First-tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12025/2017

THE IMMIGRATION ACTS

Heard at Taylor House	**Decision & Reasons Promulgated**
On 11 January 2019	**On 30 January 2019**

Before

JUDGE OF THE FIRST-TIER TRIBUNAL A MONSON

Between

AF (GUINEA)
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Alison Harvey (Counsel instructed by Migrant Legal Action)
For the Respondent: Mr David Clarke (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellant appeals from the decision of the First-tier Tribunal (Judge Keith sitting at Taylor House on 19 July 2018) dismissing her appeal against the decision made on 5 October 2017 to refuse her protection and human rights claims.

The Reasons for the grant of permission to appeal

2. Upper Tribunal Judge Pitt granted permission to appeal for the following reasons:

> "It is arguable that the First-tier Tribunal took an incorrect approach to the medical and country expert evidence and to the previous Tribunal decision."

Relevant background

3. The Appellant claims to have arrived in the United Kingdom on 25 March 2004, and she is recorded as having claimed asylum the following day. She said that she had been born in Conarky, the capital of Guinea. She had four siblings.

4. She and her husband had both worked for the Humanitarian Assistance Network (HAN). The organisation was accused by the Guinean authorities of an attempt to organise a coup to overthrow the incumbent President. The authorities started arresting people who worked for HAN.

5. Her husband was arrested on 15 December 2003. The Appellant was arrested on 2 January 2004 and taken to PM3 Prison and later transferred to another prison, where she was tortured and raped by soldiers. She escaped from prison on 20 March 2004 with the help an officer who agreed to let her escape after her having sex with him.

6. She fled Guinea on 20 March 2004, travelling to Sierra Leone where she remained in hiding until 24 March 2004. From there she travelled on to the UK together with an agent.

7. The Appellant's asylum claim was refused for the reasons set out in a letter from the Respondent dated 25 May 2004. Her appeal came before Judge Cohen on 12 August 2004. Both parties were legally represented.

8. The judge received oral evidence from the Appellant, and in his subsequent Determination he gave his reasons for finding that her claim was not credible. He found her claim to be internally discrepant, totally implausible and contrary to the objective evidence, and he held that the Appellant was totally lacking in credibility.

9. At paragraph [33], Judge Cohen addressed the Appellant's claim that she had been raped and tortured whilst detained in Guinea. Before him, the Appellant had said that she did not have any scarring because she did not allow the officers to beat her,

10. He found that if the Appellant had been raped and tortured as claimed, then she would have scarring or marks which could be assessed in a medical report. He held that the Appellant's lack of scarring, and the lack of medical evidence in this regard, was further damaging to her credibility.

11. Permission to appeal against the decision of Judge Cohen was refused by His Honour Judge Ainley in a decision dated 25 January 2005.

12. With the assistance of her current legal representatives, the Appellant subsequently presented a fresh asylum claim based on a Medico Legal report by Dr Harvie of the Medical Foundation dated 6 December 2013 and a further report by her dated 16 September 2014.

13. As summarised in the subsequent Refusal decision of 5 October 2017, Dr Harvie found that there were 29 lesions on the Appellant's body. Of these, there were six lesions on her legs which she opined were highly consistent with trauma from footwear, and 11 lesions which were typical of restraint of wrists and ankles.

14. In her report of 16 September 2014, Dr Harvie noted that the Appellant's explanation for not reporting scarring previously was that she had not looked at her body and so she was not aware of the extent of the marks on her body - and the marks which she had seen, she had not considered significant.

The Decision of Judge Keith

15. Both parties were legally represented before Judge Keith. Mr Grewal, a solicitor, appeared on behalf of the Appellant.

16. In his subsequent decision, Judge Keith set out the Appellant's evidence at paragraphs [17] to [26]; the evidence of two supporting witnesses at paragraphs [27] to [30], and the respective closing submissions of the parties at paragraph [31] and [32].

17. At paragraph [36], the Judge set out in their entirety the guidelines from **Devaseelan [2002] UKIAT 00702**.

18. The Judge embarked on his findings of fact at paragraph [41]. He took the findings of Judge Cohen as his starting point. He observed that the Appellant had denied to Judge Cohen that she had any scarring, whereas the medical evidence was that the Appellant had in fact extensive scarring.

19. At paragraph [45], Judge Keith noted that the lesions observed by Dr Harvie on a physical examination *"using a well-lit room"* included lesions *"possibly caused by heavy boots hitting the front of calves whilst being raped"* by soldiers.

