IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004762

First-tier Tribunal No: PA/55817/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

25th March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

EMH
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms Keskin, Counsel
For the Respondent: Miss Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 6 March 2024

DECISION AND REASONS

Order Regarding Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was granted by the First-tier Tribunal. I have not been asked to rescind that order. I have considered the principles of open justice. I am of the view that it is in the interests of justice that order continues. 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.

Introduction

1. The Appellant is a national of Mexico. His appeal against the Respondent's decision dated 26 November 2021 to refuse his claim to be in need of international protection was dismissed by First-tier Tribunal Judge Lester in a decision promulgated on 28 September 2023.

2. Permission to appeal was granted on all grounds by First-tier Tribunal Judge Galloway on 26 October 2023.

3. The matter came before me to determine whether the First-tier Tribunal (FTT) had erred in law, and if so whether any such error was material such that the decision should be set aside.

Error of Law – Grounds of Appeal

4. Ground one asserts that the FTT employed an unreasonably high threshold for credibility and based his assessment on minor inconsistencies/discrepancies. It is submitted that the FTT Judge did not highlight inconsistencies in the Appellant's accounts, save for in relation to money laundering and the main criticism of the Appellant's account was a discrepancy in a name as between the Appellant's account and court documents. It is submitted that the FTT Judge did not take account of all of the documents that corroborated his account or the general consistency of his account. It is argued that the Appellant should have been afforded the benefit of the doubt with regard to the discrepancy in a name. It is further argue that despite the self-direction that corroborative evidence is not required, the FTT Judge makes a negative credibility assessment as the Appellant did not adduce evidence in relation to a hotel stay prior to his flight and it is argued that this is unreasonable.

5. Ground two asserts that there was a failure to give due weight to a medical report. It is submitted that the FTT Judge unfairly discounts the expertise of the doctor in the realm of physical scarring examination because he is a Consultant Psychiatrist and concludes that he is 'not a trauma doctor/surgeon'. It is submitted that placing limited weight on the report for this reason is an error as the doctor was a practising physician for 14 years before becoming a psychiatrist, is an approved Forensic Medical examiner (police surgeon) and reports and documents injuries and their possible causation through body mapping, including assessing scarring in potential victims of torture. The doctor therefore had sufficient expertise.

6. It is further submitted that the FTT artificially separated the medical report from the credibility assessment of the Appellant and there was no evaluation of the impact of the trauma on credibility. It is submitted that the assessment of the medical evidence was made only after the FTT had reached a finding on credibility.

The Grant of Permission

7. Permission was granted on all grounds. Judge Galloway considered that it was arguable that the Judge considered the medical evidence separately and not part of the overall credibility assessment. It was arguable that the Judge had incorrectly applied less weight to the expert evidence.

The Rule 24 Response

8. There was no Response. Miss Rushforth maintained that the decision contained no error of law for the reasons below.

The hearing

9. As there was no Response I invited Miss Rushforth to outline the Respondent's position first. In summary, she submitted that the FTT Judge's approach to the medical evidence was permissible. The fact that the medical evidence was considered at the end of the decision was not fatal as what was required was for the FTT to make a decision by reference to all the relevant material and he had to start somewhere (QC (verification of documents; *Mibanga* duty) China [2021] UKUT 00033 (IAC). His conclusions on the doctor's expertise were open to him. The FTT applied the correct burden and standard of proof and considered a number of significant discrepancies. His conclusions on corroborative evidence were underpinned by TK (Burundi) . He was not bound to accept the Appellant's evidence.

10. Miss Kesic expanded on the grounds of appeal. She argued that the discrepancies were only minor and the FTT made dangerous plausibility findings. With regard to the medical report, the doctor's expertise was not acknowledged and the report was robust and well-reasoned. The medical evidence was considered separately and had it been properly considered the outcome may have been materially different.

Conclusions – Error of Law

11. The Appellant's arguments in relation to the findings on the medical evidence are twofold: firstly that the FTT Judge's approach offends against the principle in Mibanga and secondly that his finding that the expert exceeds his expertise was not open to him on the facts of the case.

12. The FTT Judge's credibility findings are set out at paragraphs 10 to 24. In those paragraphs he considers the Appellant's evidence both oral and documentary and finds that there are a number of discrepancies and a lack of corroboration where evidence could reasonably be obtained. He does not consider the medical evidence before he states at paragraph 24:

> "I find that when assessing his credibility in the round that all of the matters I have set out above impact his credibility and the weight that I can give to his evidence. I find that he is not credible."

