Neutral Citation Number: [2006] EWCA Civ 1037

Case No: C5/2005/1805

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL
Mr A L McGeachy and Mr J F McMahon

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2006

Before :

LORD JUSTICE CHADWICK
LORD JUSTICE JACOB
and
LORD JUSTICE NEUBERGER

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Between :

HK	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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Mr Nicholas Armstrong (instructed by **- Messrs Glazer Delmar**) for the **Appellant**
Ms Kate Grange (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing dates : 23rd June 2006

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Judgment

Lord Justice Neuberger :

1. This appeal, which has been conspicuously well argued on both sides, highlights the very difficult task faced by Immigration Judges when they are called upon to make findings of fact, in circumstances where there is no direct factual evidence other than that given by the appellant himself, and a lack of background information or of general experience upon which the Judges can safely rely. The appeal also throws sharply into focus the difficult question of when it is appropriate for this court, which can only interfere with a decision of an Immigration Judge or the Asylum and Immigration Tribunal ("the Tribunal") on a point of law, to remit a decision which ultimately turns on questions of fact.

The procedural history

2. The appellant, whom I shall refer to as HK, is a member of the Temne tribe and a citizen of Sierra Leone, where he was born some 22 years ago. On 10 May 2002, he left that country and arrived in the United Kingdom, where he claimed asylum five or six days later.

3. That asylum application has taken a somewhat tortuous and lengthy course. Having been interviewed on behalf of the Secretary of State on 24 June, HK was refused asylum and he was ordered to be removed to Sierra Leone. His appeal was dismissed by an Adjudicator on 4 February 2003, but that decision was remitted by the Tribunal on 17 October 2003. A decision by a fresh Adjudicator on 26 February 2004 again resulted in HK's appeal being dismissed, but that decision was also remitted by the Tribunal on 9 February 2005.

4. On 10 May 2005, the third hearing of HK's appeal took place before the Tribunal, consisting of Mr A L McGeachy and Mr J F McMahon. That hearing resulted yet again in a dismissal on 29 June 2005, against which the Tribunal refused HK permission to appeal on 27 July 2005. However, Brooke LJ and I gave him permission to appeal to this court on 13 December 2005.

The evidence of HK

5. HK's evidence was given, in the usual way, partly by reference to answers he gave to the Secretary of State on his asylum application, partly in the form of written statements and partly orally. I begin by setting out that part of his evidence which is not in dispute.

6. HK was born and brought up in Kambia in northwest Sierra Leone. His father was, to use his words, "a political man" who worked in some capacity in or with the government for five or six years from 1977. In 1982, when the government fell from power, his father became a businessman. In 1995, rebels attacked Kambia, and invaded the family home. HK's mother was killed, one of his sisters was raped, and his father and another of his sisters disappeared. HK himself was injected with drugs, ill treated in other ways, and forced to join the rebels with another sister.

7. After three or four years, HK and his sister were released and returned home, where they were looked after by a neighbour. In late 1998 or early 1999, HK joined a football team in Freetown where he lived with the coach. However, when rebels

entered Freetown on 6 January 1999, he escaped and returned to his village where he remained for some five weeks. The village was attacked again, and he spent the next two or so years as a refugee with Guinean soldiers (apart from one month temporarily back in his village). He returned to his village at the beginning of 2002, and lived there for just over a year. In February 2002, he went to Bo district in the south of the country, which he said was some seven or eight hours' journey away. He went there as he believed that it had a football team, which he hoped to be able to join.

8. At this point, HK's evidence becomes controversial. While in Bo district, he said he was attacked by a group of young men of the Mende tribe. He said that they were in their twenties, and that they targeted him because of his father, whom they described as a "greedy man", "stupid" and "foolish". HK's evidence suggested that they knew of his father's involvement in politics under a previous regime; and that they realised that he was his father's son because his surname was uncommon.

9. HK said these members of the Mende tribe took him into the bush where they walked for two days. They stopped at a point where he noticed some bones on the ground. He also noticed three leaves in a curious formation. One of the men, he said, then cut him three times on the left side of his chest, and threatened to cut his throat. He said that the men then dug a hole "and forced me to put my penis into the hole. There were poisonous ants crawling all over the place and I sustained many bites". He said that the men then sang a song saying that he was going to join their society, known as the Wunde, which he believed was a group which terrorised others.

10. According to HK, he was then left alone in the bush tied up for some ten hours. At the end of that time, he says that a man came and told him in the Temne language that the members of the Mende tribe intended to kill him as a sacrifice, but that he would help HK to escape by loosening his bonds. He did so, and HK says that he then took several weeks to return to his village through the bush. At his village, he hid the scars on his chest because, he said, if they were discovered, his life would be "in extreme danger". He said that if he was "caught by members of the Wunde", "they would know from the scars on my chest I was not a full member and that I had escaped".