20. At paragraph [48], the Judge said that, while the Medical Foundation's expertise were not in doubt, he had concerns about the lack of analysis of the scarring which was described as highly consistent with the Appellant's claimed version of events, *"when one obvious alternative cause may have been the appellant's experience of previous rape within the home, which would explain why as a Muslim woman, her calves may have been bared."*

21. At paragraphs [49] and [50], the Judge addressed the assessment of the psychological therapist, Ilana Bakal, who had been providing therapy services to the Appellant since 2010. Whilst Ms Bakal described

depression and PTSD in the context of beating and rape and detention, there was no analysis which distinguished between state ill-treatment and ill-treatment in the Appellant's first marriage. While Ms Bakal described the Appellant's claimed version of events as having been consistent with the symptoms she saw, *"the cause of that violence and assault was not analysed in further detail"*.

22. In summary, the Judge found that while Ms Bakal's assessment added a picture of someone receiving therapy over a significant period of time, her analysis of causation of PTSD was more limited than that of Dr Harvie's.

23. The Judge moved on at paragraph [51] to address the country expert of Professor Knorr. He said it was noteworthy that Professor Knorr's assessment was based throughout on an assumption that the Appellant would return to Guinea alone.

24. The Judge acknowledged at paragraph [54] that Professor Knorr's analysis provided evidence that was not available to Judge Cohen on the general state of Guinea in 2004 and the fact that those assisting Sierra Leonean refugees were themselves targeted by the Guinean authorities.

25. However, he observed, Judge Cohen was particularly troubled by several aspects of the Appellant's specific evidence. The Judge went on to discuss these aspects in paragraphs [55] to [57].

26. The Judge held at paragraph [58] that while Judge Cohen did not have the benefit of Professor Knorr's opinion of the general circumstances in Guinea, he was nevertheless able to form a view of the authenticity of the documents relied on and the likely provenance of a newspaper article which he believed to have been fabricated. This assessment was not, in Judge Keith's view, undermined by Professor Knorr's general opinion.

27. The Judge went on to reach the following conclusions:

> "60. I concluded, considering the fresh medical evidence in the context of Adjudicator Cohen's findings and the evidence available to him at the time that the appellant's claimed version of events remained not plausible. …
>
> 61. Dr Harvie's report of scarring, in particular where there was a lack of explanation for why the Appellant's domestic violence at the hands of her first husband should be discounted as a cause of scarring, was one factor, but I also consider the implausibility and inconsistency in other aspects of the appellant's version of events. The PTSD diagnosis, while it is not in doubt, was also similarly dependent in its analysis of causation on the appellant's version of events, mainly her assertion that she had suffered a fear of confinement prior to her UK imprisonment.
>
> 62. In summary, I find the appellant was not tortured, raped or detained or escaped from state detention, as claimed. Her account of doing so has not previously been found to be plausible and whilst the medical evidence indicates PTSD and significant

> scarring, but also in the context of previous domestic violence from a former relationship, I did not find that the appellant was generally credible, considering paragraph 339L of the Immigration Rules. In particular I find that she has not been subjected to ill-treatment while in Guinea for the purposes of paragraph 339K. She has not established a general credibility and material elements of her account were not plausible or consistent."

The Hearing in the Upper Tribunal

28. At the hearing before me to determine whether an error of law was made out, Ms Harvey developed the pleaded Grounds of Appeal.

29. On behalf of the Respondent, Mr Clarke submitted that the First-tier Tribunal Judge had directed himself appropriately, and that no error of law was made out.

Discussion

30. Ground 1 is that the Judge erred in his treatment of the decision of Judge Cohen. Ms Harvey submits that the Judge did not apply the **Devaseelan** guidelines correctly, and in particular failed to consider whether Judge Cohen might have reached a different decision on credibility had the evidence of scarring been before him.

31. In **Devaseelan** the Tribunal held *inter alia* as follows:

> "40. We now pass to matters that could have been before the first Adjudicator but were not.
>
> (4) Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. An Appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. … It must also be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should not usually lead to any reconsideration of the conclusions reached by the first Adjudicator."

32. I consider that the Judge's approach complied with the above guidance. The scarring on the Appellant's body was a fact personal to the Appellant. It was a fact that could have been brought to the attention of Judge Cohen, but it was not.

