Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08960/2018

THE IMMIGRATION ACTS

Heard at Field House
On 31 March 2022

Decision & Reasons Promulgated
On 18 May 2022

Before

UPPER TRIBUNAL JUDGE SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

U.M
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr A Bandegani, Counsel, instructed by Wilson Solicitors LLP
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is an appeal, brought with permission of the First-Tier Tribunal, from the Decision of First Tier Tribunal Judge Traynor ("the Judge") promulgated on 17 May 2021. By that Decision, the Judge dismissed the Appellant's appeal from the Secretary of State's decision refusing to recognise him as a refugee, or as a person otherwise requiring international protection.

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2. The Appellant claims that he is a national of Uzbekistan. He arrived in the United Kingdom on 16 December 2016 on what he claims is a fraudulently obtained Kyrgyzstan passport. The Respondent disputes the Appellant's claimed nationality and contends that he is a national of Kyrgyzstan.

3. On 16 May 2017, the Appellant claimed asylum. The primary basis of claim is that he worked for the Uzbek military and security services. He was accused of being a spy and detained, interrogated and tortured by the authorities. It is his case that he fears return to Uzbekistan due to the previous adverse interest taken in him. He further claims that if he is returned to Kyrgyzstan he will be refouled to Uzbekistan as the Uzbek authorities have notified the Kyrgyzstan authorities that they wish to detain and question him.

4. On 7 September 2017, the Appellant was convicted at Woolwich Crown Court of sexual assault on a female, for which he was sentenced to a term of eighteen months' imprisonment and ordered to register on the Sex Offenders' Register for ten years.

5. The Secretary of State served a decision to deport the Appellant from the United Kingdom on 15 September 2017. On 3 July 2018, she refused his protection and human rights claim.

6. The Appellant's appeal from the Secretary of State's decision was heard by the Judge on 15 January 2021. The Judge heard evidence from the Appellant and three witnesses and had before him documentary evidence purporting to corroborate the Appellant's claimed military service in addition to expert evidence from Dr Juliet Cohen and Dr Rano Hoehne-Turaeva. The Judge considered the Appellant's evidence was vague and noted various contradictions in his account and that of the witnesses. The inconsistences were so fundamental that they led the Judge to conclude that he could place no weight on the opinion of Dr Cohen, namely, that the lesions and scars on the Appellant's body were consistent with his account of torture [83]. Further, the Judge considered that, in the absence of any evidence to the contrary, the Appellant, who was born in what was the former USSR Republic of Kyrgyzstan, could be a dual national of Uzbekistan and Kyrgyzstan [84]. Nonetheless, the Judge concluded that the Appellant is a national of Kyrgyzstan and not a national of Uzbekistan as claimed [84].

7. In his omnibus conclusion the Judge considered *"the Appellant to be a highly intelligent and manipulative man…"* who had *"sought to present a false claim for asylum"* [85]. Accordingly, the Judge rejected the entirety of the Appellant's claim and concluded that he was not entitled to international protection; he could not therefore meet the exceptions in section 33 of the UK Borders Act 2007 and thus found that deportation was in the public interest and dismissed the appeal.

8. The Appellant’s representatives applied on his behalf for permission to appeal to the Upper Tribunal and permission was granted by the First-tier Tribunal on 2 July 2021.

Discussion

9. We are grateful to Mr Lindsay for his pragmatic concession that the Judge’s Decision cannot stand. He properly accepts that the Judge’s assessment of the expert evidence of Dr Cohen and Dr Hoehne-Turaeva is flawed and that this vitiates the Decision. We agree. In view of the Respondent’s concession before us it is not necessary to traverse the grounds raised by Mr Bandegani or set out our reasons in detail, so we briefly do so below.

10. In this appeal the Judge was required to determine two central factual issues in dispute. First, the Appellant’s nationality and second, whether his account of working in the Uzbek military and security services and his subsequent arrest(s), detention(s) and torture by the Uzbek authorities is true. The evidence in support of these contentions included a report prepared by Dr Hoehne-Turaeva and Dr Cohen, respectively. Dr Hoehne-Turaeva is a country expert. He is an academic with extensive fieldwork experience. Dr Cohen is an independent forensic physician specialising in medico-legal reports for victims of torture. The credentials and expertise of the experts was not in issue before the Judge.