11. HK went on to say that he got in touch with a friend called Amadu, to whom he explained that "I was very afraid of the Wunde… and he confirmed that I had every reason to be afraid". Amadu, he said, told him that he could not remain in Sierra Leone and, with his assistance, HK got near Lungi Airport, where he met an old friend of his father's, Mr Kamara, to whom he "explained that I was committed to the Wunde society people and that they were looking for me". He said that Mr Kamara told him that he was "in a very dangerous situation", but that he could not stay with Mr Kamara because, if he was discovered, Mr Kamara's "business would be in danger"; HK also said that Mr Kamara told him that he should escape from Sierra Leone, and that Mr Kamara helped him to obtain a passport, as a result of which he boarded a plane to the United Kingdom on 10 May 2002.

The expert evidence

12. Apart from evidence from HK himself, the Tribunal had written evidence in the form of fairly detailed reports from a number of people.

13. First, there was a report from Professor Melissa Leach of the University of Sussex, who has a doctorate "based on two years of field work research in Sierra Leone in the late 1980s", and who made subsequent visits to that country during the following decade. She said that she remained in close touch with what was going on in that country while working in neighbouring Guinea. She considered herself "well placed to comment on [HK's] appeal" and it is noteworthy that one of her books, published in 1994, refers to the Mende in its title.

14. She explained that the Wunde are one of a number of secret societies in Sierra Leone, and that they "control particular spirits which they deploy in rituals" including "initiation rituals held in special parts of the bush". She went on to explain that "virtually all Mende boys and girls are initiated", as well as people who aspire to posts in the Sierra Leone government and administration. She also said that the power of such societies is "deeply respected and feared". She explained that little was known about "precise events and activities except by those who had been initiated" because "initiates are under strict orders not to reveal what they saw in the bush at pain of death".

15. She went on to say that the location of the initiation described by HK and the warning sign of "three leaves on a path" were consistent with her understanding and experience. As to the person who helped HK escape, the evidence that he spoke Temne was, she thought, not unlikely, because "the Bo area… is close to the northern border where Mende country shades into Temne country, and, as I know from living there, it is common to encounter people with one parent of each or who speak both languages". She went on to say that HK's evidence "that he saw skulls and body parts in the bush" was consistent with the reputation of the Wunde "for performing human sacrifices and for using body parts in a variety of rituals". She thought the three leaves HK said he saw on the path were consistent with the signs used by the Wunde.

16. While she could not say anything useful about HK having to place his penis in a hole, Professor Leach could "confirm that biting ants have long been a stock in trade form of torture and punishment among Mende people". While she could not "comment authoritatively on the precise scarification", Professor Leach thought that the suggestion that the three scars on the left side of HK's chest resulted from a Wunde initiation ceremony was "entirely plausible".

17. Professor Leach went on to "opine that scars only on one side would mark [HK] out as someone who had escaped halfway through an initiation ritual". She described this as "a very problematic position" because "Wunde society members – and possibly other Mende men – would view him as a threat to their interests. They would probably be keen to re-capture him either to silence him or to complete the initiation process." She was sceptical about HK being protected, because most "officials such as police officers… are afraid of the Wunde society, and in my opinion resist becoming involved." She explained that "high ranking national politicians and other important people [in Sierra Leone] are Wunde members". She also said that as "a single young man with no family connections", HK's "family circumstances thus enhance his vulnerability."

18. In a subsequent report, Professor Leach described HK's "claims as plausible". She also said that, while she could not "say with authority… exactly what would happen should he be recaptured by [members of the Wunde], I do believe that he would be

right to live in a state of fear and uncertainty… from one of the powerful and secretive cultural and political groups in the upper Guinea sub region."

19. HK's advisers sought further evidence from another expert on the area, a Mr Reginald Cline-Cole, on the issue of the Wunde (as opposed to another secret society) being the likely source of the scars on HK's chest. Mr Cline-Cole was unable to be of much assistance, although the emails exchanged with him were before the Tribunal.

20. There were also some medical reports. First, there was a report from Dr Alec Frank, a general practitioner who had additional training in psychological medicine. He referred to HK's experiences as being "horrific as one could imagine", and described him as suffering from Post Traumatic Stress Disorder ["PTSD"], whose symptoms will remain severe for the next two to three years, possibly longer". Dr Frank also considered HK's age, because at one of the earlier hearings, HK had not been believed on this subject (wrongly as it transpired). Dr Frank considered that HK "represented an above average risk of suicide", a view based on very wide experience during a professional life of 40 years". He referred to scars on HK's genitals, which he said "categorically" were not attributable to "any sexually transmitted condition" and were "compatible with and highly consistent with multiple small insect bites which became infected." Dr Frank also said that HK suffered from paranoia and hallucinations which were "symptoms often found in [PTSD] of significant severity".

21. Dr Groszer, who trained in radiology and Psychiatry in Berlin, and is a specialist registrar in psychiatry, also prepared a report. Like Dr Frank, Dr Groszer set out HK's history and experiences as relayed to him by HK. Dr Groszer also explained that HK "exhibits episodes of repeated reliving of his past traumas in the form of intrusive memories (flashbacks) and nightmares" and that this resulted in depression from time to time, PTSD and erectile dysfunction. Dr Groszer also confirmed that the scars on HK's penis did not appear to result from a sexually acquired infection" and were "consistent with his account of the origin of these scars".

