Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11367/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 September 2019	**On 12 November 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARTHUR [J]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Jones, Senior Home Office Presenting Officer.
For the Respondent: Ms E Daykin of Counsel instructed by Duncan Lewis & Co.

DECISION AND REASONS

Background

1. This is an appeal against the decision of First-tier Tribunal Judge Adio promulgated on 9 July 2019 allowing the appeal of Arthur [J] on protection grounds.

2. Although before me the Secretary of State for the Home Department is the appellant and Mr [J] is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr [J] as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a citizen of Jamaica born on [~]. His immigration history, and his criminal offending history in the UK, is a matter of record in the various documents on file, and is summarised at paragraphs 2 and 3 of the Decision of the First-tier Tribunal. It is unnecessary to repeat the full history here. Suffice to say that the Appellant raised a protection claim and a human rights claim on 20 April 2018 in circumstances where he was facing enforcement action. The basis of his case is succinctly summarised in the Decision of the First-tier Tribunal in these terms: "*The basis of the Appellant's claim is that he will be persecuted by a criminal gang in Jamaica due to giving evidence at previous trials of gang members*" (paragraph 4). Further details of the basis of the claim are summarised at paragraph 5 of the Decision by way of paraphrasing the RFRL.

4. The Respondent refused the Appellant's claims on 13 September 2018 for reasons set out in a 'reasons for refusal' letter ('RFRL') of that date..

5. The Appellant appealed to the IAC.

6. The appeal was allowed for reasons set out in the Decision of First-tier Tribunal Judge Adio promulgated on 9 July 2019.

7. The Respondent applied for permission to appeal to the Upper Tribunal. Permission to appeal was granted by Designated First-tier Tribunal Judge MacDonald on 13 August 2019.

8. On 11 September 2019 the Appellant filed a Rule 24 response resisting the Respondent's challenge to the decision of the First-tier Tribunal.

Consideration of 'Error of Law' challenge

9. The Respondent's Grounds of Appeal in support of the application for permission to appeal essentially seek to challenge the Decision of the First-tier Tribunal on two bases: paragraphs 2 and 3 of the Grounds challenge the Judge's consideration of credibility; paragraphs 4–9 submit that even if the Appellant's account is to be accepted the Judge misapplied 'country guidance' caselaw which, if applied properly, would have resulted in the appeal being dismissed.

10. It is adequately clear that the First-tier Tribunal Judge was alert to the fact that the Respondent disputed the Appellant's credibility. In the body of the Decision the Judge rehearses the substance of the RFRL, including noting

the Respondent's contentions that "*the Appellant had been inconsistent with the timeline he provided concerning events*" (paragraph 6), "*had given an entirely vague account*" concerning a court hearing (paragraph 6), and that he had made his claim for asylum "*very late*" (paragraph 7). The Judge also noted that the Respondent considered that the scars on the Appellant's body could have resulted from "*everyday injuries*", and did not outweigh the other credibility issues identified by the Respondent (paragraph 6).

11. It is also plain on the face of the Decision that the Judge appropriately directed himself that the burden of proof was on the Appellant, and in respect of protection the standard of proof was "*reasonable degree of likelihood*" (paragraph 10).

12. In my judgement it is clear from the Decision that the Judge did not lose sight of the competing positions of the parties in respect of credibility when he brought his own judgement to bear upon the available evidence – at paragraph 24 *et seq.*. The Judge noted the available medical evidence in respect of the Appellant's scarring, and also noted the Appellant's account of how he had sustained such injuries (paragraphs 25 and 26) – further observing that he had related his experiences on a number of occasions (paragraph 27). The Judge expressly took into account the delay in claiming asylum, observing that this "*no doubt raises the issue of Section 8 of the Asylum and Immigration (Treatment of Claimants, e.g. see.) Act 2004*" (paragraph 26). Having considered such matters the Judge made findings in these terms:

> "*Regardless of the late claim there has been a general consistency with his experience in Jamaica. I am therefore prepared to find on the basis of the overall consistency of the evidence that the Appellant witnessed a murder in 1999 and was approached by the police and he gave evidence in a trial.*" (paragraph 27)

13. Such a finding was made with regard to the applicable burden and standard of proof, was reached pursuant to a careful consideration of the evidence and the issues between the parties, and was adequately reasoned. Indeed in this context, save in respect of the generalised criticism in the Grounds of Appeal at paragraph 2(d) in relation to 'delay' and 'section 8', the particularised criticisms at paragraphs 2(a), (b), and (c) relate to matters after the initial problems in 1999.

