



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/05326/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice

Decision & Reasons

On 11 September 2017

Promulgated

On 4 October 2017

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

H O

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Eaton, Counsel, instructed by Duncan Lewis & Co
Solicitors (Harrow Office)

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria who was born on 2 April 1973. He entered the UK illegally in 2008 and has been arrested for a variety of offences since then. Removal directions were set for February 2017 but he refused to leave for his flight stating that he was unwell. He subsequently claimed asylum on 23 February 2017.
2. On being taken into detention on 23 February 2017 a Rule 35 report was made on him for the purpose of which he gave a brief account of torture

that he said he had suffered in Algeria. Included within this statement it is recorded that “he reports he was stabbed on his right hand with a knife attached to a gun, as a threat”. It is stated that on his right hand there was an incision scar which was compatible with a stab from a sharp object. A doctor examining the appellant at that time reported that he had examined the appellant and that he “hereby report[ed] that I have concerns that the detainee may have been a victim of torture”, adding that “This is a factual report rather than a medico-legal one”. Subsequent to this report having been made the appellant had an asylum interview in which he was not asked specific questions about this incident and did not volunteer any information about it. His application for asylum was subsequently refused.

3. Thereafter the appellant appealed against the refusal of asylum and his appeal was heard at Harmondsworth before First-tier Tribunal Judge Lal, who, in a Decision and Reasons promulgated the following day, 29 June 2017, dismissed the appellant’s appeal.
4. Central to the appellant’s appeal was the issue of credibility, and one of the aspects to which the judge properly had regard was that the appellant had been in this country for some six years and had not made any asylum claim previously. Also, the appellant’s criminal history is such that he cannot claim to be a person whose word should automatically be accepted. However, the judge, when making his adverse credibility findings, stated at paragraph 20 of his decision, that “the Tribunal accepted no aspect of his claimed account and the major reason for doing so is that he has throughout omitted to mention that he was stabbed with a bayonet at the time of the claimed car park incident”, adding that “this was mentioned for the first time in the Rule 35 Report” and that:

“The Tribunal noted that it has not been mentioned in the asylum interview nor in the witness statement and is a major and significant discrepancy. If the Appellant had truly been stabbed by a bayonet, then the Tribunal finds that he would have mentioned it as it was a direct manifestation of his claimed fear”.

5. Permission was granted to bring this appeal by Designated Judge Shaerf, who noted as follows when dealing with this aspect of the appeal:

“The first ground for appeal asserts the Judge’s basis for his adverse credibility finding is flawed because the Appellant had alleged ill-treatment, an injury to his hand, when the Respondent was preparing a Rule 35 report which was some weeks before he was interviewed and that at interview he was not asked any question which would have given him the opportunity to describe any ill-treatment he might have received. The ground also complains that this was the sole basis for the Judge’s adverse credibility finding and as such that finding is inadequately reasoned”.

6. Judge Shaerf considered that this (and the other ground argued, which I do not need to consider by reason of what follows) disclosed an arguable error of law.
7. The way in which Mr Eaton on behalf of the appellant puts the appellant's case is that it appears from a reading of paragraph 20 that when making his finding the judge does not appreciate that the Rule 35 report predated the asylum interview. On behalf of the respondent, Mr Kotas has referred the Tribunal to paragraph 3 of the decision in which the chronology is set out, because the judge in that paragraph has stated in terms, that there had been a screening interview followed by a substantive asylum interview which had been completed by 11 May 2017 and "there had been an earlier Rule 35 Report dated 7th March 2017 while in detention".
8. The date of the report was in fact 23 February 2017 and not 7 March 2017 and in reply Mr Eaton has emphasised that the purpose of the report was to alert the respondent to any ill-treatment relied on by the appellant so that the appellant could be asked questions about this in interview. Although Mr Kotas has suggested that the questions were wide-ranging and the appellant had an opportunity if he considered it appropriate to rely again on the claimed incident with the bayonet, it is certainly correct that the appellant was not asked in terms to give further particulars regarding this incident.
9. While it is right that the appellant did not mention this incident in his witness statement either, at paragraph 14 of the decision it is noted that when asked about what the judge regarded as a discrepancy by the Tribunal during the hearing the appellant had replied that it had been mentioned to the doctor at Harmondsworth and had shown his hand and stated that it was not an issue.
10. In these circumstances, Mr Eaton submits that at the very least the reason behind the adverse credibility finding has not been adequately reasoned, because it is not clear from what is said at paragraph 20 that the judge when making this finding had the correct chronology in mind.
11. Although this is a finely balanced decision, I consider that Mr Eaton's submissions must be accepted. The normal meaning to be derived from paragraph 20 is that the appellant had failed to mention that he had been stabbed with a bayonet on the first occasion when he could have done so and did not do so until the Rule 35 report was made. Although the judge had noted earlier what the chronology was, it does not appear on the face of this decision that he had this correct chronology in mind when making this finding. Alternatively, it is at least possible that he did not, and in these circumstances, given that this is an asylum claim and that the judge is required to show that he has exercised anxious scrutiny in reaching his decision, this decision cannot stand.
12. In these circumstances, the appeal will have to be reheard and it is appropriate for the appeal to be remitted back to the First-tier Tribunal sitting at Hatton Cross (or whatever other hearing centre comes within the

ambit of Hatton Cross) to be heard by any judge other than Judge Lal and I will so order. No findings of fact will be retained and it is accordingly not necessary for me to consider the second ground of appeal. I express no view as to the merits of this appeal save that it must be reheard.

Decision

13. I set aside the decision of First-tier Tribunal Judge Lal as containing a material error of law and remit this appeal to Hatton Cross to be considered by any First-tier Tribunal Judge other than Judge Lal, with no findings of fact retained.

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

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. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

A handwritten signature in black ink that reads "Ken Craig". The signature is written in a cursive style with a long, sweeping tail on the letter "p".

Upper Tribunal Judge Craig
September 2017

Dated: 29