MB (Rule 30 Procedure Rules) DRC [2008] UKAIT 00088

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House **Date of Hearing: 10 September 2008**

Before:

SENIOR IMMIGRATION JUDGE MOULDEN

Between

MB

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr P Nathan, Counsel instructed by Scudamores Solicitors
For the Respondent: Ms Z Kiss, Senior Home Office Presenting Officer

Rule 30 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 as amended by the Asylum and Immigration Tribunal (Procedure) (Amendment) Rules 2008, should be read in conjunction with rule 31(4)(c). If there is a reply the Tribunal must take it into account. If there is no reply this is a matter which the Tribunal may take into account in the light of all the facts in the case.

DETERMINATION AND REASONS

1. The appellant is a citizen of the Democratic Republic of Congo. There has been an order for the reconsideration of the determination of a panel (Immigration Judge Sharp and Dr T Okitikpi) dismissing his appeal against the respondent's decision of 2 October 2007 to make a deportation order against him. The respondent concluded that deportation would be conducive to the public good having considered all the factors relating to the appellant and in particular the contents of paragraph 364 of the Immigration Rules.

2. The appellant's immigration history is complicated. The panel set it out in paragraphs 2 to 9 of the determination in the following terms:

> "2. This is not straightforward in view of the fact that the appellant has used a number of different names whilst living in this country the main two of which are PA and MB. It is the

appellant's case that his true name is MB who was born on - March 1983 and hence I will firstly review the immigration history of the appellant as that person.

3. It is the appellant's case that as MB he entered the United Kingdom on 16th November 1994 with his adoptive mother and siblings and was granted temporary admission to join his adoptive father BN who had arrived in the UK on 30th April 1993 and had claimed asylum.

4. On 17th October 1999 the appellant as MB was granted indefinite leave to remain in the United Kingdom as a dependant of his adoptive father under the special measures introduced for clearing the asylum backlog. On 1st February 2002 in the same name he submitted an application for naturalisation as a British citizen and there were no criminal convictions declared on his application.

5. On 23rd June 2005 the Home Office wrote to the appellant in the name of B advising him that they were aware that he had used another identity namely that of PA and asked for an explanation as to why these two identities were being used. On 9th August 2005 the representatives of the appellant as MB namely Ormerods responded by a letter advising that the appellant had denied all knowledge of ever having used the identity of PA and claimed that his [sic] was a mistake of the Home Office.

6. In his capacity as PA the appellant claimed to have arrived in the UK on 19th August 1996 as an unaccompanied minor and was granted a visitor's visa until 18th September 1996 and on the day of arrival sought asylum at the Asylum Screening Unit in Croydon. His application for asylum was refused on 8th December 1998 but he was granted exceptional leave to remain until 8th December 2002. On 30th January 2003 in the name of PA he submitted an application for indefinite leave to remain on exceptional grounds which application was refused in the reasons for deportation letter from the Home Office dated 10th November 2007.

7. In [sic] should be said in relation to his application for asylum in 1996 he was represented by solicitors Simmons Muirhead & Burton on [sic] 50 Bradwick Street, Soho, London W1. They, amongst other things, submitted on his behalf a statement by PA in correspondence dated 28th October 1996 in which PA sets out a vivid account of how his parents were killed by Government soldiers and he managed to escape and make his way to the UK.

8. There are other documents in the Home Office file showing how PA applied for a travel document on 20th January 1999 as well as his application for indefinite leave to remain on 14th January 2003. The application for naturalisation in his capacity as MB dates [sic] 1st February 2002 is also in the file.

9. It is of note that there is a further letter from Ormerods dated 13th March 2006 which was sent to the Immigration and Nationality Directorate in their capacity as acting for him as MB. They refer to MB's application for citizenship and reiterate that PA was nothing to do with their client and cannot be associated with any application that PA was making. It emphasises that their client MB has already been granted indefinite leave to remain and wishes to pursue his application for citizenship"

3. The panel set out the offences leading to the deportation order in paragraphs 10, 11 and 12 of his determination in the following terms:

"10. On 19th June 2007 the appellant was sentenced to fifteen months' imprisonment at the Wood Green Crown Court. This was for a number of offences and was made up as follows. For an offence of dangerous driving he received four months' imprisonment with no separate penalty for failing to surrender. For driving while disqualified he received four months' imprisonment consecutively with no separate penalty for having no insurance. For handling stolen goods he received three months' imprisonment consecutively. For a further two charges of theft he received a [sic] four months' imprisonment each concurrently but

consecutive to other [sic] sentences. For failing to surrender he received another concurrent one months' [sic] imprisonment and he was disqualified from driving for twelve months.