11. Dr Hoenhe-Turaeva, inter alia, considered the Appellant’s account and examined his military identity document and concluded that it was *“highly likely to be authentic”.* He considered that the Appellant’s account of being a Uzbek national who served in the Uzbek military, who was subsequently detained and tortured was highly plausible. In respect of the Appellant’s claimed nationality as a Uzbek national, Dr Hoenhe-Turaeva noted, in particular, that dual citizenship was not permitted under Uzbekistan or Kyrgyzstan law and that foreign nationals were not eligible to serve in the Uzbek Army.

12. Dr Cohen identified the Appellant as a victim of torture. She concluded that the Appellant’s physical presentation was consistent with his account and identified that three lesions were *“highly consistent with the attributions given”* and four were *“typical of the attributions given”.* Further, Dr Cohen conducted a psychological assessment of the Appellant and diagnosed him to suffer from Post-Traumatic Stress Disorder.

13. It is appreciably clear that the Judge was cognisant of the expert evidence and its substance and noted the same at [13] and [14].

14. In addressing the evidence of Dr Hoenhe-Turaeva the Judge stated thus:

“75. Having carefully considered the Appellant’s evidence in conjunction with the accounts provided by him to both Dr. Cohen and the information considered by Mr. Honhe (sic), I find that the Appellant has not given a

plausible account or credible account of what he was doing in the five-year period prior to him coming to the United Kingdom."

…

78. I have also considered, in addition to the expert reports, the documentation submitted by the Appellant in support of his appeal. This includes military identification documents, as well as photographic evidence. This has been considered by the country expert, Mr.Honhe (sic), who has indicated that in his opinion they are genuine and plausibly establish that the Appellant did in fact serve with the Uzbek military."

15. We observe that over the course of what is a detailed decision the extracts we have set out above are the only substantive references to the country expert evidence. Whilst we have no doubt that the Judge considered the country expert evidence and, whilst he was not required to accept what was said by the expert but, as was made clear in *SS (Sri Lanka) v Secretary of State for the Home Department* [2012] EWCA Civ 155, at [21], he was required to fully engage with it and to give proper reasons for reaching a contrary view. We accept that the Judge failed to demonstrate that he had performed that duty and we agree with Mr Bandegani that there is no proper engagement with the evidence in the Judge's analysis, nor did he give proper reasons for rejecting that evidence. There is no dispute and, we accept, that the country expert evidence was relevant not only to the issue of the Appellant's nationality, but also to his previous history. The country expert evidence was thus probative evidence supportive of the Appellant's claim and could not be dispensed with by a bare statement that the expert evidence had been considered. We are satisfied that the Judge's consideration of the country expert evidence at [75] and [78] was inadequate and lacks reasoning.

16. A similar criticism is made out in respect of the evidence of Dr Cohen.

17. The Judge, at paragraph 48, stated that he *"..,fully respected Dr. Cohen's conclusions of the Appellant's vulnerability and so directed that the Appellant should be recorded as a vulnerable witness in accordance with the Tribunals Presidential Guidelines".* There is no quarrel with that approach which is plainly correct. The Judge then considered the Appellant's narrative in detail and gave several reasons for rejecting his account from [44] to [82]. The Judge then dealt with the conclusions reached by Dr Cohen in the following terms:

"83. This also leads me to review an assessment of the Rule 35 report which was provided whilst the Appellant was in prison and concluded that he may have been the victim of torture. ***In this respect, there is no reason to doubt the observations of Dr. Cohen regarding the lesions and scars which were observed upon the Appellant's body and the analysis of such injuries in accordance with the***

Istanbul Protocol. In this respect, Dr. Cohen unfortunately strays into the area of credibility in assessing the evidence because she has accepted at face value that what the Appellant has said is the complete truth. *It is acknowledged that medical examiners will look to obtain a history from which they can provide a medical analysis, but it is this Tribunal that is the ultimate arbiter of the Appellant's credibility.* ***In this regard, I can be satisfied that there are injuries which the Appellant has sustained in the past but, given the doubts which have been raised regarding the reliability of the Appellant's evidence as a whole, I find that I am unable to place weight upon the suggestion made by Dr. Cohen that this is consistent with the Appellant being injured by the Uzbek authorities.*** *It is apparent that at some stage in the past the Appellant has been the victim of some violent acts but the circumstances of such acts, and who were the perpetrators, I find is in no way reliably established so as to satisfy the test of reasonable likelihood. Similarly, I find that the analysis of the Appellant's mental health and references to Post Traumatic Stress Disorder are attributed by Dr. Cohen to the Appellant's experiences when these injuries were sustained. Whilst that may be the case, I find that the evidence does not inform me to a reasonable degree of likelihood that the Appellant sustained such injuries at the hands of the Uzbek authorities or in the circumstances in manner claimed by him.* ***I find that there are fundamental inconsistencies in the evidence of the Appellant and his witnesses that lead me to conclude that the Appellant has not told the truth about these matters or who has been responsible for inflicting such injuries, including the circumstances in which they have occurred."***