22. Dr Groszer explained that he was first introduced to HK by a Mrs Levy, whom he observed carrying out an exercise called eye movement desensitisation and reprocessing ("EMDR"). Observing this, Dr Groszer said that "while recalling memories of his abduction and torture by the Wunde society, [HK] was experiencing great distress and anxiety, began to tremble slightly and was tearful whilst overall remaining quiet." He said that there was no evidence from these tests that the story was made up or imagined – a particularly significant point as an Adjudicator who had heard one of the two earlier appeals had concluded that the story resulted from hallucination.

The issues and the proper approach

23. The basis of HK's application for asylum was, of course, that he feared persecution in Sierra Leone by members of the Wunde society as a result of his partial initiation and subsequent escape. (He also claimed the right to stay on the basis that his removal to Sierra Leone would breach his rights under Article 3 and/or 8 of the European Convention on Human Rights, a point I shall deal with briefly at the end of this judgment). His asylum claim was rejected on two separate grounds by the Tribunal. First, they did not believe that part of his evidence concerning his experiences in Sierra Leone in February and March 2002, which I have summarised in paragraphs 8

to 11 above. Secondly, they concluded that, even if that evidence was correct, HK could live in Kambia, his home town, in such a way as could reasonably be expected to ensure that he was not in any danger in any event.

24. Before considering these findings in any detail, it is right to observe that each of these two reasons for dismissing HK's appeal involved making findings of primary fact or the drawing of inferences from such findings. This court can normally be expected to refuse to interfere with such conclusions. Indeed, in appeals from the Asylum and Immigration Appeal Tribunal this court is normally precluded from interfering with such conclusions. As pointed out by Ms Grange on behalf of the Secretary of State, the jurisdiction of this court to interfere with a decision of the Tribunal is limited to cases where we are satisfied that the Tribunal made an error of law, and that that error of law resulted in a decision which should not stand.

25. However, as she rightly accepted, this does not mean we cannot quash the decision of the Tribunal in this case, merely because it involved findings of fact and the drawing of inferences from those findings. Thus, in *E –v- Secretary of State* [2004] QB 1044, Carnwath LJ, giving the judgment of this court, said at paragraph 66 that "a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law", albeit subject to certain conditions which he then enumerated.

26. Perverseness in connection with a finding of fact is an aspect of mistake of law. In that connection, Ms Grange helpfully referred to what Brooke LJ said when giving the judgement of this court in *R(Iran) –v- Secretary of State* [2005] EWCA Civ 982, at paragraph 11:

> "It is well known that "perversity" represents a very high hurdle. In *Miftari v SSHD* [2005] EWCA Civ 481, the whole court agreed that the word meant what it said: it was a demanding concept. The majority of the court (Keene and Maurice Kay LJJ) said that it embraced decisions that were irrational or unreasonable in the *Wednesbury* sense (even if there was no wilful or conscious departure from the rational), but it also included a finding of fact that was wholly unsupported by the evidence, provided always that this was a finding as to a material matter."

27. The difficulty of the fact-finding exercise is particularly acute in asylum cases, as has been said on more than one occasion in this court - see for instance *Gheisari –v- Secretary of State* [2004] EWCA Civ 1854 at paragraphs 10 and 12 per Sedley LJ and at paragraphs 20 and 21 per Pill LJ. The standard of proof to be applied for the purpose of assessing the appellant's fear of persecution is low. The choice is not normally which of two parties to believe, but whether or not to believe the appellant. Relatively unusually for an English Judge, an Immigration Judge has an almost inquisitorial function, although he has none of the evidence-gathering or other investigatory powers of an inquisitorial Judge. That is a particularly acute problem in cases where the evidence is pretty unsatisfactory in extent, quality and presentation, which is particularly true of asylum cases. That is normally through nobody's fault: it is the nature of the beast.

28. Further, in many asylum cases, some, even most, of the appellant's story may seem inherently unlikely but that does not mean that it is untrue. The ingredients of the story, and the story as a whole, have to be considered against the available country evidence and reliable expert evidence, and other familiar factors, such as consistency with what the appellant has said before, and with other factual evidence (where there is any).

29. Inherent probability, which may be helpful in many domestic cases, can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases. Much of the evidence will be referable to societies with customs and circumstances which are very different from those of which the members of the fact-finding tribunal have any (even second-hand) experience. Indeed, it is likely that the country which an asylum-seeker has left will be suffering from the sort of problems and dislocations with which the overwhelming majority of residents of this country will be wholly unfamiliar. The point is well made in *Hathaway on Law of Refugee Status* (1991) at page 81:

> "In assessing the general human rights information, decision-makers must constantly be on guard to avoid implicitly recharacterizing the nature of the risk based on their own perceptions of reasonability."

