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Heard at Field House

SN (Medical and Corroborative Evidence - Credibility - Article 3) Kenya [2004] UKIAT 00053

On 23 February 2004

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

.....23 March 2004....

Dictated 3 March 2004

Before :

Mr J Barnes (Chairman)
His Honour Judge R J Rubery
Ms J A Endersby

Between

APPELLANT

and

The Secretary of State for the Home Department

RESPONDENT

Representation

For the appellant: Ms G Bruce, Counsel instructed by Glazer Delmar

For the respondent: Mr G Elks, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This determination is being reported in relation to (a) the corroborative value of medical evidence (paragraphs 12 to 15); (b) the approach to considering whether an adjudicator has taken into account the totality of the evidence before making findings of fact (paragraphs 16-18); and (c) the

treatment of suicidal ideation in relation to claims under Articles 3 and 8 of the European Convention and the effect of the decisions of the Court of Appeal in *N* [2003] EWCA Civ. 1369 and *Djali* [2003] EWCA Civ. 1371 (paragraphs 20 to 24).

2. The appellant is a citizen of Kenya born on 1 January 1972. She arrived in the United Kingdom on 28 February 1998 and claimed asylum after being refused leave to enter. She was accompanied by one son as her dependant. She was due to be removed on third country grounds on 17 September 1998 but absconded. On 18 May 1999 she claimed asylum as a Somali but withdrew this application at interview. In a letter dated 21 August 2000 and served on her on 10 September 2000, the appellant was refused asylum. She appealed against that decision but withdrew her appeal by letter dated 6 April 2001. At the same time she claimed that removal would be in breach of her human rights citing Article 3 of the European Convention. On 24 September 2001 that application was refused on such information as was then available to the Secretary of State and it is relevant to set out the terms of the refusal which are as follows:

> "The Secretary of State has noted your claim that to return your client to Kenya would breach the United Kingdom's obligations under the European Convention on Human Rights. You state that your client will suffer inhuman and degrading treatment if removed from the United Kingdom because she is suffering from depression as a result of being raped. You claim that to return Ms Nganga would lead to the deterioration of her health. The Secretary of State has considered your claim but is aware that case law at Strasbourg makes clear that depression cannot amount to inhuman and degrading treatment even when a condition deteriorates on return. This opinion has been confirmed in *Cruz Varas v Sweden* (1991-14EHRR1) and *Kudla v Poland* (26/10/LO). Such conditions do not meet the minimum level of severity required to achieve a claim under the ECHR. Furthermore, the Secretary of State is of the opinion that should your client's condition continue or deteriorate on return to Kenya she will be able to access adequate medical facilities there. He is also aware that there are numerous of human rights organisations [*sic*] in Kenya. These include NGOs such as the KHRC, the Kenya Anti-Rape Organisation, the Legal Advice Centre and Development, People Against Torture, the Independent Medico-Legal Unit [IMLU].

> The Secretary of State has considered your claim but is satisfied that you have failed to show substantial grounds that your client or her child would face a real risk of torture, inhuman or degrading treatment if returned to Kenya."

3. On 16 February 2002 the Secretary of State issued his notice of refusal of leave to enter coupled with removal directions to Kenya. The appellant appealed against that decision and her appeal came before Mr C J Tipping, an Adjudicator, on 30 May 2003. He dismissed the appeal in which she claimed that her removal would be in breach both of her Article 3 and Article 8 rights under the European Convention.

4. Before the Adjudicator the appellant elected not to give evidence and the Adjudicator summarises the appellant's claim at paragraph 6 of his determination in the following terms:

> "The basis of the appellant's claim is that at some date in 1994 she was attacked and raped. (Ms Bruce's skeleton argument refers to this event occurring in 1998, but it is clear that this is a typographical error). As a result of this attack, it is claimed that the appellant now suffers from a mental illness so severe that it would be a breach of Article 3 to return her to Kenya, especially as her symptoms would be likely to worsen in that country. Further and in the alternative, it is claimed that returning the appellant and her son would also represent a disproportionate interference with the private life which they have established in this country."