11. He was charged and convicted in the name of PA and it was said that his date of birth was not known. In his sentencing remarks the judge referred to him having a history of driving matters and stealing motor cars. The sentencing remarks were brief and make no reference to any pre-sentence report.

12. There is within the papers a printout of the appellant's previous convictions as at 24th December 2006 which show that the person known as PA had claimed to have been born in Croydon in April 1981 with an address at Sutton and which sets out some nine names under which he has been known and four different dates of birth. None of these includes MB. The list of convictions consists of three fraud and kindred offences, six theft and kindred offences, one offence relating to police, courts and prisons, six miscellaneous offences as well as one non-recordable offence."

4. The appellant attended the hearing and gave evidence as did his sometime partner, SN. Both parties were represented, the appellant by Mr Nathan who appeared before me.

5. The panel found that the appellant was not a credible witness. In paragraph 83 of the determination it said:

> "83. … he is an inveterate liar and manipulator and is therefore not to be trusted in relation to anything he says …"

6. In relation to the Article 8 grounds, the panel found that the appellant had established a private and family life in the United Kingdom in the ten years he had been here. He had had an intermittent relationship with his girlfriend and their child. The extent of the appellant's private and family life was such as potentially to engage the operation of Article 8. The panel went on to consider proportionality, concluding that the appellant was young and healthy and would be able to re-adapt to life in his country of origin. His girlfriend had visited the DRC and had relatives there. Even if she did not want to go there there were no insurmountable obstacles to her doing so. The panel considered such evidence as there was as to the appellant's son's medical condition before concluding that it would be proportionate to remove the appellant to the DRC.

7. In relation to paragraph 364 of the Immigration Rules the panel found that, taking into account the appropriate factors and the particular facts of the appellant's case there were no exceptional circumstances which outweighed the presumption that his deportation was required in the public interest.

8. The appeal was dismissed in relation to the grounds claiming asylum, humanitarian protection, deportation under the Immigration Rules and in relation to Articles 2, 3 and 8.

9. The grounds for reconsideration submit, firstly, that the panel erred in law in failing to grant an adjournment to enable the appellant to produce a Probation Officer's report and in failing to give the appellant the promised "benefit of the doubt". Secondly, it is argued that the panel failed to take into account the position of the appellant's son and his family life together with the country material as to the death rate for children in sub-Saharan Africa.

10. Mr Nathan raised the preliminary point that the respondent had not filed a reply under the provisions of rule 30 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 as amended by the Asylum and Immigration Tribunal (Procedure) (Amendment) Rules 2008. Rules 30 and 31 provide:

> "**Reply**
>
> **30.** –
>
> (1) When the other party to the appeal is served with an order for reconsideration, he must file with the Tribunal and serve on the applicant a reply setting out his case if he contends that -
> (a) there was no error of law in the decision on the appeal; or
> (b) there was an error of law in the decision on the appeal, but it was not a material error of law.
> (2) The other party to the appeal must file and serve any reply not later than 5 days before the earliest date appointed for any hearing of or in relation to the reconsideration of the appeal.
> (3) In this rule, 'other party to the appeal' means the party other than the party on whose application the order for reconsideration was made.
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> **Procedure for reconsideration of appeal**
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> **31.** –
> (1) Where an order for reconsideration has been made, the Tribunal must reconsider an appeal as soon as reasonably practicable after that order has been served on both parties to the appeal.
> (2) Where the reconsideration is pursuant to an order under section 103A –
> (a) the Tribunal carrying out the reconsideration must first decide whether the original Tribunal made a material error of law; and
> (b) if it decides that the original Tribunal did not make a material error of law, the Tribunal must order that the original determination of the appeal shall stand.
> (3) Subject to paragraph (2), the Tribunal must substitute a fresh decision to allow or dismiss the appeal.
> (4) In carrying out the reconsideration, the Tribunal –
> (a) may limit submissions or evidence to one or more specified issues;
> (b) must have regard to any directions given by the immigration judge or court which ordered the reconsideration; and
> (c) when making a decision under paragraph (2)(a) –
> (i) must take into account the section 103A application and any reply; and
> (ii) may take into account any other matter which it considers relevant.
> (5) In Rule 30 and this rule, a 'material error of law' means an error of law which affected the Tribunal's decision upon the appeal."

