Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07844/2019

THE IMMIGRATION ACTS

On the papers on 6 July 2020 **Decision & Reasons Promulgated On 29 July 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AISSATOU SEBHE DIALLO
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ERROR OF LAW FINIDNG AND REASONS

1. On 30 September 2019 First-tier Tribunal Judge Boyes ('the Judge') dismissed the appellant's appeal on protection and human rights grounds.

2. Permission to appeal has been granted by a judge of the First-tier Tribunal the operative part of the grant being in the following terms:

> 2. The grounds assert that the Judge erred in his treatment of an expert report by Dr Turvill including a failure to apply the correct standard of proof when considering the expert evidence. It is also asserted that the Judge failed to consider the risk to the appellant on return to Guinea.
>
> 3. The Judge deals with Dr Turvill's evidence at [39] – [43] of his decision. At [39] the Judge says "*the fact that [the injuries] are consistent with the claim made*

*does not mean that they could **only** have been caused in the manner which was alleged".* (My emphasis). It is arguable that this suggests that the Judge applied the wrong standard of proof when considering Dr Turvill's evidence, particularly in the light of the criticism of the Doctors findings at [42].

4. The other grounds appear to have less strength; however all grounds can be argued.

3. In light of the Covid-19 pandemic directions were sent to the parties on 2 April 2020 advising them of the Upper Tribunal's view that the question of whether the Judge had made an error of law material to the decision to dismiss the appeal could be determined on the papers and inviting the parties to make observations upon this proposal and providing additional time for any further submissions the parties wished to make to be lodged.

4. The respondent replied to the directions in a Rule 24 response dated 16 April 2020. There has as yet been no response from the appellant's representatives, Asylum Justice, based in Cardiff.

5. The Overriding Objective is contained in the Upper Tribunal Procedure Rules. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.

6. Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally.

7. Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides:

34.—
(1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
(2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
(3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
(4) Paragraph (3) does not affect the power of the Upper Tribunal to—

(a) strike out a party's case, pursuant to rule 8(1)(b) or 8(2);
(b) consent to withdrawal, pursuant to rule 17;
(c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or
(d) make a consent order disposing of proceedings, pursuant to rule 39, without a hearing.

8. It has not been shown to be inappropriate or unfair to exercise the discretion provided in Rule 34 by enabling the error of law question to be determined on the papers. There has been no response from the appellant despite having been given ample opportunity to have done

so, and nothing on the facts or in law that makes consideration of the issues on the papers not in accordance with overriding objectives at this stage. The Grounds drafted by Asylum Justice, dated 14 October 2019, set out the appellants case as to why it is alleged the Judge has erred in law.

Background

9. The appellant is a citizen of Guinea born on 18 June 1981. The Judge had the benefit of considering not only the documentary evidence but also seeing and hearing oral evidence being given as set out in the Judge's record of proceedings.

10. The Judge sets out findings of fact from [31] of the decision under challenge recording that he was not satisfied that the appellant's account that she had been trafficked to the United Kingdom for the purposes of domestic servitude, had been persecuted in the past, or faced a real risk persecution and/or harm in the future if returned to Guinea, was credible [34]. The Judge considered the evidence of Dr Turvill between [39 – 43] concluding in the latter paragraph the following:

> 43. The upshot of the medical evidence in terms of the physical injuries is that it is, for its failings, unable to support or buttress the appellant's claim to any significant degree that she was injured or suffered the violence that she claims. There is no explanation as to how the appellant could achieve the injuries in any other way as they are injuries which are not, for example, unique to torture type situations and are such as can occur in ordinary everyday life. Further the diagnosis of the appellant with moderate depression and PTSD does not mean that the claim she is made as to the genesis or foundation of such an illness is accurate or correct. There is no assessment by Dr Turvill as to other potential causes of such illnesses. As is often and routine in the circumstances medical professionals who examine the appellant in relation to their mental health accept at face value that which is claimed. It does not necessarily follow that which is claimed is accurate or correct or is accurately the true genesis of the illness itself. Having considered all that I have about this appellant in terms of her credibility in the plausibility of her account I am not satisfied that her mental illness such as it is, emanates from the matters that she complains of.

