Case No: C5/2006/0791

Neutral Citation Number: [2006] EWCA Civ 1302
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM IMMIGRATION APPEAL TRIBUNAL
AS/15533/2004

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday 10th October2006

Before:

SIR MARK POTTER THE PRESIDENT OF THE FAMILY DIVISION
and
LORD JUSTICE BROOKE
VICE PRESIDENT COURT OF APPEAL
and
LORD JUSTICE MOORE-BICK

- -

Between :

SA (Somalia)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Ltd
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Sonali Naik (instructed by **Messrs Dare Emmanuel Solicitors**) for the Appellant
Charles Bourne (instructed by **The Treasury Solicitor**) for the Respondent

- -

Judgment

Sir Mark Potter, P :

Introduction

1. This is an appeal by SA against the decision of the Asylum and Immigration Tribunal ("The Tribunal") on 17 November 2005 dismissing his appeals against refusal of asylum and the Secretary of State's decision to remove him from the UK. The decision of the Tribunal was in turn a reconsideration of the determination of an adjudicator promulgated on 2 November 2004 dismissing the appellant's Immigration and Human Rights appeal from a decision of the Secretary of State refusing the appellant's application for asylum in the UK on the grounds of a well founded fear of persecution in Somalia. The Letter of Reasons was dated 21 July 2004.

2. The appeal involves a single point of law to the effect that, in considering the matter, both the adjudicator and the Tribunal failed to deal properly with certain medical evidence placed before them as corroborative of the claimant's account of his persecution in Somalia, in that they dealt with it on the basis stated to be incorrect by the Court of Appeal in the case of *Mibanga v Secretary of State of the Home Department* [2005] EWCA Civ 367; [2005] 1INLR 377.

Factual background

3. The appellant's case is that he is a member of the minority Bendabow sub-clan of the Benadir clan in Somalia, and that he suffered persecution as a result. He left Somalia for the Yemen in 1996 and came to the United Kingdom in 2004 where he claimed asylum. He claimed in particular to have suffered torture in Somalia. Before the adjudicator and in support of his claim to have been tortured, he produced an undated medical report in the form of a letter from a Dr Ashu Madan, a general practitioner in South-east London with whose practice the appellant registered at some stage after his arrival. That report described signs upon the appellant's account of his body of old injury, principally scarring, which it was submitted (although it was not so stated in the medical report) were corroborative of the appellant's treatment in Somalia. There was also produced a letter from the United Somali Benadir Council confirming the minority clan status of the appellant.

4. The adjudicator dismissed the claim of the appellant on the grounds of credibility.

5. On 13 December 2004, the Tribunal granted permission to appeal on the basis that the adjudicator arguably had "compartmentalised the medical evidence". However on 15 November 2005, upon full consideration, the Tribunal dismissed the appeal on the grounds that the medical evidence did not corroborate the case of the appellant.

6. Permission to appeal to the Court of Appeal was refused by the Tribunal on 13 February 2006 but was granted on paper by Maurice Kay LJ on 9 May 2006, confined to what was described as "the *Mibanga* point"

7. The appeal depends upon showing that the Tribunal should have allowed the appeal against the adjudicator's decision of 14 October 2004. It is thus common ground that for practical purposes the appeal is directed against the reasoning of the adjudicator and depends upon the contention that the adjudicator did not deal properly with Dr Madan's letter.

8. The Secretary of State denies that there was any error of law by the adjudicator given the particular facts and form of the doctor's letter. In the alternative he argues that, even if the principle in *Mibanga* was breached in this case, a different and proper approach by the adjudicator would not have affected the outcome. The latter point is made by way of a respondent's notice because it was not a reason expressed by the Tribunal.

9. It is pertinent to point out that, at the time of the adjudicator's decision, *Mibanga* had not been decided in the Court of Appeal and was therefore not available to the adjudicator by way of guidance.