11. Mr Nathan argued that rule 30 was mandatory and, having failed to serve a reply, the respondent should not be allowed to argue that there was no error of law or that any error of law was not material. Whilst contending that the rule was mandatory, he accepted that no sanction was specified but argued that the rule would in effect be a nullity if there were no sanctions for failure to comply. Ms Kiss outlined the Secretary of State's position, which I asked her to commit to paper. She did so in the following terms:

> "The failure to serve a rule 30 response does not mean that the SoS (ECO) has conceded the merits of the grounds; we wish to continue to argue the case.
>
> The draft consultation document left a response under rule 30 optional.

The change to a mandatory response was opposed on 12 May 2008. The SoS has not had time to alter staff levels/recruit/train staff to facilitate compliance. Those issues are under consideration.

As there is no sanction under the Procedure Rules for failure to comply with the amended rule 30 and its imposition is questionable; there is no power in the AIT Procedure Rules to interpret the failure as any form of concession.

The Tribunal is invited to apply AIT Procedure Rule 59(1) and extend the time limit for a reply so that the Tribunal can now accept verbal representations on this point.

The reason for extending the time limit is that justice would not be served if these representations were refused."

12. Ms Kiss relied on rule 59 of the Procedure Rules which provides:

"**Errors of procedure**

59. - (1) Where, before the Tribunal has determined an appeal or application, there has been an error of procedure such as a failure to comply with a rule -

(a) subject to these Rules, the error does not invalidate any step taken in the proceedings, unless the Tribunal so orders; and

(b) the Tribunal may make any order, or take any other step, that it considers appropriate to remedy the error.

(2) In particular, any determination made in an appeal or application under these Rules shall be valid notwithstanding that –

(a) a hearing did not take place; or

(b) the determination was not made or served, within a time period specified in these Rules."

13. I consider that the provisions of rules 30 and 31 need to be read in conjunction with the overriding objective set out in paragraph 4, which provides:

"**Overriding objective**

4. The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible; and, where appropriate, that members of the Tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and in the wider public interest."

14. I am conscious that judicial treatment of appellants and respondents should be even-handed. However, this does not mean that in all cases they should be treated in exactly the same way. The overriding objective of fairness, with the other objectives, is likely to mean that, where there is a reconsideration at the respondent's request, an unrepresented appellant who is likely to have little or no appreciation of the requirements of the Procedure Rules, should not be shut out from arguing that there is no error of law or no material error of law merely because he has failed to serve a reply. On the other hand the respondent, whether the Secretary of State, an Immigration Officer or an Entry Clearance Officer, experienced in such matters and with the resources of the State available to them is less likely to have a good reason for not complying with rule 30, although I accept there may be a satisfactory explanation in some cases.

15. In this case Ms Kiss has provided an explanation for the respondent's failure to serve a reply. I find that the explanation is not a good reason for the respondent's failure to serve a reply. Whether or not the consultation paper indicated that a reply would be optional, there is no doubt that since the amended Procedure Rules came into effect on 12 May 2008 the Secretary of State has known that there is a rule as binding on her as it is on everyone else. The changes to the Procedure Rules took effect immediately and the changes affected proceedings already current except where compliance would be impossible because the deadline could not be met. In this case notice that reconsideration had been ordered was sent out on 20 June 2008 and there is no doubt that rule 30 applies.