30. Inherent improbability in the context of asylum cases was discussed at some length by Lord Brodie in *Awala –v- Secretary of State* [2005] CSOH 73. At paragraph 22, he pointed out that it was "not proper to reject an applicant's account *merely* on the basis that it is not credible or not plausible. To say that an applicant's account is not credible is to state a conclusion" (emphasis added). At paragraph 24, he said that rejection of a story on grounds of implausibility must be done "on reasonably drawn inferences and not simply on conjecture or speculation". He went on to emphasise, as did Pill LJ in *Ghaisari*, the entitlement of the fact-finder to rely "on his common sense and his ability, as a practical and informed person, to identify what is or is not plausible". However, he accepted that "there will be cases where actions which may appear implausible if judged by…Scottish standards, might be plausible when considered within the context of the applicant's social and cultural background".

The Tribunal's rejection of HK's evidence

31. With that in mind, I turn to the reasoning of the Tribunal on the first issue upon which they dismissed HK's appeal, namely their rejection of his controversial evidence. In that connection, their reasons for disbelieving him are contained in paragraphs 49 to 56 of their careful decision. With the assistance of counsel in this case, it is, I think, possible to identify the various reasons without quoting those paragraphs in full.

32. The Tribunal's reasons for disbelieving HK's story may be summarised as follows:

i) "People in Bo were likely to be members of the Mende tribe but it seems there is no reason why they should have recognised [HK] let alone who his father was;… his father had not been involved in politics for 20 years…. [HK] had lived in Kambia which is 8 hours journey from Bo, the men who had kidnapped him were aged between 20 and 30";

ii) "[T]here is nothing to back up [HK's] assertion that [his surname] is such an usual name that… he would have been though of as his father's son";

iii) "There is nothing in Professor Leach's report to indicate why the Wunde would want to initiate a member of the Temne tribe… Dr Leach refers to initiation of Mende boys and girls – not the initiation of strangers";

iv) Although Dr. Groszer referred to marks on HK's penis, he could not "corroborate the … story that he was made to lie down and with his penis in a hole, and it is difficult to understand how that exercise could have been physically undertaken";

v) Although HK had three scars on his chest, there was nothing to back up his claim that they "related to an initiation ceremony into the Wunde", and although there were many groups in Sierra Leone which use scarring, there was no evidence to show that the scarring was typical of the Wunde;

vi) It was "not… credible that, if [HK] had been taken for a forcible initiation ceremony he would have so easily been allowed to escape";

vii) Although Professor Leach had "some considerable knowledge about the Mende", "much of her report is based on speculation", she knew "little about Wunde initiation ceremonies", and indeed she pointed out that "it would be virtually impossible – not to say unethical – to obtain detailed reports from Wunde members";

viii) The evidence of Dr. Frank and Dr Groszer was not helpful, because they assumed that HK's story was true and were not in a position either to support or to challenge it.

33. It must be acknowledged that the Tribunal in this case was faced with a peculiarly difficult task – as may be evidenced by the fact that there have been two previous hearings of HK's appeal, both of which had resulted in flawed decisions. Even by the standards of asylum-seekers' stories, HK's alleged experiences in February and March 2002 are unusual and remarkable, and they do not appear to be borne on by any general country material. This can fairly be said to cause this court to be even more reluctant that it otherwise would be to interfere with the Tribunal's decision of fact. However, the Tribunal has, quite rightly, given its reasons for not believing HK's evidence, and it is incumbent on us to see whether those reasons bear analysis.

34. Reason (i) strikes me as weak, at least in the absence of some evidence as to HK's father's role in the government between 1977 and 1982, which it would presumably have been open to the Secretary of State to produce. It is quite conceivable that he had functions which rendered him notorious and unpopular in Sierra Leone generally, or among the Mende in particular, twenty years later.

35. Reason (ii) seems to me to be misconceived. If HK said his surname was unusual, it was not open to the Tribunal to reject that evidence without any factual basis for so doing. The rejection of that part of HK's evidence was, as I see it, based on "conjecture or speculation", to quote Lord Brodie, and that is impermissible.

36. Reason (iii) is good as far as it goes, but that is not very far, in my judgment. Professor Leach did indeed say that Wunde children and some influential people were initiated by the Wunde, and she said nothing about forcible initiation of others, for instance as a preparation for human sacrifice, for which she did say the Wunde had a reputation. However, in her fairly long report, she said nothing to contradict the notion that this might happen. On the contrary; she specifically described HK's story as "plausible" and emphasised the limited information available about the Wunde.

37. Reason (iv) is, I think, unjustified. The fact that HK had scarring on his penis (and, as Jacob LJ said in argument, only on his penis), which was consistent with his story, is fairly striking. Further, without condescending to details, it does not seem to me that there is anything in the Tribunal's point that it is difficult to envisage how a group of young men could have got HK, who was trussed up at the time, to lie in such a way that his penis was in a hole which they had dug.

38. Reason (v) is also unimpressive, in my view. There is no reason for thinking that a group other than the Wunde inflicted the wounds which now manifest themselves as the three scars on HK's chest. He said it was effected by Wunde members, and he was in the right part of the country to encounter them. Neither Professor Leach nor Mr Cline-Cole suggested that the scars did not result in the way HK described. Realistically, one could not have expected HK to produce confirmatory evidence. To reject HK's story partly because there was no independent evidence that his scarring was typical of the Wunde, when there was no evidence to doubt it, was as unjustified as the Tribunal's unsubstantiated rejection of his evidence that his surname was unusual.

