Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07858/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 March 2020	**On 19 March 2020**

Before

MR JUSTICE JOHNSON
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE PICKUP

Between

XIDI [X]
[ANONYMITY DIRECTION NOT MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr A Eaton, instructed by Duncan Lewis & Co Solicitors
For the respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a decision to which both judges have contributed.

2. This is the appellant's appeal against the decision of First-tier Tribunal Judge Malcolm promulgated 25.11.19, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 30.8.19, to refuse his protection and human rights claims and to maintain the decision of 5.5.17 to deport him from the UK to China.

3. The grounds first argue that at [64] and [65] of the decision the judge erred in rejecting the expert report of Dr Kulantzick. Dr Kulantzick's opinion was that the appellant's account of a land-grabbing dispute in China leading to a gang attack on him was plausible. The judge rejected that evidence because it did not take into account the previous adverse credibility findings made by the First-tier Tribunal on an earlier occasion, and because it was based on the appellant's account and the premise that his account is truthful. It is suggested that the approach of the First-tier Tribunal fell into the "Mibanga trap", referencing the decision of the Court of Appeal in Mibanga [2005] EWCA Civ 367.

4. A similar point is made in relation to the treatment of the medical evidence of Dr Arnold, dated 27.7.17, and, perhaps to a lesser extent, the psychiatric report of Dr Thorne, dated 11.9.17.

5. Resident First-tier Tribunal Judge Phillips granted permission to appeal on 24.12.19, finding it arguable that the First-tier Tribunal Judge fell into the Mibanga trap of discounting the expert evidence on the basis of the credibility findings of the previous tribunal decision, pursuant to Devaseelan (Second Appeals - ECHR - Extra-territorial Effect) Sri Lanka [2002] UKAIT 00702: "It is arguable that having accepted that the first decision was the starting point the judge did not go on to consider whether the expert evidence and the medical evidence gave him any reason for departing from the first decision."

6. The respondent's Rule 24 response, dated 14.1.20, argues that the First-tier Tribunal did not fall into error. It is pointed out that the judge referenced the new evidence, the expert reports between [23] and [27] of the decision, together with the submissions on behalf of the appellant that the evidence demonstrates the plausibility and consistency with the appellant's factual claim. At [64] the judge also considered the country background information. It is submitted that the grounds are no more than a complaint that the judge failed to use the expert evidence to overturn the findings of the previous tribunal and that there is no Mibanga point.

7. We have carefully considered and taken into account the helpful submissions of both representatives and the undated skeleton argument of Ms Cunha handed in at the hearing.

Error of Law

8. In the first instance we have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside.

9. Mr Eaton's submissions are encapsulated in the grounds as drafted and need no elaboration. The essence of the grounds is that the judge fell into the Mibanga error in relation to both the country expert evidence and the medical expert evidence.

10. Ms Cunha submitted that the First-tier Tribunal Judge was entitled to rely on Devaseelan and then treat the new evidence with circumspection, given the adverse credibility findings in the 2017 appeal decision. It was submitted, as set out at [8] of her skeleton argument, that the judge did no more than rely on the previous credibility findings as a starting point, "comparing these to those preferred to Dr Kulantzick. It was for the fact-finder to assess credibility and having considered the new evidence was entitled not to depart from the 2017 adverse credibility findings." Ms Cunha pointed out that there were other factors relevant to credibility in the 2017 decision, for example, the fact that the appellant had been found guilty by a jury, rejecting his factual account. Whilst she accepted in the course of argument that the scarring report was potentially supportive of the claimed injury, she drew to our attention the observation in the 2017 decision that in interview the appellant had made no reference to being beaten or hospitalised as a result, which was part of the negative credibility assessment. Ms Cunha submitted that in the circumstances it was not clear how the expert reports could justify departing from the previous credibility findings.

11. In essence, Ms Cunha's argument was that all the new evidence had been carefully considered and taken into account in determining whether to depart from the previous adverse credibility findings.

12. At [24] of the Mibanga decision, Wilson J stated:

> "It seems to me to be axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto. Just as, if I may take a banal if alliterative example, one cannot make a cake with only one ingredient, so also frequently one cannot make a case, in the sense of establishing its truth, otherwise than by combination of a number of pieces of evidence".

13. However, in HH (medical evidence; effect of Mibanga) Ethiopia [2005] UKAIT 00164, the Upper Tribunal cautioned:

> "The Tribunal considers that there is a danger of Mibanga being misunderstood. The judgments in that case are not intended to place judicial fact-finders in a form of forensic straightjacket. In particular, the Court of Appeal is not to be regarded as laying down any rule of law as to the order in which judicial fact-finders are to approach the evidential materials before them. To take Wilson J's "cake" analogy, all its ingredients cannot be thrown together into the bowl simultaneously. One has to start somewhere. There was nothing illogical about the process by which the Immigration Judge in the present case chose to approach his analytical task."