16. I have considered whether "an error of procedure such as a failure to comply with the rule" in rule 59 applies only to errors or failures by the Tribunal or whether, as I have concluded, it applies equally to errors or failures on the part of parties to the proceedings and those representing them. There is nothing in rule 59 which indicates that it is limited to errors or failures by the Tribunal, in contrast to paragraph 60, which is clearly limited to correction of clerical errors, accidental slips or omissions by the Tribunal. I find that rule 59(1) could be applied to the situation in which either party, in this case the respondent, has failed to serve a reply. Furthermore, although not mentioned by the representatives, rule 45(4)(c) of the Procedure Rules provides:

> "(4) Directions of the Tribunal may, in particular - …
>
> (c) vary any time limit in these Rules or in directions previously given by the Tribunal for anything to be done by a party (including, where the Tribunal considers that there are exceptional reasons for doing so, extending a time limit which has expired);"

The provisions of rules 59 and 45(4)(c) give the Tribunal separate discretions to extend time for the service of a reply (even if the time limit has expired) or to do whatever is needed to remedy the error.

17. It would be possible, in the exercise of the discretion that the Rules confer, for me to make an order extending the time for service of a reply. I might have considered it appropriate to do so if Ms Kiss had provided a better explanation than the generic one put forward or if she had produced a written reply at the hearing, subject to a need to consider whether to adjourn and give the appellant further time to address any reply. I find that it would not be a proper exercise of my discretion to extend the time for filing a reply where there is no reply and what Ms Kiss seeks is to substitute oral submissions.

18. I drew the representatives' attention to the reported determination in SP (Time for reply – Rules 30(2) and 45(4)(c)) Pakistan [2006] UKAIT 00010 which was a decision under the 2005 Procedure Rules prior to the 2008 Rules. The former Rule 30(1) provided:

> "30(1). When the other party to the appeal is served with an order for reconsideration, he must, if he contends that the Tribunal should uphold the initial determination for reasons different from or additional to those given in the determination, file with the Tribunal and serve on the applicant a reply setting out his case.

(2) The other party to the appeal must file and serve any reply not later than five days before the earliest date appointed for any hearing of or in relation to the reconsideration of the appeal.
(3) In this Rule, "other party to the appeal" means the party other than the party on whose application the order for reconsideration was made."

19. The Tribunal concluded that the provisions of rule 30(2) were mandatory. The Tribunal went on to consider the provisions of rule 45(4)(c) which stated:

> "(4) Directions of the Tribunal may in particular - ….
>
> (c) vary any time limit in these Rules or in directions previously given by the Tribunal for anything to be done by a party."

20. The Tribunal concluded, in paragraph 24 of the determination:

> "24. On the face of it this might appear to permit consideration of the late reply in this case. However, we are of the view that a careful reading of rule 45(4)(c) indicates a prospective rather than a retrospective variation, in the light of the words "anything to be done by a party." No direction was sought, and no explanation for the lateness of service of the reply was provided. Though it is clear from rule 45(4)(c) that variation of the time limit in rule 30 is possible, we conclude that a power to make to prospective directions in no sense connotes a power to condone, ex post facto, a failure to comply with the requirements of the Rules."

21. As can be seen from paragraph 16 above, following this reported determination, the wording of rule 45(4)(c) has been amended to add the words "(including, where the Tribunal considers that there are exceptional reasons for doing so, extending a time limit which has expired)".

22. Whilst the Procedure Rules contain no specific sanction for the failure to comply with rule 30, I find the answer in the provisions of rule 31(4)(c). If there is a reply the Tribunal must take it into account. In the absence of a requirement that the Tribunal must take into account the failure to serve a reply, I conclude that such a failure comes within the provisions of rule 31(4)(c) and that this is a matter which may be taken into account. Whether and if so the extent to which it is taken into account depends on all the facts of the case. These should include the merits of the grounds for reconsideration. If it is clear that there is not a material error of law then the absence of a reply should not shut out a finding that there is no such error of law or the consequences of this conclusion. The failure to serve a reply may tip the balance against the party who has failed to follow the requirements of rule 30, if that party seeks at the reconsideration hearing to deploy arguments that the other party could not reasonably be expected to anticipate.

23. In this case I have come to the conclusion, for reasons to which I will return, that there are no material errors of law. Even after taking into account the respondent's unsatisfactory explanation for her failure to file a reply, I found that the respondent's failure to serve a rule 30 reply should not, on the particular facts of this case, preclude her from arguing that there was no error of law or that any error of law was not material. I therefore heard Ms Kiss' submissions.