5. The Adjudicator did not believe her factual claims as to what had occurred in Kenya. He noted that at interview the appellant had made no mention of any personal attack on her but had merely said that she had left Kenya because of the danger arising from ongoing tribal violence. That inconsistency was not addressed in the evidence before the Adjudicator although he noted that she had told the psychiatrist who has examined her that she was too embarrassed to mention the alleged attack at interview. The Adjudicator deals with these issues at paragraphs 7 and 8 of the determination as follows:

> "7. … While I can understand the appellant's reluctance to mention the alleged sexual nature of an attack, it is to my mind inconceivable that, if it occurred, she would have failed to mention that she had been physically attacked; the attack is alleged to have included a

wound to her knee from a knife wielded by her assailant which subsequently required stitching and now carries a scar. She maintained this silence on the matter until the Additional Grounds were lodged, more than four years after her arrival here.

8. The appellant has made a number of attempts to deceive, including a fraudulent attempt to gain entry to the United Kingdom and a false claim to asylum based on Somali nationality. In the absence of oral evidence from the appellant tested in cross-examination, I do not accept that the appellant suffered the attack she claims. I recognise that the appellant's son was born in 1995, but that is not evidence that he was conceived in the course of a rape."

6. Before the Adjudicator, the appellant placed considerable reliance on two reports by Dr Rose Anne Varley, a psychiatrist at the Traumatic Stress Service at the Maudsley Hospital, who says that she had been involved with the psychiatric assessment and treatment of refugees for some eight years prior to the first report based on consultations which apparently took place on 24 and 25 June 2002. The second report, which is also undated, is based on a further consultation on 2 May 2003. Dr Varley had before her a report from the appellant's general practitioner, Dr F Hussain, which stated that from November 2000 he had prescribed anti-depressants for the appellant. This appears to have been the first medical treatment which she received after her arrival in the United Kingdom. In her first report Dr Varley diagnosed the appellant as suffering from severe symptoms of Post Traumatic Stress Disorder and co-morbid depression (of moderate severity). She said that these symptoms appear to have developed in response to the appellant having been raped while living in Kenya and that she started to suffer symptoms in the week following the alleged rape which had persisted since then with some decrease in severity after the departure from Kenya. She had been treated with anti-depressants as noted above and seen by a counsellor on a couple of occasions at her GP's surgery but was unable to continue. Dr Varley was of the opinion that she was in need of specialist treatment for her symptoms of Post Traumatic Stress Disorder which could be long-term. She then continued:

"Ms Wanja Nganga does not have such stability, safety or security as long as her asylum status remains uncertain and her fear of having to return to Kenya persists.

> I believe if she were asked to return to Kenya her symptoms would most likely worsen and her risk of suicide would increase. [There is nowhere else within the report any analysis of a risk of suicide]. Ms Wanja Nganga's potential suicidality increased not only in relation to Kenya but also in relation to protecting her son from having to return there also. She believes that if she were not around he would not be sent back and would be fostered safely here in the UK."

In her second report Dr Varley states that the appellant continued to take anti-depressant medication which had been recently increased and had also recently been prescribed sleeping tablets, although the appellant told her that the medication had only minimal effects on her mental state. She continued to wait for reference to the local psychiatric service who had not yet been able to provide any appointment. The report continues that the appellant had

> "admitted to an increase in her suicidal thoughts but denied any current intent. She did not present with any psychotic phenomena. She complained of symptoms of panic and anxiety. She was fully orientated. Her concentration was poor. She continues to show good insight into her psychological symptoms and is very motivated to have appropriate treatment."