The decision in *Mibanga*

10. Since the decision in *Mibanga* is the basis of the appellant's appeal in this case, I shall turn to it in a little detail. In that case the decision of an adjudicator was overturned by the Court of Appeal because, among other reasons, the medical evidence was not dealt with properly. The appellant claimed to be a refugee from persecution in the Congo and claimed to have suffered torture including the passage of an electrical current through his genitals. He relied on the report of Dr Norman, a doctor with special expertise in genito-urinary medicine, who was a part-time worker for the Medical Foundation for the Care of the Victims of Torture. She observed a mass of scars on his body, including two on his penis. Her report expressly addressed the question of the veracity of the history given by the appellant. She reported that a number of scars were consistent with beatings with a belt; that multiple circular scars on the legs and arms were consistent with bites from leeches on an occasion when, according to the appellant's account to her, he had by way of punishment had been thrown into a barrel of leeches; that scars on his legs were consistent with being kicked with booted feet; and in particular the scars underneath his penis were consistent with having being tortured by the application of electrodes to his genitals. She went on to say that, in her opinion, the veracity of the appellant's history was increased by his insisting that two of the scars had an innocent explanation; and that his emotional state when giving her his history, in the course of which he had at one point burst into tears and had been unable to speak for several minutes, was also, in her view, consistent with the history of torture which he had given to her (see paragraphs [12] and [13] of the judgment of Wilson J).

11. The adjudicator in *Mibanga* had made eleven findings that aspects of the appellant's claims of persecution were not credible and, at that point in her determination, turned to Dr Norman's report. She said as follows:

> "The medical evidence does not assist the appellant. The medical evidence, whilst noting the number and location [and] size of numerous scars on the appellant and his current, assessed to be fragile, mental state, does not consider, or deal with whether the scars could be the result of anything else, for example, childhood illness or skin disease. I conclude that the medical evidence does not assist in establishing the appellant's case and the doubts I have expressed on the credibility of the fundamental aspects of his claim have not been resolved by the medical evidence in any sense."

In a later passage, the adjudicator affirmatively asserted that the scars could "well be" from childhood disease, and not skin disease or illness. (see paras [15] and [16] of judgment).

12. At paragraphs [24]-[26] of his judgment, Wilson J ruled that this approach involved an error of law, in that the adjudicator as fact finder had reached her conclusion before surveying all of the relevant evidence. He stated at paragraph [24] that:

> "…What the fact-finder does at his peril is to reach a conclusion by reference only to the appellant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence."

Wilson J referred to a statement in a decision in the Immigration Appeal Tribunal in the earlier decision of *HE (DRC-Credibility and Psychiatric Reports)* [2004] UKIAT 00321 at para 22 that:

> "Where the report is specifically relied on as a factor relevant to credibility, the adjudicator should deal with it as an integral part of the findings on credibility rather than just as an add-on, which does not undermine the conclusion to which he would otherwise come."

13. At paragraph [25] of his judgment Wilson J concluded that the adjudicator had fallen into error when:

> "She addressed the medical evidence only after articulating conclusions that the central allegations made by the appellant were, in her extremely forceful, if rather unusual phraseology, "wholly not credible". Furthermore, she said that she considered that the evidence did not assist her because of her belief that the scars could well be reflective only of illness or disease. Although I accept that the fact that the appellant had identified only two of the scars as being thus reflective did not establish that the others were inflicted in the course of torture, it does – and here I choose my words with care in the light of what I will be proposing to my Lords as the proper disposal of the appeal – seem at first a little unlikely that, to take one example, the scars underneath the penis were the result of illness or disease rather than of torture of the genitals, with which, by reference to a book on the medical documentation of torture, the doctor had regarded them as consistent. Unusually, the adjudicator's determination had not included the usual express reminder to herself for the requisite standard of proof. Had she had that standard even more in the forefront of her mind; had she in particular considered the scars on the penis and also, perhaps, the multiple linear scars on the back; and above all, if she had conducted her reference to the doctor's evidence at the right forensic times; then it is at least possible that she would have come to a different conclusion."