13. After reaching that conclusion he considers the medical report of Dr Zafar at paragraphs 25 to 37 of the decision. At paragraph 37 he states that a number of matters "are such that they affect the weight that I can attach to the report conclusions". Those matters are said to be that the expert did not have access to the medical records and was not a

trauma specialist and that whilst the expert concluded that the scars were highly consistent he had noted in examination that there were other potential causes in respect of all six scars which he considered.

14. I have considered firstly whether the reasons given for apparently rejecting the medical expert evidence were adequate and sustainable because if they were, even if the decision discloses a Mibanga error it would be immaterial.

15. Dr Zaffar is a Consultant Psychiatrist. In his "Outline of Experience" he sets out that he received his basic medical qualification in 1997 and became a psychiatrist in 2011. He is an approved Forensic Medical Examiner (Police Surgeon). With regard to his expertise in scarring he states that he reports and documents injuries and their possible causation through body mapping and is well versed in the requirements of the Istanbul Protocol and the combination of this and his work as an FME/Police Surgeon has provided him with the experience required to assess scarring in potential victims of torture.

16. Dr Zaffar concludes in his report that the Appellant had suffered from a range of symptoms which would meet the diagnostic criteria of PTSD, a Depressive Disorder, Panic Disorder and Generalised Anxiety Disorder as a consequence of the relevant incident. He concludes that the Appellant should be treated as a vulnerable witness in line with the Joint Presidential Guidance Note No 2 of 2010 on account of his mental health conditions. In relation to the scarring, he conducted a physical examination, photographed and described the scars and gave his opinion on the consistency with the Appellant's account. He notes, in accordance with the Istanbul Protocol, that it is the overall evaluation of all lesions, and not the consistency of each lesion with a particular form of torture that is important in assessing a person's torture 'story'. His scarring conclusion is that the scars are over 12 months old and in his opinion, in line with the Istanbul Protocol, the lesions and scarring patterns are highly consistent with the Appellant's account. He came to his conclusions due to the location and appearance of these scars.

17. The expert's report was relevant in relation to the consistency of the Appellant's account with his reported symptoms both psychological and physical. It was also relevant to the question of whether he should be treated as a vulnerable witness.

18. In MN v Secretary of State for the Home Department [2020] EWCA Civ 1746, [2021] Underhill LJ set out the Court's view of the law on the authorities referred to in that case in relation to expert evidence about credibility:

    (1) The decision whether the account given by an applicant is in the essential respects truthful has to be taken by the tribunal or CA caseworker (for short, the decision-maker) on the totality of the evidence, viewed holistically – *Mibanga*.

(2) Where a doctor's opinion, properly understood, goes no further than a finding of "mere consistency" with the applicant's account it is, necessarily, neutral on the question whether that account is truthful – see *HE (DRC)*, but the point is in truth obvious.

(3) However, it is open to a doctor to express an opinion to the effect that his or her findings are positively supportive of the truthfulness of an applicant's account (i.e. an opinion going beyond "mere consistency")[20]; and where they do so that opinion should in principle be taken into account – *HK*; *MO (Algeria)*; and indeed, though less explicitly, *Mibanga*. In so far as Keene LJ said in *HH (Ethiopia)* that the doctor in that case should not have expressed such an opinion (see para. 117 (1) above), that cannot be read as expressing a general rule to that effect.

(4) Such an opinion may be based on physical findings (such as specially characteristic scarring). But it may also be based on an assessment of the applicant's reported symptoms, including symptoms of mental ill-health, and/or of their overall presentation and history. Such evidence is equally in principle admissible: there is no rule that doctors are disabled by their professional role from considering critically the truthfulness of what they are told – *Minani; HK*; *MO (Algeria); SS (Sri Lanka)*. We would add that in the context of a decision taken by the CA on a wholly paper basis, a doctor's assessment of the truthfulness of the applicant may (subject to point (5) below) be of particular value.

(5) The weight to be given to any such expression of opinion will depend on the circumstances of the particular case. It can never be determinative, and the decision-maker will have to decide in each case to what extent its value has to be discounted for reasons of the kind given by Ouseley J at para. 18 of his judgment in *HE (DRC)*.

(6) One factor bearing on the weight to be given to an expression of opinion by a doctor that the applicant's reported symptoms support their case that they were persecuted or trafficked (as the case may be) is whether there are other possible causes of those symptoms. For the reasons explained by Ouseley J (*loc. cit.*), there may very well be obvious other potential causes in cases of this kind. If the expert has not considered that question that does not justify excluding it altogether: *SS (Sri Lanka)*. It may diminish the value that can be put on their opinion, but the extent to which that is so will depend on the likelihood of such other causes operating in the particular case and producing the symptoms in question.

