Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03417/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 October 2019	**On 14 October 2019**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

E C
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Quee, Solicitor, Morgan Has Solicitors
For the Respondent: Miss R Bassi, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Beg ('the Judge') sent to the parties on 22 July 2019 by which the appellant's appeal against the decision of the respondent to refuse to grant him international protection was dismissed.

2. Designated Judge of the First-tier Tribunal Macdonald granted permission on all grounds.

Anonymity

3. The Judge did not issue an anonymity order. This is a matter in which the appellant has sought asylum. I am mindful of Guidance Note 2013 No. 1 concerned with anonymity orders and I observe that the starting point for consideration of anonymity orders in this Chamber of the Upper Tribunal as in all courts and Tribunals is open justice. However, I note paragraph 13 of the Guidance Note where it is confirmed that it is present practice of both the First-tier Tribunal and this Tribunal that an anonymity order is made in all appeals raising asylum or other international protection claims.

4. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order:

> "Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to amongst others the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid the likelihood of serious harm arising to the appellant from the contents of his protection claim being known to the public and also information as to his mental health being publicised."

Background

5. The appellant is a Turkish national of Kurdish ethnicity who is presently aged 45. He hails from the Manisa Province of Turkey and has a wife and four children who remain in Turkey.

6. He states that he is illiterate and worked as a painter and decorator in Turkey. Along with a friend he redecorated the HADEP building in his locality and this led to him being threatened and harassed by the police. He subsequently became a member of a Kurdish nationalist political party in Turkey, the PDP. In 2012 he was asked by a friend if a third person who was unknown to him could stay at his house for two days. The appellant agreed and permitted this person to stay, without establishing either his name or his business. A few days later he was taken from his home to the police station where he was interrogated and tortured. He was detained for two nights. Upon his return home he required two weeks in bed so as to recover from his injuries.

7. He was refused leave to enter the United Kingdom on 14 June 2012 as the visa he sought to rely upon was identified as a forgery. Removal directions were set for the same day but were subsequently cancelled. The appellant was eventually granted temporary admission having claimed asylum on 25 June 2012. His asylum application was refused by the respondent on 5 July

2012 and his appeal was dismissed by JFtT Plumptre by way of a decision dated 10 September 2012. JFtT Plumptre found the appellant to be an incredible witness even after giving him due allowance for his memory problems and observing that such problems could in part be attributed to learning difficulties. JFtT Plumptre decided, *inter alia*, that she disbelieved the appellant's account of having been arrested and tortured by the police because he had failed to mention having been tortured at any point during his four interviews with Immigration Officers and during his screening interview. She further noted that his initial asylum application was based upon a purported blood feud which he accepted in his interview no longer existed. The Upper Tribunal refused the appellant's appeal by way of a decision dated 4 April 2013.

8. The appellant submitted further representations in October 2013 which were accepted by the respondent in a decision dated 28 February 2018 to constitute a fresh claim for the purpose of paragraph 353 of the Immigration Rules. The fresh claim was refused with the appellant being granted an attendant right of appeal.

Hearing Before the FTT

9. The appeal came before the Judge sitting at Taylor House on 9 July 2019. Reliance was placed upon a medical report authored by Dr Zapata-Bravo dated 21 July 2015. This report post-dated the appellant's appeal before JFtT Plumptre. The respondent accepted that Dr Zapata-Bravo is able to give expert medical opinion upon the issue of scarring. The FtT also had before it a report dated 18 March 2019 authored by Dr Egnal, a consultant clinical psychologist. These reports were to be read in conjunction with a report from Dr Wozniak dated 30 July 2012 which diagnosed the appellant as suffering from post-traumatic stress disorder (PTSD), a report from Dr Carla Levi a clinical psychologist working for Barnet, Enfield and Haringey Mental Health Trust and a report from Jane Hunt, a GP working on behalf of the Helen Bamber Foundation, dated 13 May 2013.

10. I observe that Dr Egnal states at [9.1] of his report that the appellant has borderline intellectual functioning. Such persons who fall within this group are identified by Dr. Egnal as being able to manage their lives and maintain lower levels of employment but are unable to engage in more difficult tasks such as engaging in complex financial transactions. Dr Egnal also opines that the appellant has mild neuro-cognitive disorder.