24. This reconsideration was listed for hearing at 10am and the appellant was due to be produced from custody. At 10am he had not arrived. I adjourned to find out what had happened to him. By 10.40 he had still not arrived. The adjournment

gave Ms Kiss the opportunity to produce the written note of the respondent's reasons for not having filed a reply and Mr Nathan the opportunity to consider the authorities submitted by Ms Kiss. As this was a first stage reconsideration at which the appellant's oral evidence was not required I started hearing submissions from the representatives. Part-way through the hearing, at 11.40am, the appellant arrived. I explained to him what had happened up to that point and the purpose of the reconsideration hearing. Mr Nathan wanted to ask the appellant whether the post-sentence Probation Officer's report, which was not available at the hearing before the panel, had been found and whether he had brought it with him. The question was put to the appellant who answered both questions in the negative. I refused to allow Mr Nathan to ask the appellant further questions, this being a first stage reconsideration hearing.

25. At the beginning of the hearing Ms Kiss produced a number of authorities namely Huang v SSHD [2007] UKHL 11, OH (Serbia) v SSHD [2008] EWCA Civ 694, OP (Jamaica) v SSHD [2008] EWCA Civ 440 and three judgements of the European Court of Human Rights. Mr Nathan asked for an adjournment to enable him to consider these cases. I indicated my surprise that competent and experienced Counsel would not have properly prepared the case by arming himself with all relevant authorities whether in this jurisdiction or from the ECHR. Mr Nathan conceded that he was familiar with the judgement of the House of Lords in Huang. Ms Kiss said that she would not be relying on the three ECHR cases. Mr Nathan had had time to read the others during the adjournment. He did not repeat the adjournment request.

26. The panel dealt with Mr Nathan's adjournment request in paragraphs 25 – 27 of the determination in which it said:

> "25. The appellant requested an adjournment on the basis that no pre-sentencing report had been provided pursuant to the directions that the respondent should provide the same and hence there was no assessment as to the appellant's risk to the community. It was furthermore said that the appellant's son's medical condition was a relevant factor and there was no evidence relating to whether there were facilities in the DRC suitable for his condition. There was also a question mark as to the reference to the appellant being seemingly on bail for rape during the judge's sentencing remarks which needed to be clarified.
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> 26. The respondent accepted that there was no evidence of any rape charge being pursued whatever the position may have been at one stage and we indicated that we would ignore any reference to any possible rape offence. The respondent furthermore stated that the absence of a pre-sentence report did not in itself warrant an adjournment and the same applied to the lack of evidence in relation to medical facilities in the DRC.
>
> 27. We refused the adjournment. We consider that all the matters that might have been covered in the documents that were said to be required could be dealt with by the appellant and his witnesses in evidence and in any event we were entitled to consider the objective evidence in relation to the DRC on the Country Information Report. We were of the view that the case could proceed without injustice to the appellant."

27. The appellant's representatives have now obtained a pre-sentence probation report which is amongst the papers before me. I will refer to it later in this determination. However, it does not assist the appellant to the extent that his Counsel had argued because it does not show that he was thought to be at low risk of re-offending.

28. In his cross-examination the appellant said that there was another probation report or assessment. This is referred to in paragraph 38 of the determination where the panel said:

> "38. He gave further evidence-in-chief. He explained how he was an enhanced prisoner and was appointed a "listener" namely someone who listens to other inmates. He was in full-time education in prison and a part-time listener. He said that the probation service provided a written assessment which was that he was at a low risk of re-offending. He explained he had a copy of the assessment in his bag which he did not have with him because he had left it at Harmondsworth."

29. Mr Nathan told me that this report had not been found. I am not persuaded that it ever existed. There were compelling reasons for the judge's conclusion that the appellant was not a credible witness.