14. In agreeing with Wilson J, Buxton LJ succinctly stated:

> "The adjudicator's failing was that she artificially separated the medical evidence from the rest of the evidence and reached conclusions as to credibility without reference to that medical evidence; and then, no doubt inevitably on that premise, found that the medical evidence was of no assistance to her. That was a structural failing, not just an error of appreciation, and demonstrated that the adjudicator's method of approaching the evidence diverted from the procedure devised in paragraph 22 of *HE* set out by [Wilson J]."

The adjudicator's decision.

15. The form of the adjudicator's Determination and Reasons was as follows. Having set out the procedural history and described the evidence given by the appellant, he stated at paragraph 17:

> "The Appellant produced a report from Dr Ashu Madan of Stonehall Lane Surgery, London. The doctor had carried out an examination of the Appellant and had found a scar on his upper chest which the Appellant had explained to him was caused by a bayonet injury in 1992 and two further scars on his knees when he had been kneeling repeatedly to bury bodies. He also had sustained a lesion from being hit with the butt of a gun. He also had scars under his left eyebrow, on the bridge of his nose and left upper lip. The Appellant had explained to the doctor that these had come from being beaten. The doctor also noted that he presented a history of depression and had complained of shoulder pains, inflamed skin lesions, and had disturbed sleep patterns and recurring flashbacks. For these …[he]… had been prescribed medication and was subject to review."

It is worthy of note that at two points in that paragraph the adjudicator made clear that the origin of the scars were explained to Dr Madan by the appellant.

16. The adjudicator then summarised the submissions of the parties, including the summary of the appellant's submissions that

> "the medical report that he had produced showed that he had suffered injuries and he had explained the cause of these to the doctor who noted them."

17. The adjudicator then proceeded to his determination of the asylum appeal at paragraphs 32-41.

18. At paragraphs 34-38 he gave detailed reasons for regarding the appellant as "a person of low-credibility", specifically rejecting a number of details of the appellant's account of persecution in Somalia and his flight to the Yemen and then to the UK.

19. At paragraph 39 the adjudicator noted objective evidence to the effect that those that fled the north of Somalia could now safely return there and then, at paragraph 40, he stated

> "40. I note what Dr Madan has said in his medical report that the explanation for the marks that he found on the appellant's body came entirely from the appellant. As I have rejected his evidence, I likewise reject the explanation for the injuries he gave the doctor. In respect of the depressions the doctor only prescribed medication."

Dr Madan's letter

20. The letter of Dr Madan was in the following form. Having stated that he understood that the appellant was an asylum seeker from Somalia, he set out the appellant's account as follows:

> "SA tells me that the "Abgal" clan captured him in 1992 *and he was subsequently used as a slave to perform daily chores and regularly bury dead bodies for them. During this time, he witnessed numerous murders and he recollects there being "blood and explosions" constantly everywhere.*
>
> Fortunately, one other clan was involved in combat with his captors and they managed to release him to escape in 1993.
>
> SA sought and lived with uncle until he too was killed and was forced to flee to save himself.
>
> He ultimately sought refuge in Yemen and gained employment working in a carwash. *However, once again, he became the victim of harassment, repeatedly beaten by police officers. H*e subsequently left to seek safety in the UK." (emphasis added)

I have in that passage italicised only passages that would appear to relate to possible injury to the appellant.

21. The report continued

> "SA's presenting symptoms to me have been of generalised body pains worse in the back, but he has also repeatedly presented to my colleagues with knee and shoulder pains, inflamed skin lesions, and the most damaging being a very disturbed sleep pattern due to recurring flashbacks and nightmares when he visualises the explosions and bodies.
>
> His mood is very variable, often worse in the evening after he has discussed his experiences with other residents. He admits to ideas of deliberate self-harm, but then he will pray to ease the mental pressure."

22. The report then proceeds to set out the details of the doctor's physical examination, in which I again emphasise by the use of italics the only words relevant to causation.