Dr Varley then said that the appellant continued to suffer from symptoms of Post Traumatic Stress Disorder which had increased in intensity since she had learned of the date of her appeal hearing. Dr Varley said that she was of the same opinion as she was in June 2002 for the initial assessment report. She continued:

> "As stated previously, I believe if Ms Wanja Nganga were to return to Kenya her symptoms would worsen. This has been demonstrated in the recent exaggeration of her symptoms of Post Traumatic Stress Disorder as a result of the issue of her possible return to Kenya has come to the forefront [sic].
>
> Ms Wanja Nganga remains at suicidal risk in relation to both herself and her son's return to Kenya as she sees this as a way of protecting herself and her son."

7. We would comment at this point that there is nothing in either report to indicate the clinical basis on which Dr Varley bases her opinions as to the suicide risk of the appellant. The only

reference to the diagnostic tools employed in reaching these assessments is a heading in the first report which refers to the psychiatric assessment having included assessment for Post Traumatic Stress Disorder using the SCID questionnaire, version 2.0 for DSN 1IV PTSD.

8. The Adjudicator says this about the first report at paragraph 11 of his determination:

> "These conclusions as to the appellant's mental condition (quite apart from my conclusion above as to its alleged origin) appear to overlook the facts that the appellant was able to live in Kenya for four years after the alleged attack, and needed no psychiatric assistance until November 2000, two years after her arrival in the United Kingdom, when her general practitioner, Dr F Hussain, wrote to say that he had started the appellant on a course of anti-depressants; the weight to be attached to this note is perhaps reduced, give that it was written in support of an application at the hearing of the appellant's asylum appeal be postponed."

9. He then continues at paragraphs 13 and 14 as follows:

> "In all these circumstances, I am unable to attach much weight to the medical evidence. It may be that Dr Varley has herself fallen victim to the appellant's attempts to deceive. The appellant lived without apparent mental problems for at least six years after the alleged rape without being seriously hampered by her mental condition. There is no suggestion that she has ever attempted suicide.
>
> 14. She has been able to take advantage of her stay of five years in the United Kingdom to educate herself, not in my view indicative of someone disabled by severe mental illness. Ms Bruce states that the appellant had to break off her studies temporarily because of mental problems, but there is no evidence before me to that effect. Although Dr Varley now advises counselling, all that the appellant has previously required is a supply of anti-depressants. Nothing in the background evidence suggests that these would not be available in Kenya."

10. For this reason the Adjudicator concluded that return would not cross the very high threshold set by the courts so as to amount to a breach of Article 3 of the European Convention. As to Article 8, he noted that the appellant's son had commenced at school in September 2002 and that the

appellant had undertaken some computer training. He noted her stated intention to train as a nurse but that there was no evidence that she had taken any steps towards this goal in the period of over five years she had by then spent in the United Kingdom and considered that this goal had been recently adopted as a means of enhancing her claim. He pointed out that she had a mother and aunt in Kenya with whom the appellant remained in contact and that he had not been directed to any evidence to support her claim that life in Kenya would be made difficult by her being a single mother. He also dismissed her Article 8 claim although it is not wholly clear whether this was on the basis that her removal would not engage Article 8 at all or that he considered that removal would be proportionate under Article 8(2).

11. The grounds of appeal settled by Ms Bruce, which are of considerable length, sought first to challenge the adverse credibility finding made by the Adjudicator, including the assertion that the Adjudicator had erred in law by failing to take into account the corroborative nature of the medical evidence in relation to her claim as to what had happened in Kenya; and secondly asserted that the Adjudicator was wrong to give little weight to the medical evidence. The main thrust of the grounds is aptly summarised in the grant of permission to appeal as being:

> "That the Adjudicator erred in rejecting the medical evidence adduced on the claimant's behalf because he had already arrived at an adverse credibility finding in relation to her account generally. In light of the judgment of Mr Justice Forbes in the High Court of Justice, Queen's Bench Division, Administrative Court, in **Virjon B v Special Adjudicator** [2002] EWHC 1469 (Admin), this raises an arguable point of law which merits further consideration."

