Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02062/2020
UI-2021-000817

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 March 2022	**On 14 July 2022**

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

SK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family are granted anonymity because the case potentially involves protection issues. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or his family members, without that individual's express consent. Failure to comply with this order could amount to a contempt of court.

Representation:
For the Appellant: Mr Pipi, Counsel instructed by way of public access
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

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1 This is the appeal of SK, a national of Kenya, against the decision of Judge of the First tier Tribunal Hallen, dated 1 September 2021, dismissing the Appellant's appeal against the decision of the Respondent dated 18 February 2020, refusing the Appellant's human rights and protection claim.

2 The Appellant arrived in the United Kingdom in December 2017 in possession of entry clearance as Multi C(business) visitor, issued on 15 November 2017, valid until 15 May 2018. He was served with a notice as an illegal entrant on 23 August 2019 and claimed asylum on the same date.

3 The Appellant advanced a claim for international protection on the basis that he had been a member of the Mungiki sect in Kenya; his uncle had been a senior member of that organisation; the Appellant had become disillusioned with its criminal activities and had sought to leave; he had been arrested by the police on suspicion of being a member but later released; the Appellant had also been beaten by members of the sect for his wish to leave it. The Appellant claimed to be at risk of serious harm from the Mungiki sect upon return to Kenya.

4 The Appellant underwent an initial contact and asylum registration questionnaire interview on 23 August 2019; he completed, on 24 September 2019, a preliminary information questionnaire, and underwent a SEF interview on 17 January 2020.

5 The Respondent refused the human rights and protection claim for reasons set out in the decision letter dated 18 February 2020: in summary, that the Appellant's account was not believed by the Respondent, and that the Appellant was not at risk of serious harm upon return to Kenya.

6 The Appellant subsequently filed a notice of appeal. As is apparent from the judge's decision at [10], the matter had been listed for hearing on 11 June 2021 before a different judge. Mr Pipi, who has appeared on behalf of the Appellant throughout the proceedings, indicated to that judge that it was not intended to call the Appellant to give oral evidence in the appeal, on the basis that it was asserted that the Appellant was not mentally fit to give evidence. The appeal was adjourned to permit the Appellant to provide an up-to-date medical report to support his assertion that his mental health meant that he could not give oral evidence.

7 The matter was subsequently listed for hearing by the judge on 18 August 2021.

8 Ultimately, by the time that the appeal proceeded, the following documents relating to the Appellant's health were available to the judge:

(i) A letter dated 27 August 2020 from Dr Louise Pealing, GP at the Crosby House surgery, Slough, providing:

> "I have been asked to provide a letter TWIMC in the capacity of this gentleman's general practitioner.
>
> Mr (K) has recently registered at our surgery on 5th August and has not consulted with us here at the surgery since registration.
>
> In previous consultations with his former GP surgery I can see there has been discussion about ongoing symptoms of depression and Mr (K) reports symptoms that could be consistent with PTSD such as flashbacks and nightmares related to events he reports from his life in Kenya. Mr (K) also presents with symptoms of poor memory even for simple everyday matters.
>
> Please can you take these previous consultations and reported symptoms into account."

(ii) A further letter from Dr Pealing, dated 10 June 2021:

> " ...
>
> Mr (K) registered at our surgery on 5 August 2020 and since that time has had frequent consultations with colleagues regarding treatment and monitoring for symptoms consistent with depression and PTSD; low mood, poor memory, mind 'going blank' with difficulty focussing, and daytime flashbacks and nightmares of traumatic events.
>
> His GP record from his previous surgery shows a similar picture going back over several years.
>
> Please can you take this medical history into account."