39. Reason (vi) is more defensible, and it was, in my opinion, capable of being a valid reason for doubting HK's story. However, I doubt that it is a point which would weigh with every tribunal. The way in which HK says he managed to escape is not self-evidently absurd, let alone inconsistent with any other evidence. The idea that one of his captors might take pity on him is not inherently improbable, though it could fairly be characterised as a stroke of luck. The notion of a Temne speaker helping him was thought to be credible by Professor Leach for the reason she gave.

40. I am not impressed with reason (vii). While Professor Leach's evidence was limited, particularly in terms of hard confirmatory fact, it was not appropriate to dismiss it completely. In some cases (maybe particularly in some asylum cases), expert evidence can undoubtedly be rejected as wholly unhelpful, either because of its contents or because of the expert. Of course, the weight to be given to such evidence is very much for the fact-finding tribunal. It is also right to say that, in their decision, the Tribunal did identify many of the features of Professor Leach's evidence identified in paragraphs 13 to 18 above, but concluded that her "comments [were] not of assistance".

41. However, the claim depended on the overall plausibility of HK's story, and there was no helpful evidence other than his testimony and that of the country and medical experts. Professor Leach was an undoubtedly relevant expert, and she produced what appears to have been a full, balanced, and informed report, which, on a fair reading supported HK's story, albeit to a limited extent. In particular, to my mind, it supported some aspects of his evidence which might otherwise have seemed dubious (e.g. the existence of the Wunde, the initiation in the bush, the scarring on the chest, the use of

biting ants, the presence of body parts and three leaves on the path, the presence of a Temne speaker). It is only fair to add that the Tribunal was right to say that there were other aspects of his story (e.g. the involuntary initiation of a non-Wende, the insertion of HK's penis in the hole in the ground, the circumstances of his escape) which were not specifically supported by anything in Professor Leach's evidence, but, as mentioned, she did describe the story generally as "plausible".

42. All in all, it does not appear to me that it was appropriate to reject Professor Leach's evidence as "not of assistance", because her opinions on specific aspects of HK's evidence of which she had no direct knowledge were "unanalytical assertions" or "mere speculation", as the Tribunal did. First, there were specific aspects of HK's story, which might otherwise have seemed far-fetched, and appropriate to reject, which were supported by Professor Leach's evidence. Secondly, the description of her views on other aspects of HK's evidence as "unanalytical assertions" is unreasonably pejorative, and the description as "speculation" is unhelpful. She was plainly an expert, with plenty of experience in the field, and her views, even on those aspects of HK's evidence of which she honestly admitted she had no knowledge, were based on that expertise and experience. Of course, the Tribunal was not bound to accept her evidence or to hold that it ultimately validated HK's story. However, to dismiss her views as "not of assistance" appears to me to be simply wrong.

43. Reason (viii) is similarly unsatisfactory. The story HK told the two doctors was consistent with that which he told the Tribunal. But it goes further than that. The Tribunal were unimpressed with the views of the two doctors that the marks on HK's penis were consistent with his story. However, the unusual existence of such non-venereal scars on (and only on) that organ, coupled with the absence of any other explanation, was, as mentioned, plainly significant, although, it should be emphasised, not by any means necessarily decisive. Very probably of less significance, but not irrelevant, the medical evidence on the cause of the scarring on his chest was also consistent with HK's story.

44. The mental difficulties suffered by HK, as discussed by the doctors, were consistent with his case. Dr Groszer's conclusion, as a result of his observation of Mrs Levy's EMDR test, that HK's story was true, is also of real support to HK's case. Of course, as Chadwick LJ observed during the argument, it is the Tribunal, not the doctors, who must ultimately decide whether or not the story is to be believed. However, particularly in a case such as this, with the very unusual nature of the story and the absence of much other corroborating or conflicting evidence, that testimony should not have been passed over without mention.

45. In the light of these views as to the reasons the Tribunal gave for rejecting HK's story, I now turn to consider whether that rejection can nonetheless stand. Where a fact-finding tribunal has decided to reject evidence for a number of reasons, the mere fact that some of those reasons do not bear analysis is not, of itself, enough to justify an appellate court setting the decision aside. In such a case, the appellate court has to decide whether it would be just to let the tribunal's decision stand. That question will normally be answered by considering whether one can be tolerably confident that the tribunal's decision would have been the same on the basis of the reasons which have survived its scrutiny. In the present case, as I understood it, both counsel accepted that that was the right test, and that seems to me to be correct.

46. In this case, I am satisfied that one cannot be confident that the Tribunal would have rejected HK's case on the basis of their reasons which have survived scrutiny in this court. On the face of it, that would seem to be pretty self-evident from the discussion in paragraphs 33 to 43 above. Of the eight reasons, not much survives. Of course, as Jacob LJ said in argument, the issue cannot be resolved simply by asking how many of the Tribunal's reasons survive. The issue has to be determined partly by reference to the probative value of those reasons, both in absolute terms and by comparison with the rejected reasons, and objectively, but also subjectively, in the sense of seeing what weight the tribunal gave to the various reasons it gave. The issue also has to be determined bearing in mind the overall picture including reasons which a tribunal would have had, but which were not expressed. An example would be the impression made by a witness (a factor which is not, in my view, high in the hierarchy of cogency, especially in an asylum case which will normally involve an appellant from a very different cultural background from that of the Tribunal).