12. Before us Ms Bruce sought remittal of the appeal for hearing afresh before another Adjudicator. It was her submission that the clear findings in relation to credibility were rendered unsustainable by the failure of the Adjudicator to mention the medical report earlier in his determination and she submitted that where in paragraph 9 the Adjudicator said that his views as to credibility called into question the weight to be attached to the medical evidence, this was indicative of the fact that he had made up his mind as to credibility of the core elements of the claim without first taking into account the extent to which the diagnosis made by Dr Varley might be considered as corroborative of the appellant's claim to have been raped, albeit not disclosed until very late in the course of her claim for relief.

13. Whilst we accept that the findings made in the medical reports may be corroborative of a claimant's account, this Tribunal has in the past commented upon the fact that it is no part of the primary function of the doctor consulted to question the veracity of their patient's account to them. What is quite clear from the various medical reports both from Dr Varley and from the general practitioners is that they have accepted unreservedly the account which the appellant did not, as the Adjudicator notes, make until more than four years after her arrival here despite the fact that she had claimed asylum immediately on her arrival. That is not a criticism of the doctors concerned because it is not their function as such to evaluate the credibility of the appellant. That is the function of the Adjudicator after considering the totality of the evidence before him. The most that the doctor can do in our view, either in the case of physical conditions such as scarring or in diagnoses of mental conditions, is to say whether in his or her opinion such findings may be corroborative of the account given by the appellant.

14. In the present appeal, there is no medical evidence whatsoever as to the existence of a scar from a wound which required stitching. It may exist but it is not evidentially supported on any of the material before us or the Adjudicator.

15. We have no reason to doubt that Dr Varley was able to observe clinical symptoms by reference to the International Standards to which she makes brief reference which would support her diagnosis of Post Traumatic Stress Disorder and a depressive condition. What is quite clear, however, is that this appellant wishes to remain in the United Kingdom and to avoid removal to her own country. At the time of hearings which may affect her ability to do so, her condition is stated to deteriorate. That would seem to underline the degree to which she is anxious to avoid removal. There is nothing directly stated in Dr Varley's reports as to the degree to which anxiety as to the outcome of her appeal alone may be responsible for her diagnosed condition but it is clearly a factor which is relevant to her condition. We derive no assistance from Dr Varley's report as to the degree to which the appellant's mental condition may derive from the undoubted stress factors of fear of removal from a country in which the appellant is anxious to remain in preference to her own country. Nor would it appear that the attention of the doctor was ever critically directed to the effect of the changes which have occurred in the nature of the appellant's account during the course of her application. Those are not matters of criticism of the doctor but they serve to illustrate the

important distinction between the role of the expert and of the judge whose function is to determine the facts on the evidence before him.

16. Having very carefully considered the determination, we do not accept Ms Bruce's primary submission that the Adjudicator had closed his mind to any corroborative weight to be given to the medical reports in arriving at his findings on credibility. It is inevitable that in setting out his reasoning, an adjudicator will have to decide on the order in the determination in which he will deal with the various aspects of the evidence. But the fact that he must necessarily do so cannot be taken in the absence of very clear indication to the contrary to suggest that he has failed in his primary judicial function of considering the totality of the evidence in reaching his findings. At paragraph 5 of his determination this experienced Adjudicator details the sources of evidence before him which include the interview notes, statements made by the appellant, the skeleton argument of Ms Bruce, the documents personal to the appellant and her son, including medical evidence, and the background evidence relating to her own country. He refers there also to the case law produced to him. All this is to our mind clearly indicative of the fact that the Adjudicator has considered the evidence in the round before setting out his reasoning, which he then proceeds to give in the ensuing paragraphs. In those paragraphs he first of all points to the clear inconsistencies in the appellant's evidence before him and notes what are her admitted false claims to be a Somali national. It does not seem to us that his statement that he does not accept that the appellant suffered the attack she claims at paragraph 8 of the determination, before then going on to make his comments about the medical evidence, can be read as suggesting that he has closed his mind to the medical evidence up to that point. That is wholly inconsistent with what he says at paragraph 5 of the determination.