19. In relation to the expert's conclusions with regard to the Appellant's mental health, the FTT Judge was clearly correct to have regard to HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 (IAC) as there is no indication in the expert's report that the GP records were engaged with. Although the expert mentions that the Appellant was diagnosed with depression by his GP, the medical records are not in the list of documents seen by the expert. In those circumstances, with reference to headnote 5 of HA, since the expert does not engage with GP records, the FTT Judge was entitled to find that the absence of this engagement lessened the weight that could be attached to the expert's conclusions in relation to the Appellant's mental health. However, the

FTT Judge does not consider whether Appellant should be treated as a vulnerable witness and does not state what weight should be attached to the psychiatric diagnoses having regard to paragraph 121 (5) of MN (above). The FTT Judge states that the absence of the GP records "affects" the weight to be attached but not to what extent.

20. The Upper Tribunal noted in HA that the expert giving evidence about an individual's mental health needs to be aware of the particular position they hold because they are giving evidence about a condition that cannot be seen by the naked eye. The relevance of the Appellant's medical records to Dr Zafar's opinion in relation to the Appellant's scarring is therefore of less significance as it is an assessment of physical symptoms.

21. The factors that affected the weight attached by the FTT Judge to the scarring conclusions were said to be that the expert was not a trauma specialist and that, whilst the expert concluded that the scars were highly consistent, he had noted in examination that there were other potential causes in respect of all six scars which he considered.

22. It is the Appellant's case that he was shot by his father-in-law and had six resulting scars. The overall pattern was found by the expert to be highly consistent with the account meaning that, for the purposes of the Istanbul Protocol, "the lesions could have been caused by the trauma described and there are few other possible causes". This evidence, if accepted, was therefore probative of the Appellant's account to have been shot in the manner described.

23. There is no reference to the expert medical evidence in the credibility assessment from paragraphs 10 to 24 and the findings in relation to the Appellant's credibility make no reference to the expert's conclusions in relation to the scarring. In concluding that the expert had effectively exceeded his expertise, the FTTJ, in setting out the expert's qualifications and experience at paragraph 26, 27 and 37 of the decision, makes no mention of the basis on which the expert asserts he has the relevant expertise, namely that he reports and documents injuries and their possible causation through body mapping and is well versed in the requirements of the Istanbul Protocol and the combination of this and his work as an FME/Police Surgeon have provided him with the experience required to assess scarring in potential victims of torture.

24. I find that the FTT Judge did err in the approach and findings on the medical evidence. I have taken account of Ms Rushforth's submissions that it is not fatal that medical evidence was considered last. If it is evident that the tribunal has in fact taken the expert evidence into account as part of the primary assessment, it does not matter at what particular point in the decision it is specifically referred to. However, basic principle established by Mibanga remains important and it is an error of approach to come to a negative assessment of credibility and

then ask whether that assessment is displaced by other material (MN, paragraph 108, QC (verification of documents; Mibanga duty) [2021] UKUT 33).

25. In this case the FTT Judge did not take the medical evidence into account as part of the primary assessment as all credibility findings were made without reference to it. The medical evidence was considered after the credibility findings were made and although some of the criticisms of the medical evidence were sustainable, others were not. It was open to the Judge to find that the weight he could attach to the psychiatric assessment was lessened by the absence of engagement with GP records but the expert provided reasons based on his clinical experience for being able to assess the causation of the scars and the FTT Judge did not take this into account. He also did not give adequate reasons for failing to take account of the medical evidence of scarring in his primary assessment of credibility in circumstances where the expert concluded that on the overall assessment of the lesions there were few other possible causes. The FTT Judge did not find that he could place no weight on the medical report and in the circumstances also did not explain why the Appellant was not to be treated as a vulnerable witness.

26. In light of these findings the assessment of credibility cannot stand. I have considered whether to remit or retain the case within the Upper Tribunal with regard to the recent decisions of Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC) and AEB v Secretary of State for the Home Department [2022] EWCA Civ 1512. A complete rehearing is required and it is therefore appropriate to remit the appeal to the First-tier Tribunal with no findings preserved.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law.

The decision of the First-tier Tribunal is set aside.

The decision will be remade in the First-tier Tribunal with no findings preserved, not before Judge Lester.

L Murray

Deputy Upper Tribunal Judge
Immigration and Asylum Chamber

19 March 2024