11. The Judge notes other concerns in relation to the report noting Dr Turvill's assessment that the injuries are consistent in terms of the Istanbul Protocol, a category which means there are a number of other potential causes for the injuries.

12. The Judge find other inconsistencies in core aspects of the appellant's evidence as carefully noted in the decision under challenge.

Respondents submissions

13. The respondent's submissions in the Rule 24 response are as follows:

> 4. Ground one argues that the incorrect weight has been placed on the medical report of Dr Turvill. It is well established that weight remains a matter for the Judge to decide and that disagreement with the weight given to a particular

aspect of the evidence can only succeed if there is adequate demonstration of irrationality (see **Durueke (PTA: AZ applied, proper approach) [2019] UKUT 00197 (IAC).** There is no such argument of irrationality set out in the grounds relied upon by the appellant.

5. The grounds criticise the FTTJ for failing to conduct an overall assessment of the scars, and that it was inappropriate to focus on specific scars. It is well established that a FTTJ does not have to engage with or rehearse every detail in the evidence but should only have to provide clear reasons for their decision. It is clear [at 40 and 41] that the FTTJ has given examples of scars where the paucity evidence/account given by the appellant does not accord with a conclusion that the injury was consistent with the account given, especially given the account was vague and could not be recalled.

   These are detailed as examples that have informed the overall conclusion/finding of the FTTJ; where the FTTJ details 'I give but a few examples'.

6. At [41] the FTTJ finds that '*if the appellant cannot recall what she was being struck with, it is surprising that Dr Turvill remarked that it is consistent with the scar from a violent blow'.* It is submitted that this is a rational and logical finding that was open to the FTTJ to make.

7. At [42] the FTTJ identifies another example where the medical report lacks expected detail. Again, it was open to the FTTJ to identify such a shortcoming in the report.

8. At paragraph 8 of the grounds, it is suggested that the Tribunal could have assessed the appellant as a vulnerable adult. It is noted that there was no other medical report before the Tribunal beyond that of Dr Turvill completed 18 months prior to the hearing, nor was there an apparent application before the FTTJ to treat the appellant as a vulnerable adult. Nevertheless, the FTTJ expressly recognised and made allowances during the hearing due to the distressful nature of the evidence - see [31]. There is no error in this regard, nor one identified as a consequence.

9. At paras 11 – 13, the grounds criticise the FTTJ for 'departing' from the conclusions of Dr Turvill. The FTTJ is not bound by the opinion of a medical expert in an assessment of credibility. It is submitted that at [43] the FTTJ is simply identifying the fact that Dr Turvill had not conducted an assessment of whether the scars could have been the consequence of everyday activities rather than self-harm. This much was accepted in the grounds at para 11. It was open to the FTTJ to identify any shortcomings in a report which would affect the weight that could be attributed to it, this does not amount to a material error of law.

10. In granting permission to appeal, FTTJ Bulpitt referred to [39] of the FTTJ decision:

> *… As is accepted by Dr Turvill the fact that they are consistent with the claim made does not mean that they could only have been caused in the manner which was alleged. Consistent in the terms of the Istanbul Protocol means that there are a number of other potential causes for the injuries.*

11. Under the Istanbul Protocol, the category of scarring deemed 'consistent' itself states: *consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes.*

12. It is submitted that contrary to the observations of FTTJ Bulpitt in granting permission, the FTTJ did not applied too high a standard when considering the

report of Dr Turvill. Rather the FTTJ was simply paraphrasing the definition of 'consistent' as set out in the Istanbul Protocol demonstrated above. It is noted that the category of consistent is only one step up from the definition of 'inconsistent with' under the Istanbul Protocol.

13. In similar vein, it was open to the FTTJ to find that the medical report failed to explore any other avenues that could have contributed to the mental health conditions suffered by the appellant. This is a matter that affects the weight to be given to the report. The FTTJ was not obliged to explore make findings on alternative reasons for PTSD; the burden of proof is upon the appellant.