47. As I have said, not much of the Tribunal's reasoning for rejecting HK's evidence has survived, either in terms of number of reasons or, more importantly, in overall terms. HK's advisers had gone to some effort to obtain fairly full and apparently balanced expert country evidence which was consistent with his story, albeit only to some extent. The medical evidence was similarly full and helpful to him, again (inevitably) only to some extent. There were no specific items of evidence which contradicted HK's story and no positive inconsistencies in HK's evidence. In addition, HK's story had been consistent when related to the Secretary of State, the two Adjudicators, the two doctors, and the Tribunal. In the light of those factors, it seems apparent that the Tribunal's decision on this issue cannot stand.

48. On the other hand, this court should, in principle, be very reluctant to interfere with a decision of a tribunal, which turns purely on fact or inference from fact. All the more so where the decision is that of the Asylum and Immigration Tribunal, whose fact-finding function is so often peculiarly difficult and sensitive for the reasons discussed in paragraphs 27 to 29 above. The same factors which give rise to inherent difficulties for the Tribunal can fairly be said to make it easier for a dishonest or misguided appellant to mislead the Tribunal into accepting a bogus story. As Chadwick LJ observed in argument, allowing this appeal could lead to a perception that the more unlikely an appellant's story the harder it would be to justify rejecting it as incredible.

49. I acknowledge the force of these points, but they do not deter me from my conclusion that the appeal must be allowed at least on the first issue, namely the Tribunal's rejection of HK's story. First, the points identified in the previous paragraph cannot properly justify our refusing the appeal in the light of the analysis of the tribunal's reasons for disbelieving HK. In addition this is a very exceptional case, not merely in the unusual nature of the appellant's story, but also in the consistency of his evidence, the absence of any contradictory evidence, and the support from country and medical expert evidence. I would not go so far as to suggest that, on the evidence currently available, the Tribunal could not have rejected HK's story, but, taken as a whole, the reasons for which the story was rejected simply cannot stand. Accordingly, subject to the second issue, to which I now turn, I would allow this appeal.

<u>The Tribunal's finding of no risk in any event</u>

50. Having rejected HK's story, the Tribunal very sensibly went on to consider whether, even if his story was true, he would be at risk if he was returned to Kambia. They decided, for reasons given in paragraphs 58 and 59 of their decision, that he would not be. Again, I shall set out their reasons by reference to extracts from the decision.

51. The Tribunal's reasons for finding no risk in any event were as follows:

    i) "[W]e see no reason why the Wunde would wish to follow [HK] to Kambia which is eight hours journey away"; "Professor Leach's claim that [the Wunde] would view [HK] as a threat to their interests and would probably be keen to recapture him… is mere speculation";

    ii) "[T]here is not a reasonable likelihood that he would be recognised as the person who had been picked up at night and detained in the jungle";

    iii) In answer to the point that his marks would give him away, "the scars on his chest would be hidden by a shirt";

    iv) As for the claim that this would prevent him from playing football, it was not as if he had an established footballing career or that that was the only career open to him, and anyway he could "disguise the marks on his chest" or "take steps to change these marks".

52. Ms Grange submitted that these reasons can be separated into two groups, and it is only if both groups of reasons are unsatisfactory that HK's appeal can succeed on this second point. The first group, reasons (i) and (ii), relates to the Wunde's lack of interest in, and of information or knowledge about, HK. The second group, reasons (iii) and (iv), deal with the point that HK's chest scars would give him away. I accept that the reasons could be divided up into two groups in this way, but I think there could be a degree of overlap between them. For instance, it could be that the Wunde would not be searching for HK or would not recognise his face, but that someone seeing his scars would draw an inference which would cause the Wunde to realise who he was. Be that as it may, I turn to consider the reasons of the Tribunal on this alternative ground they had for dismissing HK's appeal.

53. Reason (i) suffers from a number of defects, in my view. First, rather as on the first issue, the Tribunal wrongly dismissed Professor Leach's evidence as "mere speculation", but this time without even referring to any details of her testimony at all. Given that there was no evidence other than that of HK on the point, some fuller consideration of Professor Leach's opinion would have been appropriate. For instance, although she said they were based in the south of Sierra Leone, she referred to the Wunde as having power and connections throughout the country.

54. Secondly, on the assumption that HK was telling the truth (which was the basis of this part of the decision), the Tribunal ought to have considered and discussed the fact that he had said that two other people in Sierra Leone, Amadu and Mr Kamara, had apparently taken the view that HK was seriously at risk. Yet no reference was made to this aspect, despite the paucity of other evidence on the topic. Thirdly, there was no evidence, and (on the basis of what one would expect, and the absence of any suggestion to the contrary in their decision) there was no basis in terms of the Tribunal's experience, which could have been invoked to support reason (i).

