IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002567

First-tier Tribunal No: PA/51944/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 25 September 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

G M
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms P. Yong, Counsel, instructed by Wimbledon Solicitors
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

Heard at Field House on 31 August 2023

DECISION AND REASONS

1. By a decision, dated 23 April 2023, Judge of the First-tier Tribunal Craft ("the judge") dismissed an appeal brought by the appellant, a citizen of Kenya, against a decision of the Secretary of State, dated 4 May 2022, which refused his asylum, humanitarian protection and human rights claims. The appellant now appeals to this Tribunal against the decision of the judge.

2. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

The factual background

3. The appellant's immigration history is lengthy and does not require detailed recitation here. It is sufficient for our purposes to note that he first entered the United Kingdom on 21 January 2007 with leave to enter as a student. His leave was extended but subsequently cancelled on his return from a trip to Kenya on 22 April 2009. After some legal proceedings and a failed application under the EEA Regulations, following which he was detained for removal, the appellant claimed asylum on 27 February 2019. He claimed that he was gay and that, during his trip to Kenya, he had been ill-treated by the police. While he was in immigration detention the appellant obtained a rule 35 report, dated 3 April 2019, which stated he may be a victim of torture. However, his application was refused on 9 April 2019. The respondent did not accept his claim as being truthful.

4. The appellant appealed and his appeal was heard by Judge of the First-tier Tribunal M A Khan on 17 May 2019. In a decision promulgated on 5 June 2019 Judge Khan found the appellant had not been a credible or consistent witness. He did not accept his account of being gay and having been ill-treated in Kenya in April 2009. He gave no weight to the rule 35 report, which noted the appellant had three scars on his legs consistent with cigarette burns, because the appellant had not mentioned being burned with cigarettes at his interview. Judge Khan does not appear to have had any other medical evidence to assist him but he did note the appellant had produced a copy of charge sheet which the appellant claimed had been posted to him by his lawyer in Kenya shortly after he had arrived in the United Kingdom in 2009. Again the judge gave this document no weight because the appellant had not produced it at his interview and subsequently said that was because he had forgotten about it.

5. The appellant was granted permission to appeal against Judge Khan's decision primarily because it was arguable that Judge Khan had erred in his analysis of the appellant's Article 8 claim. Upper Tribunal Judge Lesley Smith dismissed the appeal after a hearing on 8 August 2019. She found Judge Khan did not err in refusing to grant the appellant an adjournment to obtain expert medical evidence. Counsel for the appellant disclosed in submissions that the appellant had not begun treatment for his mental health. Upper Tribunal Judge Smith noted the appellant had not been able to provide any medical notes or even his own evidence of his condition before applying for an adjournment. As at the date of hearing, she noted that the appellant had produced a letter from Berkshire Healthcare NHS Trust, dated 31 July 2019, offering to arrange an appointment for the appellant if he contacted them. There was, in her words, "absolutely no evidence of any medical treatment".

6. The appellant's solicitors made a fresh claim on 9 March 2020, which maintained his previous account. Supporting evidence was provided including letters from Croydon Unitarian Church and Rainbows Across Borders, a scarring report by Dr. J. Hajioff, dated 9 November 2019, a

report by Dr. D. King, a clinical psychologist working for Berkshire Traumatic Stress Service, dated 3 January 2020, and a letter from S. Kasule, a specialist psychological therapist, working for Ultimate Counselling, Training and Support Services, dated 12 February 2020.

7. In a decision dated 4 May 2022 the respondent rejected the appellant's fresh claim. The respondent accepted that the appellant is a gay man and that he was in a same-sex relationship. However, it was not accepted that his scars and diagnosis of PTSD were the result of being mistreated by the police in Kenya and his account of past persecution was not accepted. It was not considered the appellant had shown he faced a real risk of persecution on return. There were few, if any, instances of prosecution for having same-sex relationships and there was not a reasonable likelihood of persecution by the state authorities. Whilst society was conservative and there was discrimination and harassment of gay men it was considered there was a sufficiency of protection against non-state actors. The appellant did not need to relocate because he came from Nairobi, which was more tolerant. The letter noted the appellant had produced a print-out of a Facebook post by Peter Kariuki from February 2020 stating that four of his clan members had declared that the appellant should be "eliminated" following confirmation that he is gay and that his family disowned him. However, little weight was placed on this message.