30. I looked at the pre-sentence Probation Officer's report. Although it was not available to the panel it was necessary to look at it in order to consider whether there should have been an adjournment and whether the report would have made any material difference. I find that it would not. The pre-sentence report is dated 2 April 2007. In the paragraph headed "Assessment of the risk of harm" it is said:

> "I assess the risk of harm to the public as low as although PA has a previous conviction for Robbery, this offence was committed over ten years ago. He poses a medium risk of harm to other road users.
>
> In view of the fact that PA has several previous convictions for different offences, I assess there is a medium risk of him committing offences of a similar or different nature."

The recommendation was for a supervision order for a period of twelve months and a requirement to complete the "Think First Programme". I note that, notwithstanding the recommendation, the judge imposed a sentence of fifteen months' imprisonment.

31. In the grounds for reconsideration Mr Nathan apologises for overlooking the deadline and the late submission of the application for reconsideration. He also indicates that his notes taken at the hearing, including the notes of the evidence and submissions, have been lost. Nevertheless, he argues that the panel erred in law by failing to honour the statement that it would give the appellant "the benefit of the doubt". I am not persuaded that so broad a statement went any further than to indicate that the panel would apply the normal criteria applicable in such a case. The appropriate standard of proof is sometimes referred to, not wholly accurately, as giving an appellant the benefit of the doubt. In any event, in this case and in the light of such a strong adverse credibility finding, I fail to see that there was any real doubt from which the appellant might benefit. The rest of the first ground for reconsideration is no more than an attempt by Mr Nathan to re-argue the case without identifying any material error of law.

32. The panel addressed the position of the appellant's son in paragraphs 90, 91 and 92 of the determination in which they said:

> "90. What however must be now considered is the extent to which the fact that the parties have a son with a certain medical condition is a relevant factor. We accept that the son does have a problem with his heart which has necessitated an early operation and may need an

operation when he is aged 5. However he has no restrictions in his way of life and despite being monitored on a three monthly basis his life continues as normal. There is no reason to think that apart from his heart condition he could not adapt at his young age to living in the country of his parent's origin even though his way of life will be different from that he would enjoy should he remain living with his mother in state accommodation and living at the state's expense.

91. We are of the view that the son's medical condition is not sufficient to prevent the appellant's removal. We accept that paragraph 28 of the Country Information Report in its 74 sub-paragraphs shows that medical facilities are far from ideal with life expectancy being 42 years for men and 47 for women according to the 2003 figures. We also accept that there are a wealth of diseases suffered by all members of the community, in particular children. We note that there are a number of international organisations seeking to assist in medical programmes including vaccination programmes for children. However it is not clear whether the son would have the same regular opportunity for being checked for his heart condition in the same manner that he does in this country and that it may not be as easy to arrange for any operation that might become necessary in due course.

92. However it must be commented that much of the medical concentration is upon the major diseases such as cholera, malaria and HIV and AIDS. In paragraph 28.36 it refers to the 2001 Swiss Report reporting how "a wide range of medical treatment is available in Kinshasa. There are few diseases (even chronic ones) or operations that cannot be dealt with in the country as long as the patient has the financial means." The Swiss report refers to there being a number of medical facilities in Kinshasa ranging from public hospitals to private hospitals and clinics together with company hospitals and dispensaries in addition to hospitals and dispensaries run by churches or Non-Governmental Organisations. The position therefore is not that it would be impossible to receive any treatment that may be needed especially if there are funds available."

33. It was open to the panel to come to the conclusion that the appellant's son's medical condition was not sufficient to prevent the appellant's removal. Whilst the appellant's sometime partner said that their son needed an operation her credibility was not enhanced by her admitted criminal convictions some or all of which were the result of crimes committed whilst acting in concert with the appellant. Significantly, there was no medical evidence to show that the appellant's son would require an operation or even particular care or medication. It is clear that the panel considered the potential problems and reduced life expectancy for children in the DRC. I was not referred to the opinions of the House of Lords in Beoku-Betts v SSHD [2008] UKHL 39 and Chikwamba v SSHD [2008] UKHL 40 but do not consider that the panel's assessment or conclusions were contrary to the guidance given.

34. The appellant has a long criminal record for a variety of offences. The panel was entitled to conclude that he was an inveterate liar. He has used a number of aliases. He has employed solicitors to put forward manifestly untrue claims for asylum in different names. I find that there is no material error of law and I uphold the panel's determination.

Signed

Senior Immigration Judge Moulden