14. Having set out his findings favourable to the Appellant in respect of the issues that were at the origin of his claimed fear of returning to Jamaica, the Judge indicated his findings in respect of subsequent events. The Judge accepted that the Appellant had been stabbed and wounded after he gave

evidence in the trial because he "*was discovered as a police informer*" (paragraph 28). I am satisfied that such a conclusion must necessarily have been informed in part by the consistency of the Appellant's account in respect of how he had sustained his scars, and the broad consistency of such scarring with his account (even if there might be other means of sustaining such scars): this was a relevant consideration even if not a determinative consideration; there is no suggestion on the face of the Decision that the Judge thought such scarring was determinative of the Appellant's account. The Judge addressed the Respondent's point about the Appellant remaining in Jamaica until December 2002 as being indicative of an absence of risk, in these terms – "*I am also willing to give the Appellant the benefit of doubt that he thought he could continue to survive in Jamaica and hid to the best of his ability, also he had assistance*" (paragraph 28). The Judge found that the Appellant's evidence of having been targeted in the UK by the same gang "*has also been consistent*"; further, in this context the Judge had regard to the fact that the Appellant was "*not able to name the same names throughout*", but noted that "*his general account has been consistent*", and took into account "*his medical problems which affect his concentration*" (paragraph 28).

15. The above analysis and findings led to the Judge's conclusion expressed at paragraph 29: "*…I have found the Appellant's account is credible with regards to what he experienced in Jamaica and the UK and him being a target for the Shower Posse*".

16. In my judgement the Respondent's challenge to these findings essentially amounts to a disagreement, and does not identify any material error of law.

17. Paragraph 2(a) of the Grounds of Appeal repeats the Respondent's argument that there might be other possible causes for the Appellant's injuries, highlighting his history of criminal behaviour and drug use. In substance this is to reargue the case that was before the First-tier Tribunal, and with which the Judge, I find, adequately engaged.

18. Paragraph 2(b) of the Grounds submits that the Judge failed to make a finding in respect of a particular aspect of the Appellant's evidence – that he had received threatening text messages and a voicemail from the gang whilst in the UK. The Respondent notes that the Appellant claimed that the police and his lawyer had seen this evidence; the Respondent submits that in such circumstances the failure of the Appellant to produce the evidence in the context of his protection claim and appeal should have been considered as potentially giving rise to an adverse inference.

19. It is to be acknowledged that the Judge did not directly address this issue, notwithstanding that it was raised at paragraph 20 of the RFRL. However on the very particular facts of this case in my judgement such an omission is not to be considered as materially damaging to the Judge's overall conclusion. The premise of the Respondent's argument in this regard is that in the absence of production of supporting evidence where such evidence might reasonably be expected to be available, an adverse inference may potentially be drawn to the effect that the Appellant's claim to have received such messages is untrue. Two significant factors in the instant case would counter the possibility of making an adverse inference: at his asylum interview the Appellant offered to play a threatening message on his telephone to the interviewing officer (see question 41); corroboration of the fact of the existence of a text message was provided in the report of a psychologist, Dr Chisholm, who was shown such a message (see report in the Appellant's supplementary bundle). Taking into account the Judge's otherwise careful and thorough consideration of the available evidence and his consideration of the Respondent's case on credibility, I am not prepared to conclude either that this point, or the Judge's failure directly to engage with this point, could rationally have made any difference to the outcome in the appeal. Even if there were an error of law in this regard I would not be prepared to set aside the decision of First-tier Tribunal on such a basis.

20. Paragraph 2(c) pleads that the Judge did not address all of the inconsistencies in the Appellant's evidence identified in the RFRL, and argues that the Judge's reasoning is consequently inadequate. The Ground does not specify which inconsistencies it is suggested that the Judge has failed to address and Ms Jones did not seek to amplify this particular Ground. In any event it seems to me that this is a further example of the Respondent essentially rearguing case that has already adequately been addressed by the Judge. The Judge plainly had it in mind that the Appellant's credibility was disputed for reasons of inconsistency, but concluded – sustainably within the scope of rational judgement – that the general consistency of account together with other features of the Appellant's case was such as to discharge the burden of proof at the lower standard. In a similar way the Judge had adequate regard to the potential damage to credibility by reason of delay in claiming protection (Grounds at paragraph 2(d)).

21. In all such circumstances I reject the substance of the Respondent's challenge to the credibility findings of the First-tier Tribunal.

22. Having made his findings as to the Appellant's narrative account, the Judge considered the question of risk in the event that the Appellant were to be returned to Jamaica. The Judge did so within the framework of Article

3 of the ECHR rather than the Refugee Convention because it was considered that no 'Convention ground' was identifiable (e.g. see paragraph 24). The Judge had regard to the Respondent's Country Policy and Information Note ('CPIN') of March 2017 in respect of risk from an organised criminal gang, and found that he was satisfied the Appellant faced a real and serious threat to the person (paragraphs 29 and 30).

23. The Judge then considered the potential protection mechanism of the witness protection programme, noting that the CPIN considered it provided effective protection (paragraph 30). However, the Judge found that there was no evidence that the Appellant had ever been part of the witness protection programme (paragraph 30).