11. The Judge dismissed the appeal, concluding at [47] and [48]:

> 'In conclusion, I find for the reasons already set out in Judge Plumptre's determination, that the appellant does not have a well-founded fear of persecution for a Convention reason. For the same reasons I find that there is no credible evidence before me that the appellant is at risk of suffering serious harm on return. He does not therefore qualify for humanitarian protection. For the same reasons I find that the

> appellant's rights under articles 2 and 3 will not be breached. In respect of the medical evidence, for the reasons I have already set out, I do not find that the appellant was arrested and tortured in detention. I find that the appellant can return to Turkey and he will have the support of his wife and children with whom he is in regular contact. Their support will provide a great deal of comfort to him which will enable him to make progress.
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> I find that there are mental health facilities in Turkey. Mr. Pipe said that he does not argue that the appellant will not be able to receive appropriate treatment in Turkey. For the reasons set out in the respondent's refusal letter I find that the appellant does not meet the requirements of paragraph 276ADE of the Immigration Rules. In considering the matter outside the Rules I taken into account *Razgar* [2004] UKHL 27 where the House of Lords held that proportionality must always involve striking a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention.'

Grounds of Appeal

12. The grounds of appeal were carefully and succinctly drafted by Mr Pipe who attended the hearing before the Judge. Five grounds of appeal are identified and overall they can fairly be identified as asserting that the Judge made material misdirections of law, made irrational findings, and failed to consider relevant medical evidence.

13. In granting permission to appeal on 27 August 2019, DJFtT Macdonald reasoned:

> 'While the Judge indicated that she did not find the evidence of the appellant's brothers to be credible (paragraphs 45 and 46) it is arguable that she erred in law for reasons set out in the grounds. In particular it is arguable that the medical evidence before the Judge demonstrated that the appellant was not fit to be interviewed and provided an explanation for the discrepant accounts. In addition, it is arguable that the Judge did not fully consider the report from Dr Egnal. Permission to appeal is granted on all grounds.'

14. No Rule 24 response was filed by the respondent.

Decision on Error of Law

15. The second ground of appeal was the primary focus of the Tribunal at the hearing, namely that the Judge made a material misdirection of law by not considering the guidance given by the Supreme Court in *KV (Sri Lanka) v Secretary of State for the Home Department* [2019] UKSC 10 when assessing Dr Zapata-Bravo's medical opinion as to the scars to be found on the appellant's body. I observe that it was expert evidence presented

by Dr. Zapata-Bravo that was expressly considered by the Justices of the Supreme Court. This ground further details:

> 'Notwithstanding the aforesaid Judge Beg relies heavily at paragraphs 40 to 42 on the judgment of the Court of Appeal in KV (Sri Lanka) which was overturned by the Supreme Court. The Judge's error has led her to approach the medical evidence in an erroneous manner. The medical evidence in this appeal is central to the question of credibility and risks/obstacles to integration.'

16. At its heart this ground challenges the consideration of law as identified at [40] to [42] of the Judge's decision and reasons:

> '[In *HE (DRC – credibility and psychiatric reports) DRC [2004] UKIAT* 00321] Mr Justice Ouseley went on to state at paragraph 19 that the part which a psychiatric report can play in assisting the assessment of credibility is usually very limited indeed. The Supreme Court considered the correct approach to the assessment of medical evidence in asylum claims alleging torture. In *KV (Sri Lanka)* [2017] EWCA Civ 119, the court held that the decision in *KV (scarring – medical evidence) Sri Lanka* [2014] UKUT 230 (IAC) was justified to the extent that the Upper Tribunal (UT) rejected a Sri Lankan asylum-seeker's account that five scars on his back inflicted by a hot metal rod had been caused by torture administered by the Sri Lankan authorities and in inferring that it was self-inflicted. On the other hand, the Court of Appeal clarified that the guidance given by the UT on how medical evidence should be presented in "self-infliction by proxy" (SIBP) cases needs to be treated as having no effect SIBP means that KV might have arranged to have these burn scars inflicted on himself by someone else whilst undertake general anaesthetic.
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> After considering the medical evidence provided by KV's experts, the UT issued guidelines for medical experts to take into account regarding the issue of SIBP when preparing expert evidence for use in asylum cases. Giving the main judgment, Sales LJ held that any further guidance was unnecessary because the correct approach to instructing experts is found in the *Practice Direction of the Immigration and Asylum Chambers of the First-tier and Upper Tribunal 2004*. KV claimed to have been detained, beaten and tortured between 2009 and 2011 by the Sri Lankan authorities for links to the LTTE.
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> The court also considered the effect of the Istanbul Protocol issued in 2004 by the OHCHR on a medical expert's function on the approach to be adopted by the Home Office or the FtT in assessing whether an asylum-seeker would face a real risk or serious ill-treatment on return to his country. Sales LJ noted that the Protocol focuses on the question of the likely immediate cause of a lesion or wound on the body of the complainant which is a proper subject for expert medical evidence. Moreover, it was the court's view that experts should adhere to the tribunal procedure rules and practice directions and not stray from the core areas requiring their input by digressing into areas of evidence and facts outside their expertise, terrain which is properly for the tribunal's assessment.'

17. These paragraphs flow from a detailed consideration of Dr Zapata-Bravo's evidence which commences from [29] of the decision and runs to [38]. In these paragraphs the Judge sets out the nature of the scarring and Dr Zapata-Bravo's professional opinion. At [38] the Judge notes Dr Zapata-Bravo's evidence that the late disclosure of arrest and torture is typical behaviour of a traumatised person who feels shame and difficulty in recounting their experiences. She then identifies the judgment of Mr Justice Ouseley sitting as the President in *HE (DRC – credibility and psychiatric reports) DRC* at [39]. What is striking is that having set out the evidence of Dr Zapata-Bravo and reminded herself at [40] that the approach to be taken to the assessment of such medical evidence in asylum claims has been identified by the Supreme Court in *KV (Sri Lanka)* the Judge then proceeded for three paragraphs to detail the Court of Appeal judgment, and in particular the observations of Sales LJ which were not approved by the Supreme Court. There is no reference to the substance of the Supreme Court's guidance either before or after [40] to [42]. Miss Bassi was unwilling to identify that this was a material error of law but she candidly accepted that the reliance upon the Court of Appeal judgment in *KV (Sri Lanka)* was a misdirection and she accepted on behalf of the respondent that there were difficulties in this decision where the leading authority was not expressly referred to. I appreciate Miss Bassi's difficulties in conceding this matter without instructions and I further note the Judge's efforts to consider the matter before her fairly and with care. However, it can only be a material misdirection of law in an asylum appeal in which the issue of scarring arises to rely upon the Court of Appeal judgment of *KV (Sri Lanka)* and in particular to rely upon the majority judgment authored by Sales LJ which was not approved by the Supreme Court, who instead preferred the observations of Elias LJ in his minority judgment. The Supreme Court gave clear guidance to the courts and to practitioners as to the approach to be adopted as to medical expert and scarring and it is this guidance that is to be followed.

18. In such circumstances the only appropriate course available is for this decision to be set aside. I am therefore not required to consider grounds 1, 3, 4 and 5.

Remittal

19. As to remaking the decision given the fundamental nature of the error of law that has been identified I accept the submissions made by both Miss Bassi and Mr Quee that clear findings of fact have yet to be made in this matter and to date there has been no careful consideration given to the medical evidence presented to the Tribunal. Both representatives submitted that the appeal should be remitted to the First-tier Tribunal. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal that reads as follows at [7.2]:

> 'The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:
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> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
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> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

20. I have reached the conclusion that it is appropriate to remit this matter to the First-tier Tribunal for a fresh decision in all matters. The appellant has not yet enjoyed an adequate consideration of his asylum claim to date and has not had a fair hearing.

Notice of Decision

21. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 22 July 2019 pursuant to Section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

22. This matter is remitted to the First-tier Tribunal for a fresh hearing before any Judge other than Judges of the First-tier Tribunal Plumptre and Beg.

23. No findings of fact are preserved.

24. An anonymity order is made.

Signed: D. O'Callaghan

Upper Tribunal Judge O'Callaghan

Dated: 10 October 2019