The judge's decision

8. The judge noted that the appellant submitted that he faced persecution in Kenya where same-sex relationships are criminalised. The appellant and two witnesses gave oral evidence at the hearing. The appellant's appeal bundle contained additional medical evidence in the form of a detailed report by S. Kasule, dated 12 July 2022, a psychiatric report by Dr. A. Mir, dated 3 August 2022, and a further scarring report by Dr. B. Sommerlad, dated 6 September 2022. The bundle also contained a country expert report by Prof. M. I. Aguilar, dated 16 July 2022.

9. In a lengthy and detailed decision running to 23 pages, the judge dismissed the appeal on all grounds. He directed himself that Judge Khan's findings were only a starting-point and each case has to be considered on its own facts. He considered the medical evidence which had not been before Judge Khan but concluded the appellant was not credible and he had not suffered past persecution. He went on to analyse the background evidence of the risk on return to the appellant as a gay man and concluded the appellant had not discharged the burden of proof.

The issues on appeal to the Upper Tribunal

10. Judge of the First-tier Athwal granted permission to appeal on all grounds. She considered it was arguable that the judge had "erred by failing to adequately consider all the relevant medical evidence, make findings of fact and provide adequate reasons", particularly with regard to "the

weight he attached to the scarring reports prepared by Dr. Hajioff and Dr. Sommerlad".

11. There are three grounds of appeal. Ms. Yong, who drafted the grounds of appeal, set them out to us in her oral submissions.

12. The first ground is actually a series of discrete arguments but the first of them is that the judge failed to consider adequately all the medical evidence. In particular, the judge was wrong to reduce the weight given to Dr. Mir's report because he had not seen the appellant's medical records. Dr. Mir was aware of the appellant's medical history. The ground also argues the judge erred by wrongly relying on a perceived discrepancy as between the two scarring reports. The judge had not had regard to the rule 35 report and he had failed to make findings on the scars. The judge's assessment of Article 3 and suicide risks was inadequate. The judge failed to give appropriate weight to Prof. Aguilar's report.

13. The second ground argues the judge failed to make findings on the risk to the appellant as a consequence of social media posts showing the appellant taking part in LGBTI activities in the United Kingdom. The judge failed to consider the appellant's claim that he was threatened by Peter Kariuki on Facebook.

14. The third ground argues the judge failed to make an adequate assessment of whether the appellant would face "insurmountable" (sic) obstacles to his integration in Kenya without family support and given his mental health difficulties. The respondent accepts the appellant is in a relationship but the judge failed to make a finding as to whether this amounted to family life.

15. On behalf of the respondent, Mr. Tufan submitted that the judge had properly considered the scarring reports and correctly noted there could have been other causes for the scars. He noted that Dr. Hajioff and Dr. Sommerlad disagreed as to the size of the scars, which had not been picked up by the judge. He said the absence of any reference to the rule 35 report was immaterial. He emphasised Dr. Mir's report was expressed in cautious terms because he had not seen the appellant's medical records. The second and third grounds did not disclose material errors either.

16. In answer to questions from the bench, Ms Yong confirmed that the Facebook page had not been supported by other evidence, such as evidence the threat had been reported to Facebook or any reaction to the fact Peter Kariuki is classed as a "friend". Nor could she find a copy of the rule 35 report in the bundles or confirm that it had been before the judge.

17. Having heard full submissions we indicated that we would allow the appellant's appeal with written reasons to follow and that we would direct that the appeal should be remitted to the First-tier Tribunal for rehearing.

The law

18. The jurisdiction of the Upper Tribunal on an appeal from the First-tier Tribunal lies only in relation to an error of law, not a disagreement of fact. Certain findings of fact are capable of being infected by an error of law, as summarised in R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 at [9]. The criteria summarised by the Court of Appeal include the following:

> "i. Making perverse or irrational findings on a matter or matters that were material to the outcome.
>
> ii. Failing to give reasons or any adequate reasons for findings on material matters.
>
> iii. Failing to take into account or resolve conflicts of fact or opinion on material matters.
>
> iv. Giving weight to immaterial matters.
>
> v. Making a material misdirection of law on any material matter.
>
> […]
>
> vii. Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

19. It is important, as has been repeatedly emphasised in many authorities, not to construe disagreements of fact as errors of law. See the Presidential Panel in Joseph (permission to appeal requirements) [2022] UKUT 218 (IAC) at [13].