(our emphasis)

18. Whilst we agree with the Judge that the issue of credibility was a matter for the Tribunal, there are several difficulties with his approach. First, we are satisfied that the Judge was wrong to state that Dr Cohen simply accepted the Appellant's account of how his injuries were sustained as *"the complete truth",* when in fact she made clear in her report that she had conducted her analysis in accordance with the Istanbul Protocol and her opinion was *"not based solely on reported history but on [her] analysis of the responses, observations and examination…"*. This taken together with her own clinical experience and the fact that there was no other apparent explanation for his PTSD, confirmed her opinion that the Appellant had not fabricated his account of detention and torture. Dr Cohen's methodology was entirely appropriate and consistent with the approved approach in *KV (Sri Lanka) (Appellant) Secretary of State for the Home Department (Respondent)* [2019] UKSC 10. Second, and further to the above, the Judge's rejection of Dr Cohen's opinion does not sit comfortably with his conclusion that there was no reason to doubt her observations and analysis of the Appellant's injuries.

19. We are therefore satisfied that the Judge erred in finding that Dr Cohen had strayed beyond her remit and we accept that his findings are inadequately reasoned if not irreconcilable with the expert evidence.

20. Third, whilst the Judge stated he had considered the Appellant’s evidence in conjunction with what he had told the expert(s), we accept he failed to demonstrate that he actually applied the medical evidence to an analysis of the inconsistencies and discrepancies of the Appellant’s account bearing in mind the acceptance of the Appellant as a vulnerable witness.

21. In *Mibanga* [2005] EWCA Civ 367 Buxton LJ held at [30]:

> "*30. … The adjudicator's failing was that she artificially separated the medical evidence from the rest of the evidence and reached conclusions as to credibility without reference to that medical evidence…”*

22. The judgment in *Mibanga* has been followed in a number of subsequent cases, including by Sir Ernest Ryder in *AM (Afghanistan) v Secretary of State for the Home* Department [2017] EWCA Civ 1123 and recently in *QC (verification of documents; Mibanga duty) China* [2021] UKUT 00033 (IAC) where a Presidential panel of the Upper Tribunal held at [57]:

> “*57. To sum up, the judicial fact-finder has a duty to make his or her decision by reference to all the relevant evidence and needs to show in their decision that they have done so. The actual way in which the fact-finder goes about this task is a matter for them. As has been pointed out, one has to start somewhere. At the end of the day, what matters is whether the decision contains legally adequate reasons for the outcome. The greater the apparent cogency and relevance of a particular piece of evidence, the greater is the need for the judicial fact-finder to show that they have had due regard to that evidence; and, if the fact-finder's overall conclusion is contrary to the apparent thrust of that evidence, the greater is the need to explain why that evidence has not brought about a different outcome*.”

23. We are satisfied that the Judge’s concluding remarks at [83] infer that he did not adhere to this approach and demonstrates that the medical evidence was not considered as a composite part of his assessment of the credibility of the claim. We are thus satisfied that the Appellant’s criticism of the Judge’s approach to the medical evidence is also made out.

24. Whilst we acknowledge that the Judge made several findings of credibility adverse to the Appellant which go unchallenged, the Judge’s consideration, or lack thereof, of the expert evidence is so fundamentally flawed that the Decision cannot stand.

<u>Conclusion</u>

25. For all these reasons, we find that the Judge erred on a point of law in dismissing the Appellant’s appeal. We therefore set aside the Judge’s decision in its entirety.

26. Having regard to paragraph 7.2 of the Senior President of the Tribunal’s Practice Statement for the Immigration and Asylum Chamber, and the extent of the fact-finding, which is required, we remit the appeal to the First Tier Tribunal to be heard afresh by a different Judge.

Decision

27. The First Tier Tribunal’s decision is set aside and the appeal is remitted for a fresh hearing to be heard by a different judge.

Anonymity order

The First-tier Tribunal made an anonymity order. We have not been invited to rescind that order. Having regard to the Presidential Guidance Note No 2 of 2022, and the Overriding Objective, we consider that an anonymity order is appropriate. We therefore make an order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

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.

R Bagral
Deputy Judge of Upper Tribunal
(Immigration and Asylum Chamber)
Date: 30 April 2022