17. It is certainly correct that, on his analysis at paragraphs 9 to 12 of the determination, he then concludes at paragraph 13 that he is unable to attach much weight to the medical evidence. Insofar as it may be said that he fails to accept the medical diagnosis made, that may perhaps give rise to legitimate argument but Ms Bruce's submissions as to the sustainability of the primary findings rests on her contention that the Adjudicator has failed to give appropriate weight to the degree to which the medical reports provide corroboration of the appellant's latest account of her experiences in Kenya. That the medical reports are based on an uncritical acceptance of the latest version given by the appellant does in our view substantially affect the degree to which it can be

said to be corroborative of the appellant's claims. Although the earlier history of the claims and the explanation that the appellant felt too ashamed to speak of what had happened earlier than four years after her arrival here is noted in the history, there is, as we have said and would expect, no comment on this aspect by the doctor because it was not part of her function to assess credibility as such.

18. It may be arguable that the Adjudicator could have reached a different conclusion on the totality of the evidence but he did not do so and his reasons for his findings are clearly set out in the determination. We agree with Mr Elks' submission that they show no error of law on the part of the Adjudicator in his approach. The findings cannot in our view be regarded as unsustainable and the Tribunal is always very reluctant to interfere with findings made by an Adjudicator unless they are plainly wrong and unsupportable on the evidence.

19. This accordingly leaves the Article 3 and Article 8 claims dependent upon the appellant's claim that she will be socially ostracised by reason of having an illegitimate child and that the effect of return will be so severe having regard to her mental condition that it would be in breach of her human rights.

20. As to the first proposition, Ms Bruce properly conceded that there was no objective evidence to support that claim. As to the question of effect on her mental health, we bear in mind the two recent decisions of the Court of Appeal in *N v Secretary of State for the Home Department* [2003] EWCA Civ 1369 dealing with Article 3 claims and *Sefer Djali v Immigration Appeal Tribunal* [2003] EWCA Civ 1371, dealing with Article 8 claims.

21. Whilst we acknowledge that there is some authority in Strasbourg jurisprudence for the proposition that prospective suicide by reason of removal is capable of engaging both Articles 3 and 8 (see also [2003] UKIAT 00017 P(Yugoslavia)), there would in our view need to be the clearest possible evidence of a real risk that this would occur which would not otherwise be preventable by appropriate medical supervision both on the part of the removing country and having regard to facilities which might reasonably be expected to exist in the country of destination. As to the latter point, the evidence before us is that there are generally good medical services in Kenya (see CIPU Assessment of April 2003 at paragraphs 5.70 and 5.71). The degree to which *D v United Kingdom* [1997] IAR 172 is to be strictly confined is made clear in paragraph 40 of the judgment of Laws LJ in *N* where he says:

> "I would hold that the application of Article 3 where the complaint in essence is of want of resources in the applicant's home country (in contrast to what has been available to him in the country from which he is to be removed) is only justified where the humanitarian appeal of the case is so powerful that it could not in reason be resisted by the authorities of a civilised state. This does not, I acknowledge, amount to a sharp legal test; there are no sharp legal tests in this area. I intend only to emphasise that an Article 3 case of this kind must be based on facts which are not only exceptional, but extreme; extreme, that is judged in the context of cases all or many of which (like this one) demand one's sympathy on pressing grounds … I consider that any broader view distorts the balance between the demands of the general interests of the community whose service is conspicuously the duty of elected government, and the requirements for the protection of the individual's fundamental rights. It is a balance inherent in the whole of the Convention: …"