The judge's approach to the medical evidence

20. Against that background we now turn to the grounds of appeal. In our judgement, the judge was perfectly entitled to reduce the weight to be given to Dr. Mir's report for the reasons he gave.

21. Dr. Mir, a consultant psychiatrist, set out the documents he had received with his instructions, which included "medical evidence" (see [3.1]). However, he specified that he did not have access to the appellant's "full medical records" (see Past psychiatric history as per the medical records [4.6.1). In his conclusion he again stated "I do not have access to the full medical records and I would like to have sight of the same as they may help me alter my opinion" (see Limitation of the report [7]).

22. The judge expressly noted the limitation on Dr. Mir's report. He also noted that Dr. Mir had received a letter from the appellant's GP and that the appellant had undertaken 12 CBT sessions with the NHS and 16 psychological sessions arranged by Rainbows Across Borders. He noted Dr. Mir's opinion that the appellant suffered from mild to moderate depressive

symptoms and symptoms of PTSD. (see [22] to [24] of the judge's decision)

23. In reaching his conclusions the judge asked himself whether the medical evidence justified making a departure from Judge Khan's findings. He noted that the respondent did not challenge that the appellant suffered from depression and PTSD. He identified the issue as being whether these were caused by the claimed arrest and detention in 2009. He found the first time the appellant was given a diagnosis of PTSD was in October 2019 and he identified the importance of the GP medical records. He noted Dr. Mir's opinion was based entirely on what the appellant had told him. No medical notes had been provided and the single letter from the GP to Dr. Mir did not mention PTSD or depression. We see no error in this reasoning.

24. The judge did note at [67] that no submissions were made to Judge Khan that the appellant was suffering from PTSD. That appears to be correct, at least according to Judge Khan's record of the hearing, but we note that Judge Khan did consider the rule 35 report which the appellant had obtained in April 2019, a month before that hearing, and which referred to the appellant complaining of generalised anxiety, insomnia, panic attacks and flashbacks. He was expressing suicidal thoughts and the doctor who wrote the report noted he had been referred to the mental health team[1]. The judge was not therefore quite correct in stating that the appellant had not raised his mental health and well-known symptoms of PTSD before the hearing in May 2019.

25. However, in our judgement, the judge's overall observation that there was an absence of any medical evidence confirming the appellant sought or received any treatment for mental health problems prior to early 2019 holds good. The appellant had access to a GP and his failure to seek treatment was inconsistent with his account that he had been unwell since the incident in 2009. (see [65] to [70] of the judge's decision)

26. Ms Yong's argued that Dr. Mir did take into account the appellant's medical history because he referred to the psychological treatment and CBT which the appellant had been receiving. However, that does not engage with the judge's reasoning that there was no evidence of the appellant seeking treatment for ten years. We see no material error in the judge's reasoning that the weight he could give Dr. Mir's report was restricted in accordance with the express limitation in Dr. Mir's report.

27. On the other hand, we do find the judge erred in misinterpreting the scarring reports. At [68] he states as follows:

> "There is a difference of opinion between the scarring experts as to whether there are many, or few, other possible causes of the scarring from cigarette burns. The Tribunal assumes a second opinion was sought because of Dr Hajioff's more cautious conclusion. The position remains uncertain."

[1] As said, we have not seen the rule 35 report and we have relied on the references to it in the decision of Upper Tribunal Judge Lesley Smith.

28. It is clear from this passage that the judge placed significant weight on what he considered to be a difference of opinion between the experts regarding the cigarette burns. However, we find that is not an accurate description and that there is in reality no material difference between the conclusions of Dr. Hajioff and Dr. Sommerlad.