33. Ms Harvey submits that the scars do not neatly fit within the above guideline as they exist independently of anything that the Appellant might say. This is not correct for two reasons. Firstly, there is no incontrovertible

evidence that the Appellant had scarring at the time of the hearing before Judge Cohen. The only matter which is incontrovertible is that when Dr Harvie conducted a physical examination of the Appellant in 2014, she found extensive scarring as detailed on a body map attached to her report. Secondly, while the scarring itself exists independently, the attribution of the scarring is dependent, at least in part, on what the Appellant says.

34. In **Devaseelan** at paragraph [42] the Tribunal added the gloss in guideline (7) that the force of the reasoning underlying guidelines (4) and (6) is *"greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him. We think such reasons will be rare."*

35. Ms Harvey submits that this gloss applies here, as there were cogent reasons for the Appellant not disclosing her scarring to Judge Cohen. These reasons were her distress and shame.

36. However, the implication that Judge Keith failed to take into account guideline (7) is not made out. Judge Keith acknowledged this explanation for the Appellant's previous suppression of the fact that she had scarring on her body. He referred to this explanation at paragraph [43] in the context of Dr Harvie's report, and at paragraph [49] in the context of the report from the psychological therapist, Ms Bakal. Judge Keith accepted that what Ms Bakal reported was consistent with the Appellant having previously been unwilling to describe the scarring to Judge Cohen because of a sense of shame and lack of awareness.

37. Accordingly, there is no merit in the submission that, as a result of taking the decision of Judge Cohen as his starting point, Judge Keith had a closed mind when it came to assessing the probative value of the medical evidence. On the contrary, having regard to the structure of the judge's decision and his careful line of reasoning, it is abundantly clear that the Judge assessed the medical evidence on its own merits, and that his assessment was not contaminated by an *a priori* assumption that the Appellant was not a witness of truth.

38. Ground 2 is that the Judge failed to follow the correct approach to the medical evidence, and in particular that his approach fell foul of the guidance given by the Court of Appeal in **Mibanga [2005] EWCA Civ 367**.

39. The Judge did not make adverse credibility findings against the Appellant based on the findings of Judge Cohen before considering the implications of the medical evidence. The Judge simply summarised the gist of Judge Cohen's findings, before turning to the medical evidence and the evidence of the country expert. The Judge then returned to the findings of Judge Cohen before reaching his overall conclusion on the credibility of the core claim of past persecution.

40. Ground 3 is that the Judge erred in law in substituting his own irrational evaluation of the clinical evidence in substitution for the clinical findings of the medical experts.

41. Dealing first with the scarring report of Dr Harvie, the Judge set out *verbatim* Dr Harvie's findings on the lesions observed on the front of the Appellant's calves which the Appellant attributed to heavy footwear scraping against her legs whilst being raped by soldiers in detention.

42. As highlighted by the Judge at paragraph [45], Dr Harvie's finding was twofold. Firstly, she found that there were *"multiple other ways"* that the traumas observed by her could have been caused to the front of the Appellant's calves. Secondly, she found that there was however, *"nothing in what is known about her lifestyle or other explanations that would suggest another cause."* Dr Harvie went on to say that the Appellant would not have had her legs exposed, as she was an Islamic woman and she reported that she covered her legs. This made it unlikely that trauma from other causes could occur.

43. As noted by the Judge at paragraph [46] of his decision, Dr Harvie had recorded in her report at paragraph 2 that the Appellant had suffered domestic violence in her previous marriage, including rape and physical violence, albeit that the violence the Appellant described was slapping, and not punching, kicking or beating.

44. Since Dr Harvie's primary finding was that there were multiple other ways the traumas to the front of the calves could have been caused, it was clearly open to the Judge to question why Dr Harvie had nonetheless ruled out all the other multiple ways of the lesions being caused other than the specific attribution given by the Appellant.

45. This was particularly so when the reasoning of Dr Harvie with regard to the exclusion of other causes was not based on her medical expertise (which led to find that the lesions were non-specific and could have been caused by multiple other ways), but on the non-medical assumption that the Appellant would never have found herself in a situation where an alternative cause could have arisen, because her legs would have always been covered.

46. Since elsewhere in her report Dr Harvie had acknowledged the Appellant had been the victim of domestic violence and rape at the hands of her first husband, it was open to the Judge to question this non-medical assumption on the ground that within Dr Harvie's report there was an obvious alternative scenario in which the Appellant might have had her calves bared, and might have sustained lesions as a result of being raped by her first husband.