55. I find reason (ii) difficult to weigh. In a sense, it can be said to be pure speculation. In the absence of any evidence, or at any rate of any express findings, it is not possible to assess either whether HK would have been memorable for his appearance, or whether his Mende captors would have had the opportunity to have his appearance fixed in their memories as a result of two days walking in the bush. On the other hand, bearing in mind the very limited evidence available and the difficult task confronting the Tribunal, it can fairly be said to be unrealistic and unfair to rule this reason out. In my view, the correct conclusion is that, in the circumstances, it was open to the Tribunal to rely on this reason, but significantly fuller consideration should have been given to its factual basis.

56. I turn to reason (iii). The implications of a finding that HK's chest scars could be hidden by a shirt also required careful consideration. While the Tribunal pretty fully considered the implications so far as footballing was concerned, they did not discuss the other implications. Their decision that HK did not need to play football may seem harsh to some people, but it was one which the Tribunal was entitled to reach for the reasons they gave. However, no consideration was apparently given to the consequences of having to wear a shirt at all times in public, and, possibly, on private occasions. In public, it may be unreasonable to expect him to wear a shirt all the time, bearing in mind that Sierra Leone can get very hot. It may well therefore be unfair to expect him to wear a shirt, not least because, if he does so, it may result in some people having suspicions about what he has to hide. In private, he may be placed in a rather similar dilemma so far as intimate relationships are concerned.

57. Finally, I turn to reason (iv). It seems to me that it would not have been appropriate for the Tribunal to conclude that HK could submit himself to plastic surgery to remove or hide the scars, at least on the basis of the evidence before them. HK said, not surprisingly, that he did not wish to submit himself to further cutting. Particularly in those circumstances (but probably even in the absence of that testimony), it is hard to see how it could be right to hold that a person could have surgery without knowing how easily available, expensive, difficult, or invasive such surgery would be. As to other means of masking the scars, there was simply no evidence before the Tribunal as to how that could be achieved. I accept that there are many issues on which a tribunal, and particularly the Asylum and Immigration Tribunal, has to do its best on less than adequate evidence. However, the following factors must be borne in mind here. First, the question of whether and how one can satisfactorily mask scars on the chest is not one on which common general knowledge or the specialised knowledge gained by Immigration Judges can be expected to bear. Secondly, the Secretary of State was represented and had notice of the point, and therefore could have dealt with it. Thirdly, the consequences of the reason being unjustified could be severe, if this is to be treated as a free-standing factor.

58. I therefore conclude that none of the four reasons for finding that HK would not be at risk was fully satisfactory. However, that does not necessarily mean that the appeal on this second issue must be allowed. The reasons given by the Tribunal on this second issue are rather less susceptible to criticism than those on the first issue. In these circumstances, it seems to me appropriate to consider (a) whether, taken as a whole the reasons can nonetheless stand, and, if not, (b) whether, to the extent that the reasons survive, the decision of the Tribunal would have been the same.

59. As to (a), it is important to bear in mind that the fact that a tribunal's reason does not appear to an appellate court to be wholly satisfactory, in terms of its nature or its expressed justification, certainly does not mean that it should be rejected, or even treated as questionable. It is almost always possible to criticise or improve on any reason or other point made by a tribunal (or indeed anyone else). To expect perfection in any decision, let alone in all aspects of a decision, would be fatuous. All the more so in the light of the many pressures and difficulties suffered by many tribunals (and none more so in this connection than the Asylum and Immigration Tribunal).

60. Nonetheless, these considerations cannot justify an unduly indulgent attitude to decisions of a tribunal, and, it may be said, particularly the Asylum and Immigration Tribunal. It is simply wrong in principle to permit plainly defective decisions to stand (unless of course they can be justified on other grounds). That is particularly true in an asylum case such as this where the standard of proof is low. Determinations such as that in this case can have very serious consequences for an appellant if they are not soundly based. It is no exaggeration to say that, in some asylum cases, the life of the appellant may hang on the decision. Like many points, this to some extent cuts both ways, as it represents one of the many pressures on the Tribunal, which an appellate court should bear in mind.

61. In my judgment, on the facts of this case, Mr Armstrong has established that the reasons given by the Tribunal for its decision on the second issue are sufficiently defective to justify our concluding that his appeal should be allowed, unless we are satisfied that the decision would very probably have been the same on the basis of those aspects of the reasons which survive. To put it bluntly, there are simply too many gaps in the analysis and reasoning needed to support the conclusion the Tribunal reached on the second issue. That may be explained by the fact that the decision on this issue may have been regarded by the Tribunal as something of an afterthought or makeweight; it would be hard not to sympathise with them if that was the case.

62. I must go on to consider issue (b), i.e. whether the decision can be upheld on the basis of the Tribunal's reasoning that survives. Here, as I suspect in many cases, a negative answer to question (a) almost inevitably leads to a negative answer to question (b). None of the Tribunal's four reasons, identified in paragraph 51 above, has survived in a satisfactory state; if any one of them is to be relied on, it would require more careful analysis and justification. I would therefore allow the appeal on the second issue as well.

