Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11924/2015

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 9 January 2017	**On 2 May 2017**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

H I B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Mair, Counsel instructed by TRP
For the Respondent: Mrs H Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Mauritania. Since his arrival in the UK it has been his case that he fears persecution in Mauritania due to his minority Peuhl ethnic group status because following an attempted coup in June 2003 he and his brother were arrested, ill-treated and detained for three months before escaping.

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2. The appellant has obtained permission to challenge the decision of First-tier Tribunal (FtT) Judge Pacey dated 15 February 2016 dismissing his appeal against a decision made by the respondent on 27 April 2015 refusing his asylum claim. It is an important backdrop to this case that the appellant applied for asylum in 2003 and when refused appealed to an Immigration Tribunal and that on 12 May 2004 Judge Chohan dismissed his appeal. In reaching an adverse credibility finding Judge Chohan found his claim to have escaped from prison in 2003 implausible and that it "does not fit well with the objective evidence".

3. In deciding in 2016 to dismiss the appellant's appeal against a second asylum application, FtT Judge Pacey applied principles set out in **Devaseelan [2004] UKIAT 00082** and concluded that the appellant had "adduced nothing before me to enable me to displace the **Devaseelan** principles".

4. The grounds of appeal raised three main arguments: It was submitted that Judge Pacey had (i) misapplied the **Devaseelan** guidelines by failing to apply scrutiny to the new materials; (ii) failed to understand the methodology underlying the medical report of Dr Julian Cohen dated 7 September 2015 and the fact that the findings in that report "were at the high end of the usage of options for assessment set out in the Istanbul Protocol"; and (iii) failed to engage with the new background evidence which had been adduced by the appellant.

5. I am grateful to both parties for their submissions.

6. It is convenient if I deal with (ii) and (iii) before (i).

7. I consider that the judge's treatment of the medical report is vitiated by legal error: It will assist if I first of all set out what Judge Pacey said about the medical evidence in the case, in particular the report of Dr Cohen:

> "29. I accept the medical report from Dr Cohen as new evidence, which I can therefore take into account. However, although she considered the Appellant's mental state to be consistent with his account, I treat her findings with caution, since it is also reasonable to suppose that someone in the Appellant's position, who has been living in limbo in the UK for a number of years, would manifest signs of depression for that reason alone, regardless of anything that might have happened before he came to the UK.
>
> 30. Moreover, I note that the report was only commissioned in 2015, when signs of physical injury would have faded. With the passage of time, physical evidence must inevitably become less precise (with the exception, of course, of an irreversible injury such as an amputation, which is not the case here). It is

remarkable that no such medical report was sought when the Appellant first claimed asylum.

31. I also note that Dr Cohen did not carry out an anal examination and therefore there is no objective evidence available of the alleged rape.

32. Whilst, then, I accept that the Appellant has at some time suffered physical injuries and his mental health problems, as evidenced by his medical record and in particular his high PHQ9 score, in my view, for the reasons I have set out, they do not constitute such new evidence as would enable me to displace the finding of the previous Immigration Judge.

33. The Appellant initially claimed and continues to claim a fear of persecution based on his previous experiences at the hands of the authorities, which manifests as a fear that he would be killed or subject to inhumane treatment on return. I do not therefore find his explanation of remaining silent about his rape and the extent of the torture to be credible. Whilst it might have been hard – and I accept this – for a proud man in his culture (or indeed perhaps any culture) to admit to having been raped, given that silence, on his evidence, would risk his being returned to Mauritania, in my view he would in his own interests have reasonably been able to overcome reluctance in the interests of securing his own safety, that would be assured, on his account, by being granted refugee status in the UK."

8. There are several difficulties with the assessment, not least that despite Dr Cohen's medical report being lengthy the judge dealt with it only briefly. The judge correctly observed that Dr Cohen's report sought to analyse and evaluate both the appellant's physical and mental symptoms. As regards Dr Cohen's findings on the appellant's physical symptoms, the judge gave only two reasons why he considered they were to be treated with caution, namely that since the report was only commissioned in 2015, the physical evidence had inevitably become less precise; and no such report was sought when the appellant first claimed asylum. The first of these reasons appears to rest on a misconception about the effect of the passage of time in attribution of causes for physical injuries. Whilst it is widely accepted that the passage of time can affect the ability of medical examiners to determine the age of scars (see **KV (scarring – medical evidence) Sri Lanka [2014] UKUT 00230 (IAC)**), there is no suggestion that this prevents attribution of causes. Insofar as the judge considered the failure of the appellant to obtain a medical report earlier, it is unfortunate that he did not at least state why he did not accept the explanation given for that by the appellant and his new solicitors. In any event, neither of these reasons begin to address the contents of Dr Cohen's report. Whilst some of the ways in which Dr Cohen seeks to apply the Istanbul Protocol five-fold hierarchy of degrees of likelihood of attribution are curious (in that