(iii) An extract from electronic records from Crosby House Surgery printed on 24 June 2021 noting a consultation of that date and providing as follows:

> "Pt requested a letter for his ongoing court proceedings that he is unable to/unfit to give oral evidence due to his PTSD sx: poor memory, crying++, 'mind goes blank' under duress in particular
>
> Witnessed horrific violence in Kenya and this has been the basis for his PTSD.
>
> Suffering with classic PTSD symptoms – as evidenced reviewing previous GP consultations going back.
>
> The court proceedings are for home office seeking asylum
>
> D/ced with Dr Hear re this letter/medico-legal report request and took advice
>
> D/ced with pt that as GPs we are not clinically qualified to provide an in-depth medico-legal report concerning fitness to give oral evidence due to a psychiatric disorder such as PTSD.

> He requires a specialist assessment
>
> Unfortunately Mr K is not under the psych team and this assessment is unlikely to be able to be done in a timely fashion for his proceedings
>
> Pt is under talking therapy (who also review pts with PTSD) and he ahs (sic) ongoing treatment with mirtazapine- next TT appt is next Tuesday
>
> D/ced I advise we refer him to a private psychiatrist qualified to be able to carry out this assessment and provide a fitting report – PT agrees to me getting these details for him"

(iv) A letter from a Dr Mwangi, Department of Health, County Government of Kiambu (Kenya) dated 8 August 2020 stating, in summary, that the Appellant had been admitted to hospital on 9 September 2017 '...after he was brutally assaulted by an illegal gang (Mungiki)". Certain injuries are set out, including experiencing forced circumcision, followed by: "Due to psychological trauma he came back to our facility with depression and dementia..."

9 The judge records at [9] that the documents before him also included the case of *AM(Afghanistan) v SSHD* [2017] EWCA Civ 1123, and the Joint Presidential Guidance Note No 2 of 2010 on Vulnerable and Sensitive witnesses (hereafter 'PGN No 2 of 2010').

10 The judge noted that the appeal proceed by way of oral submissions only, which are set out in the judge's decision at [23-24].

11 In the judge's subsequent findings and reasons at [31] onwards in the decision, the judge directed himself in law as to relevant authorities on the assessment of credibility. The judge then held:

> "However, I found the Appellant's account to be lacking in credibility. I found internal inconsistencies in the evidence given to the Respondent and I found his account to the Respondent about his membership of the Mungiki was vague, lacking in specificity and as a consequence unreliable. I found his evidence unreliable on balance for the reasons below."

12 At [32] the judge noted that the Appellant had elected not to give oral evidence in support of his appeal. The judge noted the two letters from the Appellant's GP at Crosby House Surgery, and noted that the GP had confirmed that GPs were not specialists and were not able to provide a medico-legal report on the Appellant's ability to give oral evidence. The judge noted that no medico legal report had been provided to the Tribunal.

13 The judge also noted at [32] that the Appellant had been properly legally advised in respect of not giving evidence to the Tribunal.

14 At the end of [32], the judge provides as follows:

> "As he did not give oral evidence at the hearing there was no need for me to ensure that questioning by the Respondent was to be conducted in accordance with the presidential guidance albeit I made sure that other parts of the guidance were followed."

15 The judge thereafter considered the following matters as diminishing the credibility of the Appellant's account:

(i) the delay in the Appellant claiming asylum in the United Kingdom [34];

(ii) the lack of detail in the Appellant's account of his departure from Kenya [34];

(iii) the Appellant's evidence in interview regarding his membership of the Mungiki sect was inconsistent and vague [35], and speculative [36], [41];

(iv) the Appellant's inability to provide specific details regarding his uncle's involvement in the Mungiki sect was inconsistent with the Appellant's alleged membership of the group and the length of time he claimed to have been a member of it [37];

(v) the Appellant's level of knowledge of the group was inconsistent with his asserted involvement in it [38];

(vi) in interview, the Appellant had failed to provide a satisfactory explanation for inconsistencies in his claim [39];

(vii) the Appellant give a very general account regarding the Mungiki group's demography and structure [40];

(viii) the Appellant's account as to threats he had received from the Mungiki was lacking in detail as to specific threats, and speculative [42-43].