47. The Judge did not thereby substitute his own clinical finding that the lesions observed by Dr Harvie were attributable to heavy footwear scraping against the Appellant's legs when she was being raped by her

first husband. The Judge was simply pointing out, as it was open to him to do, that Dr Harvie had implicitly discounted domestic violence as a possible explanation for the lesions on the calves, without explicit analysis or reasoning.

48. At paragraph [48], the Judge addressed the claimed link between the Appellant's PTSD and her claimed ill-treatment in detention. According to Dr Harvie, the link was a fear of confinement and of people in uniforms. Dr Harvie recognised that the Appellant had been imprisoned in the United Kingdom, but indicated that these fears predated her imprisonment. The Judge continued:

> "However, Dr Harvie's assessment was of course many years after imprisonment in the United Kingdom and in reaching that conclusion, Dr Harvie was entirely reliant on the Appellant's assertion that her dreams and fear of confinement had predated her UK imprisonment. Whilst I did not discount her conclusion as a result, the conclusion in turn depended very much on the Appellant's credibility and whether she was likely to seek to mislead Dr Harvie."

49. Ms Harvey submits that the Judge erred in law in not accepting Dr Harvie's expert evidence that the Appellant's PTSD flows from her treatment in detention in Guinea, rather than from her experience of detention in the United Kingdom.

50. Ms Harvey's submission runs counter to the guidance given by the Court of Appeal in **JL (Medical reports – credibility) China [2013] UKUT 00145 (IAC)** on the differing roles of the judicial decision-maker and the expert. At paragraph 3 of the head note, the following is stated:

> "The authors of such medical reports also need to understand that what is expected of them is a critical and objective analysis of the injuries and/or symptoms displayed. They need to be vigilant that ultimately whether an Appellant's account of the underlying events is or is not credible and plausible is a question of legal appraisal and a matter for the Tribunal Judge, not the expert doctors."

51. The issue of the true cause of the Appellant's PTSD was a matter of legal appraisal for the Judge. He was not bound to accept Dr Harvie's opinion as to the cause.

52. Ground 4 is that the Judge failed to understand the expert evidence of Ms Bakal, and thus proceeded on an erroneous factual basis. Ms Harvey submits that the Judge failed to understand that as a representative of Freedom from Torture, Ms Bakal's remit was to deal with intentional infliction of suffering inflicted for a purpose by a person acting in an official capacity. So when Ms Bakal states that the Appellant has the characteristic features of a survivor of torture, it is to this that she is referring, not to the Appellant having suffered spousal violence.

53. I do not consider that the Judge misunderstood Ms Bakal's remit. What he was doing in paragraphs [49] and [50] was making an assessment of the

probative value of Ms Bakal's report. It was open to the judge to find that the report was limited in its probative value for the reasons which he identified.

54. Ground 5 is that it was procedurally unfair for the Judge to find that the Appellant's scars or her PTSD might be the result of her treatment within her first marriage without giving the Appellant the opportunity to refute this by evidence, or giving her representative the opportunity to refute the point by argument.

55. I do not consider that there was any procedural unfairness. The Appellant's evidence was clear. She attributed the scars and her PTSD to her claimed detention in 2004, and the two experts opined that the scarring and the PTSD symptoms were strongly supportive of this account. In postulating alternative causes for the scarring and the symptoms of PTSD, the Judge was not straying outside the evidence that was known to the two experts.

56. Ground 6 is that the Judge made findings about the Appellant's ability to obtain medical care and social support in Guinea that were contrary to the uncontested evidence, and Ground 7 is that the Judge was irrational in accepting that the Appellant was a suicide risk while at the same time holding that she did not have a genuine fear of persecution in Guinea.

57. On the topic of the impact on the Appellant's mental health on her return to Guinea, the Judge held at paragraph [64] that the expert assessment of the likely impact was within the context of her returning as a lone woman. However, the Appellant had witnesses who were willing to attend the Tribunal and who had relatives in Conarky. He did not accept that they would be unwilling to assist or accommodate the Appellant, even if she either chose to or was not able to be reconciled with her family in Guinea. In summary, he did not find that she was at risk of returning as a lone woman and he found that she would be able to access accommodation and close support.