24. The Judge went on to consider internal relocation. In this context the Judge had particular regard to the Appellants "*individual circumstances*", noting that he had been street homeless in the UK, and acknowledging the expert evidence suggesting that there was likely to be a repetition of such homelessness if the Appellant were to be removed from his support networks and present housing; it was also noted that he had "*a multiple of medical problems*", including hypertension, diabetes, ischaemic stroke affecting the left side of his body, and impaired mobility (paragraph 31). It was noted that it was not disputed that the Appellant had no family support in Jamaica (paragraph 32). Further to this the Judge noted the evidence of a country expert to the effect that the Appellant would be entirely dependent on state agencies and "*at very significant risk of being destitute, homeless and without adequate medical or therapeutic care*" (paragraph 32). In consequence the Judge found "*in view of the Appellant's multiple medical problems, his lack of economic means as well as vulnerability, it would be unreasonable to expect him to relocate in Jamaica*" (paragraph 33).

25. The Judge then concluded the appeal in these terms:

> "*I therefore find that the Appellant has shown that if returned to his country he would face a real risk of suffering serious harm as defined in Article 15 and is unable or owing to such risk unwilling to avail himself of protection of Jamaica. Harm would be from non-state agents. Further, internal relocation/internal flight is unreasonable or unduly harsh in the situation. In view of the multiple medical issues that the Appellant has as well as the risk from the Shower Posse and his poor and psychological condition coupled with the previous attacks he has experienced in Jamaica, I find that the Appellant is in a vulnerable situation and without any relatives back in Jamaica will end up most likely being destitute and homeless. In light with my findings above I find the Appellant would also have his rights under Article 3 of the Human Rights Convention breached.*" (paragraph 33)

26. The Respondent's Grounds of Appeal seek to challenge the Judge's evaluation of risk on return by placing reliance on the cases of **AB (Protection - criminal gangs - internal relocation) Jamaica CG [2007] UKAIT 00018** and **JS (Victims of gang violence – sufficiency of protection) Jamaica [2006] UKAIT 00057**: "*It is respectfully submitted that applying the rationale of these two reported Country guidance determinations to the appellant's circumstances the appeal is bound to be dismissed*" (Grounds of Appeal at paragraph 4). Paragraphs 5 and 7 of the Grounds contain quotations from each of these cases. Otherwise the substance of paragraphs 4-9 of the Grounds are to the effect that because his testimony at court had led to gang members being sentenced "*there is no reason why [the Appellant] would not be admitted to the witness protection scheme*", which would be effective because he was not a 'high-profile' case, in which case he would not be at risk and would not need to relocate.

27. Ms Jones readily accepted Ms Daykin's observation (set out in the Rule 24 response) that the decision in **JS** had been set aside by the Court of Appeal with consent of the parties on 14 June 2007, and therefore did not stand as country guidance.

28. The country guidance offered in **AB**, as summarised in the headnote, pertinently includes "*…unless reasonably likely to be admitted into the Witness Protection programme, a person targeted by a criminal gang will not normally receive effective protection in his home area*".

29. As noted above, the Judge found "*there is no indication the Appellant has been included in the witness protection programme*" (paragraph 30). In this context it is also to be noted that the Judge found that the Appellant had been attacked and injured in Jamaica subsequent to giving evidence in a trial: this would suggest that he was not in the witness protection programme. (It is to be noted that in his evidence the Appellant indicated that he had not asked for protection whilst in Jamaica, and was unaware of the programme: e.g. see Decision at paragraph 14.)

30. I note, pursuant to the Judge's findings, that the Appellant gave his testimony against gang members in 1999. If he was not admitted into the witness protection programme at that time, I queried by what mechanism it might be suggested that he could now enter witness protection. Ms Jones responded by stating that if the Appellant had not been cross-examined by the Presenting Officer on this point before the First-tier Tribunal, it was not for her to offer any submissions on this issue at the

'error of law' stage because that would involve a change of dynamic in the presentation of the Respondent's case.

31. It does indeed appear to be the case that the Appellant was not cross-examined in this regard: see paragraphs 13-16. Moreover it is not apparent that the Presenting Officers submissions addressed such a matter: see paragraph 17. Ms Jones also accepted that there was nothing identified in any of the country information before the First-tier Tribunal as to how a witness might access the witness protection programme some 20 years after the event.

32. In such circumstances it seems to me that I am left with the essential finding of the First-tier Tribunal that there "*is no indication that the Appellant has been included in the witness protection programme*" (paragraph 30). There being nothing further by way of evidence or exploration on this point, I am unable to see how the Judge can be criticised for concluding – in line with **AB** – that the Appellant would therefore be at risk from an organised criminal gang.

33. For the avoidance of any doubt, in my judgement the conclusions of the First-tier Tribunal in respect of internal relocation were sustainably reached after careful consideration of the very particular individual circumstances of the Appellant, and as such were in keeping with the well-established orthodoxy, reiterated at paragraph 164 of **AB**, that "*each case will turn on its own facts*".

34. In all the circumstances I find no basis for impugning the Decision of the First-tier Tribunal. The Respondent's challenge fails.

Notice of Decision

35. The decision of the First-tier Tribunal contained no material error of law and accordingly stands.

36. The Appellant's appeal remains allowed.

Signed: Date: **8 November 2019**

Deputy Upper Tribunal Judge I A Lewis