> "In the midline of his right upper chest there is a 1.5" x 1" scar *from a bayonet injury in 1992*, and two further scars on his knees *from that time when he was kneeling regularly to bury bodies.* Also, from that time is a 1" lesion on the occiput *from being hit with the butt of a gun.*
>
> Examination of his face reveals at least scars: 1.5cm under his left eyebrow, ½cm vertical scar on the bridge of his nose, and a 1.5cm left upper lip scar *after repeated beatings and being banged against walls by police in Yemen*. There are also 1"-1.5" scars on his right elbow *from these incidents*.
>
> In view of his presentation, history and depression *linked with his repeated assaults* I have commenced SA on Fluoxetine 20mg and will keep him under regular review."

The Tribunal decision

23. Before the Tribunal, as before us, the appellant argued that the adjudicator considered and reached his conclusion as to the credibility of the account of the appellant before considering the medical evidence which it was submitted was corroborative of the appellant's story. The Tribunal dealt with this aspect quite shortly. It stated at paragraph 8 of its decision that:

> "…In relation to the first ground, the application asserted that the adjudicator was wrong to reject the medical evidence which corroborated the fact that the appellant was tortured in both Somalia and in Yemen. However we pointed out to Mr Adewoye that in fact the medical evidence did no such thing."

Having considered the terms of Dr Madan's letter, the Tribunal stated:

> "9. Nowhere in that letter does Dr Madan express any opinions at all about the appellant's scars, the cause or likely cause; he merely repeats what he has been told by the appellant, namely that the scar in the middle of his upper chest is from a bayonet injury, that two further scars on his knees are from the time when he was kneeling to bury bodies and the one lesion on "*the occiput from being hit with the butt of a gun*". He refers to a lesion under the appellant's left eyebrow, a vertical scar on the bridge of the nose and a scar on the left upper lip having been caused by repeated beatings and banging against the walls by police in Yemen. He adds "*There are also* 1"-1.5" *scars on his right elbow from these incidents"*.

> 10. Nowhere does the doctor express his opinions at all as to whether it is possible that the scars could have been caused in a way in which the appellant describes."

Discussion

24. In so stating, the Tribunal were pointing out the obvious factual difference between the nature and quality of the medical evidence in this case and that in the case of *Mibanga*. In moving on to describe the appellant's presenting symptoms in the passages I have quoted, Dr Madan's report amounts to no more than a record of (a) the appellant's history as recounted to the doctor and (b) the appellant's own explanations for the old injuries found on examination. The report expresses no separate view or opinion as to whether or not the explanation for the wounds found is objectively supportive of or consistent with the history given, nor indeed as to other possible causes.

25. The adjudicator was asked, and we are asked on this appeal, to infer that the doctor regarded the history as consistent with the signs of injury found on examination because he does not say otherwise. That does not seem to me to be a correct approach.

26. All that Dr Madan's report does is to show that the account by the appellant to the adjudicator as to his treatment is consistent with the later account given to the doctor, without adding any additional confirmation or expert indication on the doctor's part as to the inherent likelihood that such explanations are true.

27. In my view, such a report is inadequate for the task it is tendered to perform, namely to corroborate and /or lend weight to the account of the asylum seeker by a clear statement as to the consistency of old scars found with the history given. In this context the expert question of consistency should not be left to the adjudicator as a matter of inference or construction.

28. In any case where the medical report relied on by an asylum seeker is not contemporaneous, or nearly contemporaneous, with the injuries said to have been suffered, and thus potentially corroborative for that very reason, but is a report made long after the events relied on as evidence of persecution, then, if such report is to have any corroborative weight at all, it should contain a clear statement of the doctor's opinion as to consistency, directed to the particular injuries said to have occurred as a result of the torture or other ill treatment relied on as evidence of persecution. It is also desirable that, in the case of marks of injury which are inherently susceptible of a number of alternative or "everyday" explanations, reference should be made to such fact, together with any physical features or "pointers" found which may make the particular explanation for the injury advanced by the complainant more or less likely.

