Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00751/2018

THE IMMIGRATION ACTS

Heard at Field House, London
On the 22nd January 2019

Decision & Reasons Promulgated
On 15th February 2019

Before:
DISTRICT JUDGE MCGINTY
SITTING AS A DEPUTY UPPER TRIBUNAL JUDGE

Between:
MR BN
(Anonymity Direction made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Harvey (Counsel)
For the Respondent: Mr Tarlow (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Rodger promulgated on the 30th July 2018. Within that decision, First-tier Tribunal Judge Rodger found that she did not accept the Appellant's core account about his involvement with Ginbot 7 or his alleged detention or mistreatment in Ethiopia and did not accept his account of the Appellant's or his family members being targeted by the police authorities. The Judge further stated that she did not believe the Appellant's account about the circumstances surrounding the Appellant leaving Ethiopia or relating to his alleged forced labour/trafficking on the way to the UK. The Judge did not accept that the Appellant had any real risk upon returning to Ethiopia and did not accept he had any connections with Ginbot 7 or that he had been previously arrested, detained or mistreated by the authorities. The Appellant's asylum claim was therefore rejected.

2. It was further found for the same reasons the Appellant was not entitled to either humanitarian protection or protection under Article 3 and it was found that the Appellant did not have any family or private life in the UK for the purposes of Article 8.

Grounds of appeal

3. The Appellant has now sought to appeal against that decision for the reasons set out within the Grounds of Appeal. That is a detailed document that I have fully taken account of, but is a matter of record and is therefore not repeated in its entirety here. However, in summary, it is argued in ground 1 that the Judge erred in his assessment of the medical evidence. It is argued that Dr Cohen is very well known to the Tribunal and to the Courts and the Judge was satisfied about her expertise on physical and psychiatric/psychological injuries. It is said that it was a text book report. However, it is argued

that the Judge reached conclusions based on the Appellant's account before considering the reports of Dr Cohen.

4. It is argued that the Court of Appeal in the cases of Mibanga [2005] EWCA Civ 367 and R (AM) v The Secretary of State for the Home Department [2012] EWCA Civ 512 stated that a fact finder must not reach his or her conclusion before surveying all of the evidence relevant thereto and must consider the evidence in the round. It was argued that the Judge had failed to have proper regard to the expert evidence of Dr Cohen which it is said was the only material before him giving expert evidence on the state of the Appellant's mental health.

5. It is further argued that between paragraph 46 and 54 of the decision, the Judge went on to contest Dr Cohen's clinical findings and that contrary to what the Judge stated, Dr Cohen had considered alternative and accidental causes for the scarring suffered by the Appellant.

6. It is further argued that the Judge failed to note that the scarring to the Appellant's face was said to be "typical" of baton blows, and that typical denoted a greater degree of consistency than "highly consistent" and the Judge had said "the only scarring highly consistent with the Appellant's attribution relates to the scar on his abdomen". It was further argued that the Judge speculated as to whether or not the scar to the thigh could have an alternative cause such as the Appellant falling out of a vehicle.

7. It is further argued that although the First-tier Tribunal Judge indicated she had found that there was no basis for Dr Cohen stating that medical treatment in respect of one scar had been delayed and was more likely to have been given in Ethiopia than Libya, it is argued that there was nothing untoward in Dr Cohen's conclusion that the Appellant was less likely to receive medical treatment whilst taken

across the Sahara by smugglers than when held in a police station in Addis Ababa.

8. It was further argued that the Judge discounted Dr Cohen's evidence on the Appellant's problems of recall of events, on the basis that the Appellant was not suffering from a high level of frequency or severity of symptoms of PTSD when the only evidence before the Judge was that of Dr Cohen.

9. It is argued that Dr Cohen found that a large number of scars given his age, the asymmetric distribution and location on some parts of the body not usually injured accidentally provided strong corroboration of the account of torture given. It is argued that the Judge has erred in pitting her opinion on medical matters against that of the expert.

10. In the second ground of appeal it is argued that the Judge erred in his understanding as to the assessment of the evidence relating to risk upon return and that the Judge departed from the country guidance in the case of MB (OLF and MTA – Risk) Ethiopia [2007] UKIAT 00030 regarding how someone from within Ginbot 7 would be treated, on the basis simply that a news report that Andargachew Tsige together with 500 people had been released from prison which the Judge had found indicated a change of attitude towards the treatment of Ginbot 7. It is argued that Mr Tsige, the General Secretary of Ginbot 7 was also a UK citizen who had been visited by UK consulate officials in detention who were calling for his release and was a citizen of dual nationality and that there was no evidence to say that the other 500 people released were linked with Ginbot 7 and that there was insufficient evidence for a Judge to depart from the country guidance case.