14. It is well established that whilst the medical reports can support an appellant's claim they are not determinative of an assessment credibility. It is noted that there is no direct challenge to the findings at [36 – 38] where the FTTJ rejects the claim that the appellant was forced into marriage by her uncle. It is submitted that this is the material context against which the rest of the claim has to be assessed. Likewise, there is no direct challenge to the findings made at [44 – 54] where the FTTJ rejects the claim the series of events that brought to the UK, and her claim to how she lived in the UK prior to claiming asylum.

15. It is submitted that the consideration of the medical reports is wholly in line with the principles set out in ***Mibanga***, since it informed the findings made in relation to the claimed abuse suffered in Guinea. It was not considered in isolation to the entirety of the claim.

16. Ground two argues that the incorrect standard of proof has been applied. At [11] the FTTJ clearly identifies the correct standard of proof to be applied distinguishing the assessment from that conducted under the NRM process. At [31 – 33] the FTTJ sets out that he has had regard to all the evidence and made appropriate allowances in light of the sensitive nature of the evidence and directs himself to the correct standard of proof.

17. Ground three criticises the FTTJ for failing to consider the country and background evidence of domestic violence in Guinea. As noted above the FTTJ set out that he has had regard to all the evidence [31], and at [37] makes a clear finding in relation to background evidence in the appellant's bundle being at odds with the claim.

18. Further, the grounds do not directly challenge the FTTJ findings in the alternative at [56 – 57] that echo the submissions made in the reasons for refusal letter from para 89 onwards, namely that there is a sufficiency of protection and internal relocation alternative. Reliance is placed on *OK (PTA: alternative findings) Ukraine [2020] UKUT 44 (IAC)* which provides guidance in the headnote:

    Permission should not be granted on the grounds as pleaded if there is, quite apart from the grounds, the reason why the appeal should fail.

19. Further at paras 16:

    > *16. We observe that when considering applications for permission to appeal to this Tribunal, judges must give careful consideration to whether there is any, well any meritorious, challenge to an alternative basis for refusing or allowing an appeal as the absence of such challenge would normally be determinative as to the prospect of success.*

20. That there is no challenge to the findings in the alternative that there is a sufficiency of protection and internal flight option, no challenge to the rejection of how/why she came to the UK, and no challenge to the rejection of

her account of living in the UK as a consequence it is submitted that there are clear reasons why the appeal would fail.

Discussion

14. It is important to read the Judge's decision as a whole. This is a detailed and very carefully written decision taking into account all the evidence before the Judge. The Judge sets out the correct legal self-direction in relation to the burden and standard of proof and the grounds fail to establish that having done so the Judge ignored it and applied an incorrect burden or standard to the evidence.

15. In relation to the medical report the Judge does not challenge that the appellant may have the scars/marks on her body noted by Dr Turvill as these are specifically recorded in the decision but does not accept the appellant's evidence as to causation is credible. The Judge was entitled to record limitations in the medical evidence. In RT (medical reports - causation of scarring) Sri Lanka [2008] UKAIT 00009 the Tribunal held that, where a medical report is tendered in support of a claim that injuries or scarring were caused by actors of persecution or serious harm, close attention should be paid to the guidance set out by the Court of Appeal in SA (Somalia) [2006] EWCA Civ 1302. Where the doctor makes findings that there is a degree of consistency between the injuries/scarring and the appellant's claimed causes which admit of there being other possible causes (whether many, few or unusually few), it is of particular importance that the report specifically examines those to gauge how likely they are, bearing in mind what is known about the individual's life history and experiences.

16. The Judge was also entitled to refer to the Istanbul Protocol on Medical Reports.

> Paragraphs 186 and 187 of the Istanbul Protocol in relation to the term "consistency" state:
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> "186…for each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution:
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> (a) Not consistent: the lesion could not have been caused by the trauma described;
> (b) Consistent with: the lesion could have been caused by the trauma described, but it is non specific and there are many other possible causes;
> (c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;
> (d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;
> (e) Diagnostic of: this appearance could not have been caused in any way other than that described.

> 187… Ultimately 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 the torture story."