16 At [44] the judge considered the letter from the County Government of Kiambu Department of Health dated 8 August 2020 and held:

> "I placed little weight on this evidence as it was submitted nearly 3 years after the alleged assault. If it was a true document, I would have expected it to have been submitted to the Respondent as part of the asylum application process with sufficient details provided to the Respondent so that its veracity could be checked. I did not see the original of the document but did note that the GP evidence provided by the Appellant and the Crosby House surgery made no reference to the Appellant being diagnosed with dementia only poor memory. Furthermore, and more importantly, there is no reference to forced circumcision or any treatment prescribed for it mentioned in any of the GP records produced by the Appellant since his entry in the UK. If the letter from Kenny was a true document, I would have expected further reference to the alleged forced circumcision and dementia in the later documents from the Crosby House surgery and/or any medication prescribed to the Appellant. Given these discrepancies, I placed little weight on the letter of 8 August 2020 from Dr Mwangi."

17 We set out further paragraphs 45-46 of the judge's decision:

> "45 Overall, I found that I could place little weight on the Appellant's evidence due to the inconsistencies, vagueness and lack of specificity in his account. I formed the view that the Appellant adopted (*sic*) his account to what he thought was most advantageous to his claim. This leads me to the conclusion that the Appellant was not a member of the Mungiki and does not face any threat to his safety on his return to Kenya. I have considered the documentary evidence, and letter from Doctor Mwangi in the round and in accordance with the principles of Tanvir Ahmed. I have found the Appellant to be an unreliable witness and I also find the document produced from the County Government of Kiambu Department of Health dated 8 August 2020 also to be unreliable for the reasons stated above.
>
> 46. I took into account that the Appellant alleges that he suffers from stress, depression, memory loss and PTSD. However, on looking at the medical evidence provided, I note that it was confined to two letters from his GP surgery with no specialist report provided. I find that such symptoms can be attributed to the normal stresses that can and do arise from being an illegal immigrant with no right to reside in the UK and having to go to the asylum process. I also find that the Appellant's reluctance to give oral evidence at the hearing before me was less to do with his stress and memory loss and more to do with his wish to avoid cross examination by the Respondent when the above inconsistencies and lack of detail could have been put to him. I infer that the real reason that the Appellant did not want to give oral evidence to me was due to this fact and not his suffering from memory loss which he was keen to highlight in his two statements."

18 The judge held that [47] that the Appellant had not made out his case of being at real risk of serious harm. Further, at [48] the judge held that the Appellant could return to Kenya and have the support of his family with whom he had corresponded and spoken with whilst in the United Kingdom, and he had not made out any case for leave to remain under paragraph 276 ADE(1)(vi) of the immigration rules. Further, at [49], the judge held that any interference with the Appellant's right to private life would be proportionate, and dismissed the appeal.

19 The Appellant sought permission to appeal to the Upper Tribunal on grounds which we summarise as follows.

Ground 1

(i) The judge erred in law in failing to comply with the PGN No 2 of 2010; it was asserted that the Appellant was both a vulnerable and a sensitive witness, on the basis of the medical evidence from the Crosby House surgery dated 27 August 2020 and 10 June 2021.

(ii) Referring in particular to paragraph 15 of the guidance:

> "The decision should record whether the Tribunal has concluded the Appellant... is vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the Appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind."

it was argued that there was nothing in the determination which recorded whether:

(a) the Tribunal considered that the Appellant was a vulnerable or sensitive witness;

(b) the effect the Tribunal considered the identified vulnerability or being a sensitive witness had in assessing the evidence before it; nor

(c) what weight was to be given to the objective evidence.

(iii) The judge failing to apply such guidance represented an error of law, as per para 30 of *AM (Afghanistan) v SSHD* [2017] EWCA Civ 1123:

> "To assist parties and tribunals a Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses', was issued by the Senior President, Sir Robert Carnwath, with the agreement of the Lord Chancellor on 30 October 2008. In addition, joint Presidential Guidance Note No 2 of 2010 was issued by the then President of UTIAC, Blake J and the acting President of the FtT (IAC), Judge Arfon-Jones. The directions and guidance contained in them are to be followed and for the convenience of practitioners, they are annexed to this judgment. Failure to follow them will most likely be a material error of law. They are to be found in the Annex to this judgment."