she applies them in several places not to the alleged case of torture, but to the likelihood of a particular way in which an injury was inflicted, e.g. by a blunt object), it is clear that she considered that the physical scars which the appellant had (some 61 of them) constituted "very strong evidence corroborating the torture described", the wording used in paragraph 64 of the report.

9. As regards the judge's reasons for treating Dr Cohen's findings on the appellant's psychological conditions "with caution", the only reason given is once again problematic. It is problematic first because it does not appear to recognise that Dr Cohen also diagnosed PTSD and second because in rejecting Dr Cohen's assessment that the appellant's psychological problems were consistent with his account, the judge effectively relies on his own causal assessment. He states that:-

> "... it is also reasonable to suppose that someone in the Appellant's position, who has been living in limbo in the UK for a number of years, would manifest signs of depression for that reason alone, regardless of anything that might have happened before he came to the UK".

The judge was perfectly entitled to point out, as Dr Cohen had done, that psychological problems of the type the appellant suffered from can be caused by or significantly characterised by stress relating to experiences in the country in which asylum is sought: indeed the Istanbul Protocol states as much.

10. In the appellant's case, however, Dr Cohen had considered the possible causation and had expressly rejected it. A similar encroachment of the judge onto the territory of clinical assessment can also be seen in the treatment of the issue of the delay on the part of the appellant in failing to mention his allegation of anal rape when he first claimed asylum and appealed. The judge's statement regarding this essentially addresses a generalisation that people who have been subjected to anal rape would not keep quiet about it if they truly feared persecution. Issues surrounding delay in mentioning rape are far from being straightforward and in certain circumstances it will be entirely legitimate for a decision-maker not to accept that the delay was justified; but such issues cannot be resolved by recourse to generalisations of the kind relied on here.

11. It is also apparent that the judge did not really grapple with the fact that for Dr Cohen it was not the physical or mental diagnosis, each taken on their own, that was important in this case but their combination: see paragraph 70 of the report.

12. I consider that the third main ground of appeal is also made out. I take the thrust of the ground to be that the judge failed to properly assess the new background evidence. In my judgement there is a significant failure of the judge at paragraph 26 to understand the proper scope of **Devaseelan** principles. In paragraph 26 the judge stated:

> "New objective evidence has been provided. However, the issue on which the previous determination was founded was the Appellant's lack of credibility. Since his account was not believed, any general, objective evidence cannot reasonably be held to support a case that has not been accepted."

However, to assert that "any general, objective evidence cannot reasonably be held to support a case that has not been accepted" is plainly erroneous. The task set for judges dealing with a new asylum appeal where there have been adverse credibility findings made by a Tribunal previously is to consider the new evidence, together with the old, in their entirety. General objective evidence is not excluded from the category of new evidence just because it is general and objective rather than specific to an individual. For example, if an applicant was previously disbelieved because he claimed he had been involved in a mass prison breakout on a particular date even though there was no objective evidence to show there was such a breakout on that date, a judge applying **Devaseelan** principles cannot a priori state that such materials "cannot reasonably be held to support a case that has not been accepted". The new background evidence in the appellant's case did potentially bear on the credibility of the appellant's own account of escape and should not have been excluded a priori in this way. Of possible significance as well was that Judge Chohan in his 2004 decision had obviously seen of particular importance the fact that the appellant's account did "not fit well with the objective evidence".

13. I have focused on grounds (ii) and (iii) because in doing so it has been necessary for me to address (i) as well and it will be apparent that I am satisfied that the judge misapplied **Devaseelan** criteria. I conclude that the judge materially erred in law and that his decision is to be set aside.

14. Both representatives stated that if I did decide to set aside Judge Pacey's decision I should remit the case to the First-tier Tribunal. I am persuaded that this is the right course and in line with the Senior President's Practice Statement, since the case turns very much on credibility and none of Judge Pacey's findings of fact can be preserved.

Notice of Decision

15. I remit the case to be heard in the First-tier Tribunal not before Judge Pacey or Judge Chohan.

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 Date 28 April 2017

Dr H H Storey
Judge of the Upper Tribunal