14. The Upper Tribunal went on to conclude in that case that the Immigration Judge had arrived at his conclusions as to credibility by looking at the evidence in the round.

15. Applying the principle and the caution set out above, we have looked carefully at the First-tier Tribunal decision and considered whether,

regardless of the order in which the evidence was addressed, it can be said that the findings were made after consideration of the evidence as a whole. As the respondent has pointed out, the judge did not overlook either the country expert or medical expert evidence. It is clear, however, that at [64] the judge rejected the country expert evidence in relation to the plausibility of the appellant's land grab dispute account, on the basis that it did not take into account the previous adverse credibility findings, and because it was based on the appellant's account and the premise that his account is truthful. Contrary to the understanding of the judge, it is clear from the expert report that Dr Kulantzick had the previous tribunal decision available to him and it was, therefore, inaccurate to state that the expert report did not take the previous adverse credibility findings into account. Ms Cunha accepted this point in her submissions.

16. At [65] the judge acknowledged the country background information of substantial evidence of land disputes but stated, "… however, the basic position is that the appellant's previous account was not accepted and whilst it is clear from background information that there is a substantial problem with land disputes in China I do not consider that the report provides any new information which would allow me to depart from the findings of First-tier Tribunal Judge Dhanji on the credibility of the appellant in relation to this matter."

17. Similarly, at [73] of the decision Judge Malcolm discounted the expert medical evidence stating, "Given the findings on the appellant's credibility I did not consider that the information in Dr Thorne's report had any material bearing on my findings as set out above," concluding at [74] "I do not consider that there is any reason to deviate from the previous First-tier Tribunal findings." There may have been some conflation by the judge between the two medical reports. The medical evidence of physical injury in Dr Arnold's report had been relied on to the limited extent of demonstrating that injuries sustained were consistent with the appellant's account of being physically assaulted by a gang, arising out of the land-grab dispute. A similar point is made in relation to the psychiatric report of Dr Thorne. Mr Eaton pointed out that the report detailing anxiety and depression opined that these were understandable stress reactions to his immigration predicament, including immigration detention. Mr Eaton submitted that this was relevant to the adverse credibility findings from 2017 as well as the assessment of credibility by the First-tier Tribunal in 2019.

18. Whilst the judge was correct to apply the Devaseelan principle to take the first decision the starting point and as determinative of the facts on the basis of the evidence as it then was, we accept the argument put to us today that Judge Malcolm should have acknowledged and taken into account that the expert evidence now relied on was not before the previous Tribunal Judge, and there may also have been no country background evidence at all on the issue before the previous Tribunal. Given that fact, Judge Malcolm should have carefully considered the evidence as a whole to determine whether, taken together, the new expert

and other evidence, which also included medical evidence showing injuries potentially consistent with the claim of being attacked by a gang, justified departing from the adverse findings from the previous appeal decision. We are satisfied that was not done.

19. Instead, it appears that Judge Malcolm used the previous adverse credibility findings as justification to undermine the new, expert, evidence, both in relation to land grab disputes and, more clearly, in relation to the medical evidence supporting previous physical injuries. We are less persuaded by Mr Eaton's argument in relation to the judge's consideration of the psychiatric report.

20. We are satisfied that the failings in the decision identified above amount to a material error of law, requiring the decision to be set aside to be remade in its entirety.

21. We have given careful consideration as to whether this is a case which ought to be remade in the Upper Tribunal or in the alternative remitted to the First-tier Tribunal, taking into account the submissions of the two representatives on the point. Mr Eaton contended for a remittal to the First-tier Tribunal with the decision to be made de novo. Ms Cunha did not resist his submission on this point.
22. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal vitiate all findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal. The effect of the error has been to deprive the appellant of a fair hearing of his case.
23. In all the circumstances, with the acquiescence of both parties, we relist this appeal for a fresh hearing in the First-tier Tribunal, on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh with no findings preserved.

Decision

24. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

We set aside the decision.

We remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.

Signed

Upper Tribunal Judge Pickup

Dated 10 March 2020

Consequential Directions

25. The appeal is remitted to the First-tier Tribunal sitting at Taylor House;
26. The appeal is to be decided afresh with no findings of fact preserved;
27. The ELH is 3 hours;
28. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judges Malcolm and Phillips;
29. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated, indexed and paginated bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming appeal hearing;
30. The First-tier Tribunal may give such further or alternative directions as are deemed appropriate.

Anonymity

We have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, we make no anonymity order.

Signed DMW Pickup

Upper Tribunal Judge Pickup

Dated: 10 March 2020