(iv) The judge erred in failing to comply with the Practice Direction of the First tier and Upper Tribunal: Child, Vulnerable Adult and Sensitive Witness, dated 30 October 2008 issued by Carnwath LJ. Paragraph 2 of which reads:

> "A child, vulnerable or sensitive witness will only be required to attend as a witness and give evidence at the hearing where the tribunal determines that the evidence is necessary to establish the fair hearing of the case and their welfare would not be prejudiced by doing so."

(iv) The Judge erred in failing to consider, or determine:

(a) whether the Appellant's oral evidence was necessary to establish a fair hearing, and

(b) even if it was necessary, whether giving oral evidence would prejudice the Appellant's welfare.

Ground 2

(v) The letter from Kiambu Department of Health was 'unfairly rejected'; the Respondent had sight of that document in September 2020 and had nearly one year to make any enquiries about it they wished.

(vi) Further, in indicating, at paragraph 46 of the judge's decision, that the Appellant 'alleged' to suffer from stress, depression, memory loss, and PTSD, the judge failed to give due weight to medical evidence before the Tribunal (Grounds, para 5(b)).

Ground 3

(vii) The judge failed to consider the objective evidence before him, merely referring to it as part of the 60 page Appellant's bundle (and this point was repeated at paragraphs 5(a) and (c) of the Grounds).

20 Permission to appeal was granted by Judge of the First tier Tribunal Pickering on 27 October 2021 on the grounds that it was arguable that the judge did not make a decision as to whether the Appellant should be treated as a vulnerable adult witness in the light of the practice direction. Permission to appeal was granted generally.

21 The Respondent filed a reply under rule 24, Tribunal Procedure (Upper Tribunal) Rules 2008 resisting the Appellant's appeal, and arguing that the judge had directed himself appropriately in law. It was asserted that the judge had properly considered the Appellant's claimed mental health issues and properly applied the PGN No 2 of 2010 – this being set out at paragraphs 32 and 46 of the judge's decision.

22 We heard submissions from both parties in relation to the appeal. Mr Pipi adopted his grounds of appeal. Mr Tufan adopted the Respondent's rule 24 notice and sought to invite the Tribunal to find that no material error of law was disclosed in the judge's decision.

Discussion

Ground 1

23 Insofar as the Appellant alleges that the judge erred in law in failing to determine whether the Appellant should be treated as a vulnerable witness, we find such criticism is not made out. We find that the judge did treat the Appellant as a vulnerable witness.

24 The judge clearly referred to the medical evidence in the matter at [32]; indeed, stating that he had given it 'special attention'. The judge was then clearly alert, at the end of [32], to the possibility that a vulnerable witness might need special measures to be taken during the process of giving oral evidence. However, the judge held that there was no need for him to ensure the questioning of the Appellant by the Respondent was to be conducted in accordance with the PGN No 2 of 2012, because it was clear that those acing for the Appellant had elected not to call him to give evidence. The judge stated that he nonetheless made to the other parts of the guidance were followed.

25 We find that the judge would simply not have directed himself in this manner, had he not been treating the Appellant as a vulnerable witness.

26 However, Mr Pipi also argues that it was not apparent, if the Appellant was being treated as a vulnerable witness, what the effect the judge considered the identified vulnerability had in assessing the Appellant's evidence.

27 We note that the Appellant in *AM (Afghanistan)* had been diagnosed by an expert psychologist as having moderate learning difficulties 'with some skills being significantly weaker than those of others of his age'. The expert had stated that 'I would expect him to experience significant difficulties accurately recalling questions and answers during interviews and court hearings'. Further, the expert made explicit recommendations as to the arrangements that should be put in place if oral evidence was to be taken from that Appellant (see *AM (Afghanistan)*, paras 11-13). Before the Court of Appeal, the parties agreed that the First tier Tribunal had erred in law when assessing that appellant's credibility by failing to have regard to his age, vulnerability, and the evidence of a significant learning disability, as set out in the psychologist's report (para 18).