11. In the third ground of appeal it is argued that the treatment in the reports of both experts was evidence of a failure to apply the correct standard of proof in asylum cases namely that of reasonable degree of likelihood.

Oral submissions

12. In her oral submissions before the Upper Tribunal, Ms Harvey indicated that Dr Cohen had prepared a further letter for the Tribunal dated the 21st January 2019, further commenting upon the clinical issues raised within her report. However, Ms Harvey correctly indicated that the letter was not relevant for the purposes of the error of law hearing and only relevant if a material error was found. I have therefore not placed any weight upon that letter in respect of my consideration of the error of law issue.

13. Ms Harvey further argued that there were in fact two grounds of appeal, one relating to the medical evidence and the other relating to the treatment of the evidence regarding the risk upon return from Mr Seddon. She conceded that the second ground alone regarding risk upon return would not be sufficient in isolation for the appeal to succeed.

14. Ms Harvey argued that Dr Cohen is a leading expert providing training on expert reports and scarring cases including two First-tier Tribunal Judges and that the First-tier Tribunal Judge in this case was satisfied of her expertise, but argued that the way that the Judge dealt with the expert evidence was arguably incorrect. She argued that the Judge had made findings regarding the Appellant's credibility before then going on to say that she had taken account of the Appellant's mental health and age. However, Ms Harvey conceded that the First-tier Tribunal Judge had to start somewhere in respect of her analysis of

the evidence provided that the evidence was considered "in the round". She drew my attention to the fact that Dr Cohen had said that the facial scarring was typical of injury caused by being beaten with a baton which is a higher level of likelihood classification beyond "highly consistent". She argued that therefore the Judge's statement that the only scar highly consistent with the Appellant's attribution related to the scar on his abdomen when he said he had been beaten with a stick in Libya was wrong.

15. Ms Harvey further challenged the Judge's finding at paragraph 52 that she had not been persuaded by Dr Cohen's evidence that the delay in medical care for the Appellant's leg seemed more likely to be possible in Ethiopia than the conditions described in Libya, on the basis that the Judge had stated that it was not clear Dr Cohen had come to this conclusion save that he relied upon the Appellant's account relating to the injury. She argued that it was more likely that if the wound had been sutured it was resulting from hospital treatment of a minor child in Addis Ababa rather than occurring when crossing the Libyan desert in a caravan in a sandy area. However, she conceded that all in reality that Dr Cohen could say was that it had been sutured, rather than going on to give expert evidence regarding where such treatment took place.

16. Ms Harvey further argued that although the Judge accepted that the Appellant may well be suffering from PTSD, that the Judge in saying that need not accept that it affected his recall on memory was wrong to find at paragraph 54 that he had low level mental health symptoms, and all that was stated by Dr Cohen was the fact that the Appellant was not now suffering from a high level of frequency or severity of symptoms, but it was still affecting his ability to study and to take part in activities. She said that the Judge's findings that the symptoms were of a low level only was not borne out by the evidence

and that Judge Cohen's evidence was that considering the large number of scars, given the Appellant's age, their asymmetric distribution and the location of some on parts of the body not usually injured accidentally was corroborative evidence of the account of torture given for the purposes of the Istanbul Protocol.

17. In respect of the report of Mr Seddon, Ms Harvey further explained upon her Grounds of Appeal by indicating that a newspaper report when talking about the release of Mr Tsige was there dealing with someone who was a dual national for whom the UK Consulate were making diplomatic interventions to have him released and that the newspaper article did not refer to the 500 people also released as having anything to do with Ginbot 7 and that therefore the Judge was wrong to place weight upon the newspaper article as a reason for departing from country guidance.

18. Ms Harvey said that the third ground of appeal simply drew together the other two grounds of appeal and did not seek to argue that it added anything to this appeal.

19. In his submissions on behalf of the Secretary of State, Mr Tarlow argued that the Appellant was simply disagreeing with the valid reasoned findings of the First-tier Tribunal Judge. He argued that the Judge had given a carefully worded account of the case of the Appellant regarding what he said had happened in Ethiopia and for the Appellant's brother working for Ginbot 7. He argued that the Judge had properly taken account of the expert evidence of Dr Cohen and Mr Seddon and come to conclusions that were open to the Judge on the evidence and was not satisfied that the expert evidence was corroborative of the Appellant's account. He argued that the Judge simply considered the Appellant not to be credible and the decision

was sustainable. Mr Tarlow further argued that the Judge made findings open to him regarding PTSD.

20. In respect of the evidence given by Mr Seddon, Mr Tarlow conceded that the newspaper article in itself was insufficient for the Judge to depart from country guidance but argued that in light of the Judge's analysis of the expert medical evidence, there was no material error.