22. In that case the appellant was suffering from HIV/AIDS and it was accepted that her removal would result in a substantial shortening of her anticipated life span in comparison with that which would apply in the United Kingdom were she to continue to receive medical treatment here. We accept that this case is differently based but it seems to us that the principles enunciated by Lord Justice Laws in the passage which we have quoted are nevertheless applicable. The evidence of Dr Varley as to suicide risk is in our judgment speculative in the same sense that similar, if not stronger, medical evidence was so regarded by the European Court in *Bensaid v UK* [2001] INLR 325. In the present case there is no history of past self-harm and in her more recent report Dr Varley noted that there was no current intent of suicide although there was an increase in suicidal thoughts (see passage set out earlier in this determination). It is claimed that the risk of suicide arises only as a means of preventing her return to Kenya on the basis that her son would then be fostered in this country. It is not, in other words, linked to an anticipated deterioration in her current condition on such return but is put forward as a basis for preventing any attempt at removal by a threat of self-harm. Whilst we cannot say that there is not a possibility that someone would take such extreme measures, we cannot emphasise too strongly that there would need to be the clearest and must unequivocal evidence of real risk before such a threat to prevent legitimate immigration control could be regarded as engaging Article 3.

The appellant is said in the report to be lacking any psychotic phenomena and to be fully orientated with a good insight into her psychological symptoms. On the evidence before us, we do not regard this threat as posing more than a speculative risk. We consider what was said at paragraph 40 in *Bensaid* to be applicable:

> "The court accepts the seriousness of the applicant's medical condition. Having regard however to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the contracting state for the infliction of harm, the court does not find that there is a sufficiently real risk that the applicant's removal … would be contrary to the standards of Article 3. …"

23. Precisely similar considerations apply to the threat of serious harm to her made in the Article 8 claim. This arises only on the basis that the interference with the appellant's right to physical and moral integrity would be such as to engage Article 8 and to render removal in the interests of effective immigration control disproportionate. In cases of this nature we do not consider that the appellant can succeed under Article 8 if she fails under Article 3. There is no measurable difference in the test for engaging Article 8, which requires a flagrant denial of those rights, and we rely in this respect on the judgments in *Sefer Djali*. The speculative nature of the evidence as to suicidal ideation is equally applicable to the Article 8 claim. We do not consider on the facts that Article 8 is engaged at all but, were we wrong in this, we have no doubt that removal would be proportionate under Article 8(2) in the sense that the decision to remove is lawful as falling within the margin of appreciation open to the Secretary of State in reaching decisions as to the proportionality of removal. This is not a case where it could be said that a decision to remove would be so plainly wrong as to render it unlawful. To achieve that result, it would, as we have observed, be necessary to reach a standard akin to that which would be in breach of Article 3 rights. This reflects the approach of the Tribunal in the starred decision of [2004] UKIAT 00024 M (Croatia).

24. Up to this point we have considered this appeal on the basis that the Adjudicator's adverse credibility findings are sustainable. If we are wrong in this, however, it would make no ultimate difference to our conclusions. On that basis the appellant would have been subject to one attack by an unknown male in which she was raped and as a result of which she became pregnant and subsequently gave birth to her son. She continued to live in Kenya for nearly four years

and suffered no further attack throughout that period. She was living with her aunt and she currently maintains contact with her mother in Kenya. It was Ms Bruce's submission to us that the cases of *N* and *Djali* should be distinguished because this appellant additionally feared a repetition of what had previously happened and would be ostracised in society. Given the length of time between the claimed attack and her departure, and the accepted absence of any evidence to support the claim that the appellant would be ostracised in Kenya (even were that capable of engaging Article 3 or Article 8 in the circumstances) we see no evidential basis to support Ms Bruce's submissions in this respect. She is, however, wrong in our view in her attempt to limit the importance of the principles enunciated in *N* and *Djali* simply to cases which replicate their specific facts. In our view, the judgments set out the issues of general principle on which Article 3 and Article 8 claims should be approached by illustrating the high threshold which has to be reached in any case in which it is claimed that removal will be in breach of human rights under those Articles.

25. For the above reasons, this appeal is dismissed.

J Barnes
Vice President