17. No material legal error is made out in the manner in which the Judge assessed this evidence. It is also important to note that the Judge does not assess the medical evidence in isolation of the other evidence available in the appeal. It is accepted the approach required of the Judge was to assess the weight that could be given to the medical evidence in light of all the other material which the Judge did, as disclosed by a careful reading of the decision under challenge.

18. The Rule 24 response is correct to note that the question of the credibility of the claim is not the role of the medical expert. An expert report sets out the opinion of the person suitably qualified in relation to matters appertaining to their expertise. The evidence they will have seen will, in most cases, be far less than that a judge may have who will have the benefit of seeing and hearing oral evidence being given, as the Judge did in this appeal. It is clear from reading the determination that the Judge identifies a number of concerns arising from the appellant's evidence and it is the cumulative effect of the same that warrants the adverse credibility findings being made. Disagreement with the weight that was given on the basis the appellant will prefer greater weight to be attached does not establish arguable legal error.

19. In S v SSHD [2006] EWCA Civ 1153 the Court of Appeal said that an error of law only arose in this type of situation where there was artificial separation amounting to a structural failing, and not where there was a mere error of appreciation of the medical evidence. Mibanga was distinguished. In that case the medical evidence had been so powerful and extraordinary that it took the case into an exceptional area. The Court of Appeal said that HE (2004) UKIAT 00321 was relevant to the case in so far as, where medical evidence merely confirmed that a person's physical condition was consistent with his claim, the effect of the evidence was only not to negate the claim. It did not offer significant separate support for the claim. The Court also said that Mibanga was not to be regarded as laying down a rule of law as to the order in which judicial fact finders were to approach evidential material before them. In this case an explanation as to why the medical evidence did not carry weight had been given by the IJ.

20. It has not been made out that the weight given to the medical and other evidence by the Judge is irrational, unfair, or unreasonable, when considering all aspects of this appeal together.

21. The Judge clearly considered the background country information and the claim otherwise does not reflect a proper reading of the decision under challenge.

22. There is arguable merit in the respondent's submission that although the primary findings of the Judge are challenged the alternative findings are not. The availability of a sufficiency of protection and

internal flight option is specifically referred to by the Judge. At [55], in which the Judge sets out the primary finding, and [56 – 57] the Judge writes:

> 55. It follows therefore that in light of the fact that I do not accept that the appellant has been treated in the manner in which she has alleged in Guinea by her husband or indeed her uncle that she has suffered such persecution or harm in the past which could or may lead to her suffering such in the future.
>
> 56. Such that she has a genuine fear of return to Guinea she can and must avail herself of the protection afforded to persons in Guinea by the police force. I accept that which is contained in the reasons for refusal letter paragraph 91 that there is increased cooperation between the NGO and the Guinea government in terms of protecting women's rights and that there is a toll free number for women who fear being subject to forced marriage and in the capital there is a police unit that specialises in sex crimes. Protection does not have to equal or be similar to that which is offered or available in the United Kingdom, it must be sufficient which is a fluid and malleable concept when it comes to particular risks.
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> 57. The appellant can no doubt be assisted by her Majesty's government with funds to enable her to obtain accommodation and/or the necessities in the capital city in which she has lived while studying at university. I'm confident that the appellant is able to use the skills obtained at university and in her working life and the general fortitude which she has shown living in a country not of her birth for a not insignificant period of time in re-establishing herself in her own country. She is of course able to speak the language of Guinea and knows the culture and currency at and life in general there.

23. The Judge also expresses concern and unease with regard to the appellant's account at [60] and the fact there may be something which the appellant has held back or not properly explained. The Judge can only be expected to make findings upon the evidence that has been made available and with regard to that material, whilst the appellant disagrees with the findings made, the grounds fail to establish arguable legal error material to the decision to dismiss the appeal. Findings are adequately reasoned and within the range of those reasonably available to the Judge on the evidence. The appellant's disagreement and desire to remain in the United Kingdom do not warrant the Upper Tribunal interfering any further in this decision.

Decision

24. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

25. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 7 July 2020.