21. Both parties conceded that if there was a material error of law the case should be remitted back to the First-tier Tribunal for re-hearing before a differently constituted Tribunal.

My Findings on Error of Law and Materiality

22. Although it was argued by Ms Harvey that the Learned First-tier Tribunal Judge has made adverse credibility findings against the Appellant before considering the expert evidence, it is in fact clear from the Judge's findings at paragraph 33 that as she stated she had looked carefully at all the evidence both individually and in the round having regard to the background material provided both by the Appellant and the Respondent before making his findings of fact. When the Judge goes on to consider the evidence, the Judge clearly has to start from somewhere, as accepted by Ms Harvey. I do not accept given the way the Judge directed herself that she has in fact made adverse credibility findings before going on to consider the expert evidence. The fact that she has made findings between paragraph 36 and 45 before going on to set out and make findings about the expert evidence of Dr Cohen, was simply the order in which

the Judge dealt with the evidence in the decision, rather than the Judge making adverse credibility findings and then considering those in light of the expert evidence. I am satisfied that the Judge did exactly as he said she had done and considered all of the evidence in the round before making findings.

23. At paragraph 50, First-tier Tribunal Judge Rodger stated "*having read Dr Cohen's report and noting that the Appellant has not been consistent about treatment that he received or made any prior reference to being injured whilst jumping out of a vehicle when crossing the Sahara, I am not satisfied that I am able to rely upon on the opinion of Dr Cohen that the injuries suffered by the Appellant were suffered as a result of the various stages of adverse treatment that he alleges to have been subjected to. Dr Cohen has not specifically addressed whether any of the other injuries, such as the back or knee scars, could have been caused by falling out of a vehicle or address the inconsistency in his account about who mistreated him and where and about whether he had suffered a loss of consciousness. Whilst it is correct that he has not attributed all of his scars to torture, I am not overall satisfied that he has not fabricated the attribution of the remaining scars and I am not persuaded that Dr Cohen has fully considered whether any of these injuries could have been caused by the accidental injury of falling out of a vehicle. Whilst she states that the injury on the back scar injury is not usual for an accidental injury, there is no proper allowances of how and in what circumstances the Appellant fell from a vehicle and whether this could have caused the scarring to his back. Overall, in circumstances where the Appellant has revealed that he was injured when jumping out of a truck across a desert, I am not able to find that he has proved to the lower standard of proof, that any of his other injuries were not suffered as a result of*

such accident or that they were suffered by beatings from the Ethiopian authorities or from trafficking experiences".

24. However, the point made by Dr Cohen at paragraph 40 of her report on page 10 regarding the facial injuries was that these were "*typical of the beating described with repeated blows by a baton*". Dr Cohen noted that the Appellant also described a fall when he was arrested and being beaten whilst in Libya with a stick, punches and kicks and that whilst other forms of blunt trauma injury could be other possible causes for these scars and it was difficult to distinguish their relatively likely cause on examination findings, such that it was possible some were due to accidental causes the overall number and distribution in her opinion was extremely high for all of them to be due to an accidental cause – such that as the number of such injuries increases, so the chances of them all being due to a series of accidents correspondingly decreased.

25. Indeed, it is noteworthy that Dr Cohen did describe the facial scarring as being "typical" of being of injuries caused by a repeated blow with a baton, which is one of the higher attributions under the Istanbul protocol and higher than "highly consistent". When considering this evidence, the First-tier Tribunal Judge does not appear to have taken account of the fact that 'typical' is more consistent than "highly consistent" and indeed in paragraph 52 states "*the only scar highly consistent with the Appellant's attribution relates to a scar on his abdomen when he says he was beaten with a stick in Libya*". The Judge has not seemingly fully taken account of the fact that the facial scarring was said to be typical of attribution of baton blows, meant it was more likely than "highly consistent". It appears that the Judge has misinterpreted the relevance of that attribution.

26. Further, at paragraph 60, Dr Cohen has stated that "*however, the injuries to his face would not have been sustained from forced labour alone*" whilst the Appellant was in Libya and at paragraph 62 of her report went on to say that "*my overall evaluation, as per paragraph 188 of the Istanbul Protocol, considering the large number of scars given his age, their asymmetric distribution and the location of some on parts of the body not usually injured accidentally, is that they provide strong corroboration of the account of torture given*". She went on to state that there was no evidence of exaggeration or embellishment and that the Appellant had readily identified those scars not attributed to torture or those for which he was not certain or could not recall the cause and that the history, examination, findings and timings were all clinically congruent. Dr Cohen had said that 8 scars on the face were typical of the attribution given of baton blows, one scar was highly consistent with being beaten with a stick and 12 scars consistent with the attributions given and that she had considered other possible causes and had given her opinion as to where they were relatively likely or where relevant and possible to do so, as stated at paragraph 58 of her report.