Conclusions and closing comments

63. Given that I consider that the appeal should be allowed on the two issues discussed above (namely the rejection of HK's story and the finding that he would not be at risk in any event), it follows that I would allow this appeal. However, before concluding, there are three points I should make.

64. First, the decision and reasoning in this case should not be interpreted as casting doubt on, or diluting, the point made in *R (Iran)-v- Secretary of State* and *E –v- Secretary of State* (and a number of other cases) about the difficulty normally faced by a projected appeal against a decision of the Asylum and Immigration Tribunal on issues of fact (whether primary fact or inference from fact). In this connection, is important to

emphasise the very unusual nature of the facts of this case. It is unnecessary to repeat them, but they include the nature of the appellant's story, the absence of any evidence to call it into question, the nature and extent of the evidence in support, the consistency of the appellant's story, and the nature of the reasons given by the Tribunal. As Mr Armstrong put it, this is "an unusual and extreme case".

65. Secondly, the fact that we are setting aside the decision of the Tribunal should not be seen as an adverse criticism. The difficulties faced by any tribunal required to decide this case are plain, and arise from many of the factors discussed in the previous paragraph. Indeed, they are apparent from the unusual (but admittedly not unique) fact that two previous decisions on HK's appeal have been remitted.

66. Thirdly, HK has also appealed against the rejection of his appeal by the Tribunal based on Articles 3 and 8 of the Convention. Realistically, Mr Armstrong, while not abandoning the argument, did not develop it orally at all. In so far as the argument is based on the risk of mistreatment if HK is returned, it is substantially the same as the second issue and the Article 3 appeal is to that extent allowed. As to the appeal based on Article 8, I hope it does no discourtesy to the argument simply to say that I agree with what is in Ms Grange's skeleton argument, namely that the Tribunal directed themselves in accordance with the law and reached a conclusion which was plainly open to them.

67. I would therefore allow HK's asylum appeal (and his appeal under Article 3 of the Convention) and remit his appeal against the Secretary of State's refusal of asylum (and leave to remain) for determination by a fresh Tribunal.

Lord Justice Jacob

68. I agree with the judgments of Chadwick and Neuberger LJJ.

Lord Justice Chadwick

69. I agree that this matter must be remitted, once again, for further determination on the facts. I, too, have reached the conclusion that the reasons given by the tribunal for the findings of fact which they have made are vulnerable to challenge on the only ground upon which this Court can properly interfere: that is to say, that those reasons disclose that the tribunal erred in law.

70. To my mind, the appeal illustrates – with unusual clarity - the very difficult task faced by decision makers in a case where the applicant gives an account of facts which, if they occurred, took place in an environment which is wholly outside the experience of the decision taker and in circumstances in which there is very little relevant in-country material or expert evidence against which the applicant's account can be tested.

71. The striking features of the applicant's account in the present case is that there is no evidence to contradict it; such in-country material and expert evidence as there is tends to support it (or, at the least, is not inconsistent with it); the applicant has, himself, been consistent throughout; and there is no finding that the applicant has shown himself otherwise to be an unreliable witness.

72. On analysis of the tribunal's reasoning, I am unable to avoid the conclusion that the applicant's account has been rejected simply because the facts that he describes are so unusual as to be thought unbelievable. But, as Lord Justice Neuberger has pointed out, that is not a safe basis upon which to reject the existence of facts which are said to have occurred within an environment and culture which is so wholly outside the experience of the decision maker as that in the present case. There is simply no yardstick against which the decision maker can test whether the facts are inherently incredible or not. The tribunal's failure to confront that problem must lead to the conclusion that they erred in law.

73. In that respect it is impossible, in my view, to hold that the tribunal's conclusion that the applicant would not be at risk if he were to return is not infected by their rejection of his factual account. If the applicant is telling the truth about what happened to him, the possibility that his fear of discovery by members of the Wunde sect, if he were to return to his own part of the country, is well-founded cannot be dismissed. There is no finding that he does not, himself, believe that he would be at serious risk; nor that, if he were identified as one who had witnessed (without completing) a secret initiation ceremony, his life would not be in danger. The tribunal was not in a position (on the material before them) to conclude that the scars on the applicant's chest would not mark him out to those who might be concerned to protect the secrets of the Wunde initiation rites; and were not in a position to conclude that those scars could be reliably concealed or disguised.

74. I would add this. The appeal was argued in this Court – as it was below – as if it were primarily an asylum appeal. The Secretary of State did not suggest that the test to be applied – in relation to the need to be satisfied as the risk of serious harm if the applicant were returned to Sierra Leone – differed if the claim to remain was founded on article 3 of the Human Rights Convention rather than on the Refugee Convention. It may be that there were good reasons for that approach in the present case. But I would not, myself, endorse the proposition that the test is the same in each case. And I have difficulty in identifying, in the present case, the basis upon which it seems to have been accepted that the persecution which the applicant fears that he would suffer on return would be persecution for a reason which enables him to rely upon the Refugee Convention.