28 However, there was no similar evidence in the present case. We find that the judge was entitled to note the limitations of the content of the medical evidence from the Crosby House surgery. The two letters from Crosby House surgery, and the single page electronic record from the surgery do not in fact set out clearly, or at all, any specific diagnosis that has been made of the Appellant's mental ill-health. The GP had declined to provide a medical-legal report, on the basis that they lacked the relevant expertise to do so and could not comment on the Appellant's ability to give oral evidence in a hearing. The Appellant had been granted an adjournment to obtain further medical evidence, but none was provided.

29 We accept that it can be inferred from the fact that the Appellant appears to have been prescribed antidepressants that he has a diagnosis of depression. Otherwise, we note that the medical evidence before the judge, such as it was, did not confirm any specific diagnosis. There was no opinion expressed within that evidence that any diagnosed medical condition of the Appellant would have any material effect on the

Appellant's ability to give oral evidence, or to answer questions reliably. The judge suggested that the symptoms of mental ill-health that the Appellant complained of could be attributed to the normal stresses that can and do arise from being an illegal immigrant with no right to reside in United Kingdom and having to go to the asylum process. Mr Pipi has not advanced to us any argument or proposition that it was erroneous in law for the judge to have made that suggestion.

30 We therefore find that there is no mileage in the Appellant's argument that the judge failed to take into account the Appellant's vulnerability when assessing the credibility of his past account; the judge explicitly undertakes this task at [46].

31 The Appellant also appears to argue that the judge failed to determine, taking into account the Appellant's vulnerability, whether oral evidence was required in this matter. We find that in the present case there was no question of the judge needing to express any such view; those acting for the Appellant had taken that matter out of the judge's hands, by making the clear election not to call him. Whether, having regard to PGN No 2 of 2010, and/or paragraph 2 of the Practice Direction of the First tier and Upper Tribunal: Child, Vulnerable Adult and Sensitive Witness, 30 October 2008, a Tribunal considering evidence from a vulnerable witness would ever actually need to determine or direct that oral evidence was required to be given by that witness, we leave to a case in which the point directly arises. Our preliminary view would be that it is unlikely that a Tribunal would actually need to direct that oral evidence be given by a vulnerable witness; that choice is generally for the party seeking to call such a witness, aware that failing to call the witness may result in the party not making out its case to the required standard.

Grounds 2 and 3

32 These can be dealt with more swiftly. The only criticism of the judge's treatment of the letter from Kiambu Department of Health was that the judge failed to take into account the fact that the Respondent had had sight of that document for a prolonged period before the hearing. However, there is no obligation on the Respondent to undertake checks of the Appellant's evidence. The judge gave a number of reasons at [44] as to why little weight should be attached to that document, and there is no discreet challenge to those reasons.

33 Further, whereas it is correct to note that the judge did not make explicit reference to the country information regarding the existence of the Mungiki sect, it has not been demonstrated by the Appellant what difference this would have made to the judge's assessment of the Appellant's credibility. Mr Pipi did not in fact draw our attention to any particular passages within the country information contained within the Appellant's bundle before the judge. However, we note that such evidence is somewhat limited. No part of that evidence has been drawn to our attention to demonstrate that the judge's approach to the

Appellant's credibility was erroneous in any way; for example that what was deemed implausible by the judge was in fact arguably plausible, by reference to country information.

34 We find that there is no material error of law within the judge's decision.

Notice of Decision

The decision did not involve the making of any material error of law.

The appeal is dismissed on asylum and human rights grounds.

Signed *R. O'Ryan* Date: 26.5.22

Deputy Upper Tribunal Judge O'Ryan