IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001458
First-tier Tribunal No:
PA/54782/2022
LP/00384/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 18 August 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

DEPUTY UPPER TRIBUNAL JUDGE METZER KC

Between

NC

(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: Ms U Dirie instructed by Duncan Lewis Solicitors

Heard at Field House on 27 June 2023

DECISION AND REASONS

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

1. The application for permission to appeal was made by the Secretary of State but for the purposes of this decision we will refer to the parties as they were described before the First-tier Tribunal, that is NC as the appellant and the Secretary of State as the respondent.

2. The appellant claims to be a citizen of Iran with a date of birth of 29th June 1980 who entered the UK in 1999. In 2008 he was sentenced for two counts of sexual assault and one count of fraud and imprisoned to 1 ½ years for each offence (3 years consecutively) and placed on the Sex Offenders Register for an indefinite period.

3. The Secretary of State signed a Deportation Order and NC appealed. His appeal was dismissed on 19th January 2011 by Judge Hollingworth and Mr Olszewski who made adverse credibility findings.

4. NC made further submissions that he was a victim of torture, and which were refused by the Secretary of State. She challenged his credibility, relying on the previous decision and disputed that he was from Iran or that his scarring was a result of torture. His application was refused under the Immigration Rules on the basis that he was not culturally and socially integrated into the UK, that there were significant obstacles to his return to Iran or there were there any very compelling circumstances. The appellant appealed and produced medical reports including two from Dr Galappathie, Consultant Psychiatrist, dated 5th January 2023 and 9th March 2023 on the appellant's mental health and another on scarring from Dr Robinson dated April 2014.

5. First-tier Tribunal Judge S J Clarke (the judge) allowed the appeal on 2nd April 2023 finding that the appellant succeeded on asylum and human rights grounds (Article 3 and 8).

6. The Secretary of State's grounds of appeal to the Upper Tribunal were as follows:

   (i) the judge erred in her approach to the Section 72 certificate because the appellant had two convictions resulting in sentences in excess of 12 months. It was asserted that the date of hearing was relevant.

   (ii) the judge failed to give adequate reasons for departing from the findings of the 2011 First-tier Tribunal decision (bearing in mind the appellant had been in the UK since that decision) and she failed to have regard to Devaseelan v The Secretary of State for the Home Department [2002] UTIAC. The previous tribunal had found the appellant neither credible nor reliable.

   (iii) The judge erred in approach to Article 3 on medical grounds and failed to have regard to caselaw including **AM (Zimbabwe)** [2020] UKSC 17.

   (iv) The judge failed to make any findings in relation to whether the statutory exceptions under Section 117C of the Nationality Immigration and Asylum Act 2002 had been met and therefore erred in finding that the threshold of very compelling circumstances was met for allowing the appeal on Article 8 grounds.

7. Ms Dirie on behalf of the appellant submitted a Rule 24 response which highlighted inter alia that ground 1 was misconceived because the author had applied the amended version of section 38 of the Nationality and Borders Act 2022. The relevant date was that of conviction and the appellant's conviction predated the reduction of prison sentence by Section 38 of the Nationality and Borders Act 2022 of Section 72 of the Nationality Immigration and Asylum Act 2002, from 2 years to 12 months on 28th June 2022.

8. Mr Clarke conceded at the outset of the hearing that ground (i) was misconceived and he placed no reliance on it. We consider that he was right to do so for the reasons given in the Rule 24 notice. He also acknowledged that should the appellant succeed in relation to Article 3 that would found the basis for allowing the appeal on Article 8 grounds which was parasitic on those findings. Indeed, he also acknowledged before us that the asylum claim rested on the findings made intertwined with the findings on Article 3 but if we found for the Secretary of State, the appeal as a whole should be remitted to the First-tier Tribunal. He submitted that the judge had failed to apply Devaseelan properly. It was important to look at the starting point which was the underlying decision and Mr Clarke reminded us of the key principles in Devaseelan and which the judge effectively failed to apply. The appellant had been in the UK for 11 years prior to the previous hearing in 2011 and only accumulated evidence afterwards to support his current appeal. No consideration was given to that. A considerable number of credibility findings were made by the previous tribunal which were not addressed. Simply the judge found the medical evidence determinative of the appeal but the departure from the previous decision in the light of its reasoning was inadequately reasoned. The judge had not properly applied **KV (Sri Lanka) v Secretary of State** [2019] UKSC 10, specifically paragraph 25. The conclusion on credibility rested with the judge even where the category of scarring fell into categories a-e. The judge simply adopted the reasoning of the medical experts and when their reports were analysed, there were significant difficulties with the judge's improperly reasoned adoption. Despite not considering methodology in compiling the medical reports the judge nonetheless found them determinative. There was simply no return to the credibility findings of the previous decision. Paragraph 12 was a clear indication that Devaseelan v The Secretary of State for the Home Department [2002] UTIAC had not been followed. The decision read as a decision de novo and there were no findings on the claim itself and the actual substance of what happened.