27. In such circumstances, given that Dr Cohen had clearly considered the question of possible accidental injury causing the relevant various scars, I do not consider that the Learned First-tier Tribunal Judge has adequately explained the reason for rejecting Dr Cohen's attribution of the injuries as being caused by beating, rather than accidental injury, in terms of falling off from the lorry, as stated by the First-tier Tribunal Judge at paragraph 50 of the decision.

28. Further, in respect of the Appellant's PTSD, although First-tier Tribunal Judge Rodger accepted and found that the Appellant may well be suffering from PTSD at paragraph 53 of the decision, and accepted that traumatic experiences often do affect recall, memory and

concentration and can result in delayed or coherent reporting of any difficulties or experiences, the Judge went on to state that having considered the "*low level of his symptoms and on considering his account both individually and in the round, I am not able to accept for the many inconsistencies in his account are due to his alleged experiences or mental health symptoms or age. He has low level mental health symptoms and having considered this and his account in the round, I do not accept that the discrepancy as to the treatment he received from the various agents on his journey where he received injuries or beatings that this is explicable by any alleged trauma he suffered or mental health problems or age*".

29. However, as stated by Ms Harvey, the evidence from Dr Cohen was in fact that "*although his symptoms are not currently at high level of frequency or severity, they do affect his ability to study and to take part in activities. His coping strategy is to try to keep busy and to be with other people in order to avoid the intrusive memories of his past experiences as far as possible*" and at paragraph 66 of her report and at paragraph 67 that "*he shows the expected response to extreme trauma within his social and cultural context and identifies some fluctuation over time, with the improvement in the past year. There is no exaggeration of his symptoms. I therefore find no indication of fabrication of the psychological condition*".

30. Dr Cohen has not referred to his symptoms as being "low level", but simply at the time of her report they were not at high level of frequency and severity, but had improved over the previous year. Post-traumatic stress disorder is often characterised as being mild, moderate or severe, and simply Dr Cohen indicating that they were not at a high level when examined by her does not mean that he only had low level mental health symptoms, as indicated by the First-tier Tribunal Judge, when the effects of them are still said to be that they

affect his ability to study and to take part in activities and that he was employing coping strategies to avoid intrusive memories of past experiences. This was despite the symptomatology having improved over the previous year.

31. I therefore do find that the First-tier Tribunal Judge has misinterpreted the evidence regarding the level of symptomatology suffered by the Appellant in respect of his post-traumatic stress disorder and the effect that it was having on him, when making findings regarding the inconsistencies found by the Judge in the Appellant's account.

32. In respect of the second ground of appeal, conceded by Mr Tarlow, the newspaper article supplied by the Secretary of State at the First-tier Tribunal hearing from the website African News confirmed the release of Mr Tsige together with 500 other prisoners was insufficient for the Judge to depart from the report of Mr Seddon, regarding the adverse treatment of the Ethiopian authorities for those perceived to be part of a terrorist organisation, of which Ginbot 7 is classed as being one. Mr Tsige as indicated by Ms Harvey was a dual national citizen, for whom the British UK authorities had been actively campaigning for his release.

33. Further, although there was reference within that newspaper article to 500 other people being released, there is no evidence within that newspaper article to suggest that they were in fact also Ginbot 7 members, as found by the Judge, which led her to depart from the report of Mr Seddon and the country guidance.

34. In summary, the Judge's errors in her consideration and treatment of the expert report of Dr Cohen, as stated above, linked with the Judge's error in relying upon the newspaper report to depart

from the evidence given by Mr Seddon and the country guidance in the case of MB (OLF and MTA – Risk) Ethiopia UKIAT 00030 in that it relates to members or perceived members of a terrorist organisation, do amount to material errors of law. It cannot be said that if those had not been made, that the Judge might not have reached a different conclusion. The conclusion would not necessarily have been the same irrespective of those errors. I therefore find that the decision of First-tier Tribunal Judge Rodger should be set aside in its entirety with no preserved findings of fact and the matter remitted back to the First-tier Tribunal for re-hearing before a differently constituted Tribunal.

Notice of Decision

The decision of First-tier Tribunal Judge Rodger does contain material errors of law and is set aside.

The Appellant is granted anonymity, the previous Tribunal having granted anonymity to him, and it being appropriate given the nature of his asylum claim. 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

RFMcGinty

District Judge McGinty
Sitting as a Deputy Upper Tribunal Judge Dated 22nd January 2019