29. In cases where the account of torture is, or is likely to be, the subject of challenge, Chapter Five of the United Nations Document, known as the Istanbul Protocol, submitted to the United Nations High Commissioner for Human Rights on 9 August 1999 (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) is particularly instructive. At

paras 186-7, under the heading "D. Examination and Evaluation following specific forms of Torture" it states:

> "186… For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution
>
> > (a) Not consistent: the lesion could not have been caused by the trauma described;
> >
> > (b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;
> >
> > (c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;
> >
> > (d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;
> >
> > (e) Diagnostic of: this appearance could not have been caused in anyway other than that described.
>
> 187. Ultimately, it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story (see Chapter IV.G for a list of torture methods)."

30. Those requested to supply medical reports supporting allegations of torture by asylum claimants would be well advised to bear those passages in mind, as well as to pay close attention to the guidance concerning objectivity and impartiality set out at paragraph 161 of the Istanbul Protocol.

31. Briefly continuing comparison of the instant case with the case of *Mibanga*, in that case the factors relevant to credibility plainly included Dr Norman's express medical opinion as to the causation of the injuries and it was thus impermissible to determine the central question of credibility without having regard to that opinion expressed. In the present case there is no comparable opinion. The adjudicator and the Tribunal both considered, rightly in my view, that the explanations for the injuries which I have highlighted in paragraph 22 above came from the appellant and not from Dr Madan. He, like the adjudicator, was dependent entirely upon the explanations given by the appellant and there is nothing in his report to indicate that he stood back and considered them objectively for the purpose of his report. Because the explanations came directly from the appellant and were not the subject of separate, critical consideration by the doctor, the adjudicator was entitled not to regard them as medical opinion of the kind being dealt with in *Mibanga*.

32. Having said that, it does not detract in any way from the force of the decision in *Mibanga* to the effect that, where there <u>is</u> medical evidence corroborative of an

appellant's account of torture or mistreatment, it should be considered as part of the whole package of evidence going to the question of credibility and not simply treated as an "add-on" or separate exercise for subsequent assessment only after a decision on credibility has been reached on the basis of the content of the appellant's evidence or his performance as a witness.

33. In this case, if one has regard simply to that section of the adjudicator's decision headed "Determination and Reasons", it is open to criticism in the light of "*Mibanga*" that, as a matter of form, the content of the medical report is dealt with as an "add-on", following the section in which, as a result of an examination of the evidence of the appellant, the adjudicator found him to lack credibility and to have fabricated his case. Considered on that narrow basis, there appears to have been a breach of the approach prescribed in *Mibanga*, namely that medical evidence corroborative or potentially corroborative of an appellant's account of torture and /or fear of persecution should be considered as part of the entire package of evidence to be taken into account on the issue of credibility.

34. However, looked at as a matter of substance, I do not consider that to be a fair reading of the decision. In this case, the adjudicator, in the course of setting out the submissions of the appellant, clearly referred to the submission that the medical report produced demonstrated that the appellant had suffered the injuries of which he was complained and two paragraphs later properly reminded himself of the burden of proof, a feature apparently absent in the case of *Mibanga*. In paragraph 40, as quoted in paragraph 19 above, the adjudicator made the point that the explanation for the marks on the appellant's body came entirely from the appellant, which explanation the adjudicator rejected. Following *Mibanga*, it would plainly have been appropriate for the adjudicator to include a sentence noting the potentially corroborative effect of Dr Madan's letter before expressing himself in those terms. However, the adjudicator did not have such guidance available and, since the potentiality of corroboration was in fact unfulfilled as a result of the lack of any positive opinion by Dr Madan as to the causes of the lesions observed, I do not consider that the lack of such a sentence undermines the validity of the adjudicator's decision or demonstrates that the Tribunal was other than correct in the confirmatory conclusion which it reached.

Conclusion

35. Since the adjudicator correctly decided that the effect of Dr Madan's letter depended entirely upon explanations given by the appellant which the adjudicator rejected, he was entitled to reach the conclusion which he did and no error in point of law has been demonstrated in this case.

36. The appeal should therefore be dismissed.

Lord Justice Brooke:

37. I agree.

Lord Justice Moore-Bick:

38. I also agree.