9. The judge in terms of ground 3 failed to have proper regard to the case law on Article 3 and the fact that there were temporal issues and thresholds to be considered. AM (Zimbabwe) [2020] UKSC 17 held that the appellant must show there are substantial grounds for believing that they would face a real risk of being exposed to either a serious rapid and irreversible decline in health resulting in intense suffering or a significant reduction in life expectancy. There were specific temporal issues in terms of the mental health of the applicant declining and it was difficult to follow the judge's reasoning. Further the judge had failed to have regard to **HA (expert evidence; mental health) Sri Lanka** [2022] UKUT 111 (IAC) when considering the medical reports. Dr Galappathie did not reflect the GP

evidence and he referred to a psychiatric report in 2022 which was not before the Tribunal. It was extraordinary if the appellant had jumped from a train in 2017 and only raised this event in 2022. It was not in the GP reports and the psychiatric report from 2022 was not before the Tribunal. As such the judge had not properly engaged with aspects of credibility and the principles of J and just jumped to MY (Suicide risk after Paposhvili) Occupied Palestinian Authority [2021] UKUT 232.

10. Ms Dirie submitted at the hearing that in relation to Grounds 2 and 3 the judge applied the correct legal tests, and the grounds were no more than a disagreement. It was clear why the appeal had been allowed on Article 8 grounds. There was no challenge to the medical reports in the grounds themselves and Mr Clarke was attempting to reargue the case. The judge had referred to the Devaseelan guidelines and which were not a strait jacket and she noted there was no medical evidence before the previous judge. It was implicit in the way the judge wrote the decision that she had accounted for the Devaseelan principles. At paragraph 30 the judge had regard to the caselaw.

11. In the event that an error of law was found the matter should be returned to the First-tier Tribunal for a whole set of new findings.

Conclusions

12. The determination of Judge Hollingsworth found the appellant neither credible nor a reliable witness. The appellant claimed to have been detained having deserted from military service in Iran and tortured. As the First-tier Tribunal decision of 2009 recorded at [45] 'not even after his illicit arrival in the United Kingdom did, he ever attend a hospital or doctor' and also confirmed 'he said he had no medical problems'. Chronologically his account was found to be at variance with the objective material evidence on conscription in Iran. He was also found to be aware of the asylum process despite having spent a number of years in the UK illegally and failing to claim asylum. The Tribunal thought him Iraqi because of what was recorded in the OASys report at 3.6 as stating that 'he is originally from Iraq'. At [53] the previous Tribunal acknowledged his scarring but found 'these are not conclusive as to causation. No medical evidence has been provided to show on what basis these injuries were sustained'. The Section 72 certificate was upheld 'on a presumption basis only'.

13. The judge at [28] states

> 'I find that having the benefit of the medical evidence, noted to be missing by the previous Tribunal, and which goes to the core of the claim, and the ability of the Appellant to provide a reliable account if *(sic)* he has suffered PTSD at the time of the previous hearing, and the medico-legal report is very soon afterwards, the Appellant has shown that he was detained and tortured as claimed, for a Convention reason, imputed political opinion as being anti-regime as a draft evader…',

14. At [29] she stated, 'the appellant's account of abuse and torture is corroborated by the medical evidence and this also supports his nationality – that he is Iranian'.

15. **BK (Afghanistan) [2019] EWCA Civ 1358** set out the principles of **Devaseelan** as follows:

> *"32. The Tribunal in Devaseelan then gave guidance that can be summarised as follows:*
>
> *(1) The first adjudicator's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made. In principle issues such as whether the appellant was properly represented, or whether he gave evidence, are irrelevant to this.*
>
> *(2) Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator.*
>
> *(3) Facts happening before the first adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second adjudicator.*
>
> *(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.*
>
> *(5) Evidence of other facts, for example country evidence, may not suffer from the same concerns as to credibility, but should be treated with caution.*
>
> *(6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.*
>
> *(7) 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. Such reasons will be rare.*
>
> *(8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case.*
>
> *...*
>
> *36. Having set out the guidance and considered the criticisms made of it by the claimant in that case, Judge LJ said:*

> *'40. … The great value of the guidance is that it invests the decision-making process in each individual fresh application with the necessary degree of sensible flexibility and desirable consistency of approach, without imposing any unacceptable restrictions on the second adjudicator's ability to make the findings which he conscientiously believes to be right. It therefore admirably fulfils its intended purpose'.*

16. We acknowledge that the judge at [12] to [15] made reference to Devaseelan and as can be seen from [36] of **BK** there needs to be a degree of sensible flexibility. The judge's approach to the previous decision, however, shows she did not engage with the previous findings but departed from them wholesale on the basis of the medical evidence which she did not critically engage with as required by caselaw. **Budhathoki** [2014] UKUT 00341 (IAC) confirms that it is generally unnecessary and unhelpful for FtT judgments to rehearse every detail or issue raised in a case but, it is necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost.