58. The Judge addressed the country expert report of Professor Knorr at paragraph [65]. Professor Knorr was clear that, as a result of regime change, the Appellant would not be of any objective risk on return.

59. The judge held that the appellant also did not have a genuine subjective fear that State actors would mistreat her, *"noting that her previous ill-treatment had not occurred"*.

60. While the Appellant suffered from PTSD and was assessed as being a suicide risk, the lack of a genuine fear of persecution led him to conclude that there was not a risk that her rights under Articles 3 or 8 would be breached, particularly as she would be returning to Guinea with an appropriate network of support.

61. He found that Professor Knorr's assessment of the availability of medical treatment was slightly inconsistent, suggesting that on the one hand such treatment was not available, but on the other hand, even if it was available, she would not be able to access it. The Judge continued:

> "In reality, the appellant had been receiving ongoing therapy sessions over a number of years from the Medical Foundation, and I conclude, that with appropriate support of her close friends and social network in Guinea, the therapy services and an equivalent nature could be accessed by the Appellant in Guinea. In addition, I find that the appellant would be able to access the services available there. In reaching that assessment I considered Professor Knorr's assertions about the limited availability of such services but also the medical COI assessment referred to at paragraph (171) of the Refusal letter which referred to follow up by psychologists from public facilities in Conarky."

62. As with the medical evidence, Ms Harvey advances a litany of criticisms in respect of the Judge's findings on the Appellant's ability to access appropriate mental health care and social support in Guinea.

63. I consider that these criticisms are no more than the expression of disagreement with findings that were reasonably open to the Judge for the reasons which he gave. In particular, it was open to the Judge to find that relatives of her UK-based friends would support the Appellant in Guinea.

64. Having reviewed Professor Knorr's report, I am entirely satisfied that the Judge's findings on the availability and accessibility of medical treatment and care are sustainable, and are not irrational as implied by the error of law challenge.

65. Professor Knorr herself expressly linked the issue of accessibility to an asserted non-availability of social or kinship support. This is exemplified in paragraph 5 of her report where she said as follows:

> "On the background of the information provided concerning the lack of medication and treatment in Guinea and [MF's] condition of mental health and the lack of kin support she would face I conclude that [MF] would not be in a position to gain access to any sort of adequate mental health care. She would be in a particularly weak position to get access to medication and therapy as she has no one who would assist her in obtaining treatment …"

66. Professor Knorr highlighted the fact that Guinea had the lowest ratio of psychiatrists per people in West Africa. But the Appellant was not receiving treatment from a psychiatrist in the UK.

67. The Judge's approach to the assessment of whether there was a real risk of a violation of Article 3 ECHR on the grounds of suicide risk was entirely in line with the guidance given in the authorities which he cited. It was not irrational of the Judge to take into account that there was neither a well-founded nor a genuine subjective fear of persecution. On the contrary, a failure to do so by the Judge would have been erroneous in law.

68. At paragraph [69], the Judge held that the Appellant continued to maintain contacts in connections in Guinea. She was not financially independent in the United Kingdom and had relied over many years from assistance from friends as well as receiving significant treatment by the NHS for cancer, with financial consequences to the UK taxpayer. The personal life which she had developed in the United Kingdom was when she had no expectation remaining permanently in the United Kingdom.

69. The Judge continued:

> "Based on the findings of what he reached, I concluded that there were not significant obstacles to her return to Guinea and that her return there was proportionate."

70. In Ground 8, Ms Harvey submits that the Judge erred in law in his assessment of the Appellant's claim under Article 8 ECHR in two respects. Firstly, she says that the findings of the Judge were not adequately reasoned. Secondly, she submits that taking into account the Appellant's past disability as a sufferer from ovarian cancer constitutes unlawful discrimination against the Appellant contrary to Section 13 of the Equality Act 2010.

71. The inadequacy of reasoning challenge is based on the proposition that the Judge only devoted two short paragraphs to the Article 8 claim. However, as the Judge made clear, his finding on Article 8 was shaped by his earlier detailed findings on the protection claim and the Article 3 (mental health/suicide risk) claim.

72. On the issue of proportionality, it was not unlawful of the Judge to take into account that the Appellant's unlawful presence in the UK following the exhaustion of her appeal rights in respect of her initial asylum claim had had an adverse impact on the UK taxpayer.

Notice of Decision

73. The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of their 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 Date: 14 January 2019

Deputy Upper Tribunal Judge Monson