr Munro because he formed the view that it was not capable of supporting the Appellant's evidence. This conclusion is irrational because, whilst it was open to the judge to reject the evidence of causation, the report is unarguably capable of supporting the Appellant's account. The assessment of the medical evidence is flawed, and the error infects the credibility findings as a whole.

12. In the Rule 24 response the approach that is advocated to assessing evidence is one that would properly be characterised as a **Mibanga** error (**Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367**).

13. I did not engage with the other grounds of appeal. There was no need to. The Appellant has raised an issue of fairness arising from the judge's questioning of LI. I did not hear submissions on this issue. My understanding is that it is the Appellant's case that the judge asked questions during cross-examination. I make the following observations. When considering whether or not a hearing is fair or whether there is any apparent bias resulting from the intervention of a judge, the test is whether the circumstances when ascertained would lead to a fair-minded and informed observer concluding that there was a real possibility or real danger that the adjudicator was biased; **Porter and Magill [2002] 2 WLR 37**. In **K v Secretary of State for the Home Department [2004] UKIAT 00061** the Immigration Appeal Tribunal said the following:-

> "42. There is a danger that the comments relied on in Oyono have been misunderstood. An Adjudicator or any judge is of course entitled during evidence-in-chief to seek clarification of an answer, whether because it has not been heard properly or understood or interpreted properly. He is entitled to check that he has recorded the answer correctly. But that is not the limit on his powers or indeed his obligations of intervention during the giving of evidence. An Adjudicator also has obligations in relation to the general control of a case. It is proper for an Adjudicator to intervene during examination-in-chief and cross-examination for the purposes of moving the proceedings along, so long as that is done in a fair manner. It is necessary and proper for an Adjudicator to point out that a line of questioning is irrelevant or valueless or repetitious or is going nowhere. It will, of course, be necessary to consider any response made by a representative to

such an approach. But what was said by the Deputy President in Oyono assumes that the questions being put are relevant and are not being pursued at undue length. Even where the parties are both represented, it is still relevant for questions to be put by the Adjudicator to a witness if they raise matters which trouble the Adjudicator if they have not been raised or dealt with by the opposing advocate. This is especially so if the Adjudicator is concerned by the point and it is something which may affect the decision or indeed should affect the decision, but cannot fairly do so without the relevant witness being given the opportunity to deal with it. The comments made in this respect by the Adjudicator in paragraph 60 are entirely right.

43. Of course, what is said in Oyono in relation to the timing at which an Adjudicator should put questions for that purpose is right. An Adjudicator ought not to interrupt examination-in-chief or cross-examination except in the circumstances to which we have referred or for other reasons associated with the general control of the case and the court room. If there are inconsistencies between documents and oral evidence or between answers which have been given already, it is nearly always best to wait until after cross-examination and re-examination to see what matters are put. However, it is wholly legitimate for the Adjudicator to ask his or her own questions on issues of inconsistency, points raised in the refusal letter or matters which trouble the Adjudicator whether or not they are raised by the other party. What is important, however, in relation to those matters is that the Adjudicator should not develop a different case from that being presented by the other party or pursue his or her own theory of the case."

14. The decision of the First-tier Tribunal to dismiss the Appellant's appeal is set aside. I agreed with the parties, with reference to the Practice Statement of the Senior President of Tribunals of 25 September 2012, that considering the nature and extent of judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal where the matter will be reheard *de novo.*

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 or any member of his family. 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 *Joanna McWilliam* Date 13 November 2019

Upper Tribunal Judge McWilliam