17. In relation to the appellant's claim, the judge does not reason her departure from the previous decision save in relation to nationality and then the engagement is limited. The judge states she accepts the appellant is from Iran because he 'always maintained' that and she indicates at the outset at [15] that she accepts his claim on nationality because the 'torture has the hallmarks of being carried out in Iran'. Her expertise on that issue, however, nor that of the experts was identified. That said, the judge's approach to nationality appears to be the sum of her engagement with the previous credibility findings. She then proceeds to rely on the medical reports. At [16] she states this

> *'Since the Tribunal decision, the appellant has accessed the NHS for medical services, and the reports were placed before the psychiatrist who referred to them and it can be seen that from March 2011, two months after the first determination the records date from'.*

18. She does not engage with limb (4) of Devaseelan (as set out above) even though she records that the medical records stem from 2 months after the first determination. She did not ask herself whether the evidence should be treated with caution as per limb (5) of Devaseelan.

19. Although the grounds to the Upper Tribunal did not directly challenge the medical evidence itself, the previous FtT tribunal found the appellant neither credible nor a reliable witness having given evidence at variance with the objective background material and further because of the differing accounts given; that was not taken into account as a starting point when the judge assessed the medical evidence or their content. She simply did not reason how the medical reports, on proper analysis, founded a reversal of the previous adverse credibility finding and the decision reads that she merely deferred to the findings of the experts on credibility.

20. As held in **KV** 'The conclusion about credibility always rests with the decision-maker following a critical survey of all the evidence, even when the expert has placed his conclusion within category (a) or (e). Indeed, in an asylum case in which the question is only whether there is a real possibility that the account given is true, not even the decision-maker is required to arrive at an overall belief in its truth; the inquiry is into credibility only of a partial character'. The judge appeared to accept Mr Robinson's scarring report (although we note it was said not to be compliant with the Istanbul Protocol) without reflection and without considering the approach advanced in **KV** or the previous decision. The scarring report expert appears to step outside his remit when referring to the 'generally known history of torture methods in Iran, the appearance of his scars and his mental state'.

21. No reference was made to [44] of the previous FtT decision which, notwithstanding the scarring, noted that 'had at no stage ever has the appellant ever had medical treatment a feature which we think wholly undermines his claims to torture'. When simply accepting the new reports in order to find the appellant's claim credible, particularly on mental health, the judge failed to engage with the GP medical reports which identified no mental health issues until March 2022 when the GP recorded 'Recently seen psychiatrist through his lawyer-got report of 41 pages'. That report was not produced. The judge produced large extracts from the experts' reports but at no point, when departing from the previous decision, did she consider those medical reports in the light of the previous findings of the First-tier Tribunal that he was not credible nor that his GP reports showed no sign of PTSD until 2022 albeit he was registered with the GP from 2014. The judge did not comply with **HA** which emphasises that existing GP notes are directly relevant and the discrepancies between the GP notes and expert reports should be addressed. Bearing in mind the total reliance the judge placed the expert reports it was incumbent upon her in her approach to the evidence to comply with **HA** particularly headnotes (5) and (6); headnote (6) held:

> *'In all cases in which expert evidence is adduced, the Tribunal should be scrupulous in ensuring that the expert has not merely recited their obligations, at the beginning or end of their report, but has actually complied with them in substance...'*

22. We find there is a material error of law in relation to ground 2 which fundamentally undermines the sustainability of the decision. We therefore address ground 3 briefly. Paragraphs 30 and 31 were difficult to decipher because whole extracts of caselaw had been inserted into the decision without clear marking of quotations and they simply merged with the text and thus in her approach to suicide the judge apparently makes reference to return to Nigeria. Even if fear is subjective, it must be *genuinely* held and bearing in mind the difficulties we have raised in the judge's treatment of the appellant's credibility in the light of the previous decision, we find there is an error of law in her approach. We preserve none of the findings. The matter will be reconsidered de novo in line with Devaseelan.

Notice of Decision

The Judge erred materially for the reasons identified. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007

(TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Helen Rimington

Judge of the Upper Tribunal Rimington

Immigration and Asylum Chamber

Signed 27th July 2023