29. Dr. Sommerlad examined the appellant on 29 July 2022. He identified and photographed two scars at the top of the appellant's right leg and one at the top of his left leg. His opinion is expressed as follows:

> "The three scars that [the appellant] points out are small, broadly circular scars, which are likely to be the result of small burns and typical of cigarette burns.
>
> > **Istanbul Protocol (d) typical of**: this is an appearance that is usually found with this type of trauma but there are other possible causes.
>
> There is a high consistency between the scars I examined and the account given by [the appellant] of the events in which he alleges they were sustained."

30. Dr Hajioff examined the appellant on 8 November 2019. He also identified three round scars on the appellant's legs, as well as scars on the appellant's head which were attributed to a road accident in 2008. Regarding the scars on the appellant's legs, he wrote:

> "33. The three circular scars on his thighs are from cigarette burns. I judge those scars to be ***typical of*** cigarette burn injuries. I have seen many such burns and they are less than a centimetre in diameter, with a rough surface that is slightly pigmented.
>
> 34. The age of he scars is also consistent. Scars age slowly. At first they are vividly coloured, but, gradually, they become paler and, eventually, after about a year, are very light coloured or take on the colour of surrounding skin. With darker skins, there may be some increased pigmentation. His scars are pale apart from the cigarette burns.
>
> 35. There are, of course, other possible causes of the injuries, such as accidental trauma. …"

31. In an annex to his report, Dr Hajioff sets out the Istanbul Protocol definitions. There is no doubt that the reference in [33] to "typical of" is intended as a reference to those criteria.

32. We note that the judge summarised Dr Hajioff's conclusions at [17] as follows:

> "He found the scars which he examined were consistent with the appellant's description of the trauma he suffered. Under the Istanbul Protocol the finding of consistent means that the scarring could have been caused by the trauma described but is non-specific and there are many other possible causes".

33. As noted, that was not Dr Hajioff's opinion. It is possible the judge was referring to the concluding paragraph of Dr Hajioff's report in which he said that the appellant has signs of injury "consistent with" his account of what happened to him (see [38]) but we do not read that as anything other than an overall conclusion.

34. We consider the judge materially erred in his assessment of whether the medical evidence justified a departure from Judge Khan's findings. His summary of Dr Hajioff's report involved a mistake of fact meeting the criteria at para 9(vii) of *R (Iran)*. The judge's approach is not sustainable and his decision must be set aside.

35. We do not propose to consider the remaining grounds of appeal in detail in view of the fact we have decided to set aside the judge's decision. The Facebook post which the appellant has produced stands in isolation and the judge's failure to have regard to it would not, in our judgement, amount to a material error.

36. Nor are we able to say that the judge's failure to make a clear finding on whether the appellant's relationship amounts to family life amounts to an error of law. According to the appellant's partner's witness statement, he has been refused asylum and is without status in the United Kingdom. The judge's assessment of paragraph 276ADE(1)(vi) was detailed and did refer to the medical evidence regarding the appellant's mental health.

37. We have had regard to para 7.2 of the relevant Senior President's Practice Statement. The entirely of the appellant's protection claim must be considered afresh by a different judge (not Judge Craft). None of the judge's findings on the protection claim are preserved. The judge hearing the remitted appeal will have to treat Judge Khan's findings as a starting-point but will also note the change of position on the part of the respondent that it is now agreed that the appellant is a gay man who is in a same-sex relationship in the United Kingdom. Regardless of the findings which are made on the appellant's claim of past persecution, careful consideration will have to be given to the up to date background evidence on the risk to openly gay men living in the appellant's home area of Nairobi.

38. Given the overlap with Article 3 and Article 8 it is appropriate for these elements of the claim to be re-heard as well with up to date evidence and we shall not therefore preserve the judge's findings on these grounds of appeal. For the avoidance of doubt all the grounds of appeal shall be re-heard by the First-tier Tribunal.

39. The nature and extent of the factual findings to be made are such that this is an appropriate case to be remitted to the First-tier Tribunal.

NOTICE OF DECISION

The decision of Judge Craft involved the making of an error of law and is set aside.

The appeal is remitted for hearing de novo in the First-tier Tribunal by any judge other than Judge Craft.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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.

Signed: N Froom

Deputy Upper Tribunal judge Froom Dated: 11 September 2023