



IAC-FH-NL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/09477/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 12 November 2014**

**Determination
Promulgated
On 17 November 2014**

Before

**THE HONOURABLE MRS JUSTICE ANDREWS DBE
UPPER TRIBUNAL JUDGE PITT**

Between

**MS ES
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Nason, Solicitor instructed by Luqmani Thompson & Partners Solicitors

For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of the First-tier Tribunal (Judge Nicholas Paul) which in a determination promulgated on 7 March 2014 dismissed the appellant's appeal against the Secretary of State's decision to refuse her international protection. A claim under Article 8 was also dismissed.

2. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on 9 July 2014. There are five separate grounds of appeal, but for reasons that will become apparent a number of them overlap with each other.
3. The first ground of appeal was that there was a procedural impropriety, in that a number of submissions allegedly made by the respondent and recorded in the determination were not in fact made. Mr Nason, who appeared before the First-tier Tribunal and appeared before us today, relies on the case of **MM (unfairness; E & R) Sudan [2014] UKUT 00105** which sets out the principle that:

“Where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-tier Tribunal (the “FtT”) to be set aside.”

4. In support of that ground of appeal there was exhibited to the grounds a note of the appellant’s cross-examination and a note of the submissions made by the Presenting Officer on behalf of the respondent (a Mr Page). The notes were taken by Mr Nason at the time of the hearing before the First-tier Tribunal in manuscript, and have been typed up. It was suggested in the grounds that a comparison should be made between those notes and the Tribunal’s record of the proceedings. The First-tier Tribunal Judge was asked to provide the record, which was also typed up. The typed up record is entirely consistent with the notes taken by the appellant’s solicitor both in terms of its content and as regards the (short) number of the questions that were asked in cross-examination. There is also a consistency between the record and the notes in relation to the submissions that are recorded as being made by the parties on both sides.
5. However a number of submissions, itemised in paragraph 1.4 of the grounds of appeal, which are attributed to the presenting officer in the determination, appear neither in Mr Nason’s notes nor in the record kept by the Tribunal. These include a submission recorded in paragraph 25 of the determination:

“Ms Page [(sic)- in fact it was Mr Page] made the point in passing that neither of the two witnesses had at any stage in their demeanour or in their explanations conveyed any real sense of what must have been the tragic loss given the disappearance (and presumably murder) of the family members”

Likewise, in paragraph 26:

“...the account which it was submitted was manifestly absurd as to how a complete stranger at a church had taken her under her wing and then brought her to the UK...”

Later in that paragraph the respondent is said to have submitted that “the fact that (Mama Anna) had not been called to give evidence” was also damaging to the appellant’s case.

6. On the basis of the absence of any record of those submissions and the others referred to in paragraph 1.4 of the grounds of appeal, Mr Nason submitted that there was a material error of the type referred to in **MM**.
7. Until the hearing today, Mr Nason had not had the benefit of seeing a note on the Tribunal file which had been prepared by the First-tier Tribunal Judge in response to the appellant’s solicitor’s letter of 15 August 2014 which had raised these concerns. He says, amongst other things, “my record of the submissions is reasonably accurate but was also based on my recollection as I drafted the judgment within 24 hours of hearing the case”. He also stated that “both parties highlighted credibility as a central issue”. Given that the judge says that he drafted the decision within 24 hours, and thus whilst matters were still fresh in his mind, it is of course possible that he remembered additional submissions that were not recorded in his own notes, or the way in which Mr Page had developed the basic points which were recorded in the Tribunal’s own record, and which were compared with the notes of the solicitor.
8. We are concerned that a serious allegation that the Tribunal has erred to the extent of making up submissions which were not in fact made to it has been raised on appeal in the absence of any clear evidence that that is what had happened. At the very least we would have expected to see a witness statement from those who were present at the time attesting to the fact that the respondent’s representative, Mr Page did not make those submissions. The matter could then have been put to Mr Page for him to confirm or deny. However the highest that Mr Nason was able to put it is that those submissions do not appear in his notes; but we cannot draw the inference that the submissions were never made merely from the absence of a record that they were. It is possible that both the Tribunal’s notes and the notes of submissions made by Mr Nason are not as full as they might have been. There is insufficient evidence before us to say that the judge’s recollection that he wrote the determination within 24 hours and that he had a recollection of those submissions being made to him is to be disbelieved and rejected. Accordingly there is an insufficient basis for us to find that there was a material error of law on that ground.
9. However, having said that, we then have to look at the findings that were made by the Tribunal, which brings us to grounds 2 to 4. Essentially, it is submitted by Mr Nason that there was a failure by the Tribunal to afford anxious scrutiny to the case such as to amount to an error of law in accordance with the case of **ML (Nigeria)**. A number of points are highlighted in ground 2 but perhaps the strongest of these is the fact that in the conclusions in paragraph 30 of the determination the First-tier Tribunal says that “the appellant’s claim appears to be at its highest that rogue soldiers have attacked her house and then taken her and her family into custody”. As Mr Nason pointed out this was not the appellant’s case

taken at its highest. There was a detailed skeleton argument and submissions were made to the Tribunal which made it clear that her claim was based upon the allegation that her father was a journalist who wrote at least one article which was highly critical of the government in the DRC, and that as a result of that and of his political affiliations with an opposition group he and his family (including the appellant) were kidnapped and ultimately many members of the family, including the father, simply disappeared. That was the case which was being put in terms of a claim for humanitarian protection and asylum, and that was the case which the Tribunal had to decide.

10. Mr Duffy, who appeared before us (but did not of course appear below on behalf of the respondent) made the fair point that the essence of what the judge was saying in paragraph 30 of the determination was that because he rejected the evidence given in relation to the appellant's father (which is what he went on to say), then the appellant's claim at its highest was that rogue soldiers had attacked her/her house. In other words, the judge's characterisation of the claim put at its highest must be read in the light of the rejection of that evidence. However, even if that is what the judge meant, we cannot be sure, because that is not really the way in which paragraph 30 naturally reads. The remark about the appellant's claim appearing to be at its highest that rogue soldiers had attacked her/her house and then taken her and her family into custody comes before any evaluation of the evidence about her father. It is only after he has characterised her claim put at its highest that the judge goes on to say "even if that is true there is no evidence to link the appellant specifically with any risk of political persecution". Mr Duffy's point would have had far more force if the judge had dealt with these matters in the reverse order.
11. That is simply one of a number of cogent criticisms of the determination that have been made under the ground that there was a failure to afford anxious scrutiny. Some are stronger than others but when that particular ground of appeal is evaluated in conjunction with the remaining criticisms in paragraphs 3 and 4 of the grounds of appeal, it is clear that this determination simply cannot stand.
12. Grounds 3 and 4 focus on a lack of adequate reasoning for making adverse credibility findings against the appellant and a failure to give her a proper opportunity to answer the points made against her before making such findings. Criticism is made in particular of paragraphs 31 and 32 of the determination which are singularly lacking in reasoning to support the judge's conclusions. Ground 4, a failure to put adverse credibility findings or the basis for them to the appellant in cross-examination, is even stronger. We have already referred to the fact that the cross-examination as recorded both by the Tribunal and by the appellant's solicitor is quite short. In fact, when one looks at it, it consists of no more than a handful of questions, about fifteen, ending with questions about the reasons why the arrest took place. Having being questioned about the soldiers, there was nothing put to the appellant about what happened to her after she was

arrested or about how she came to meet the lady called Mama Anna who she says helped to smuggle her into the UK using her daughter's passport.

13. If there was going to be an attack on the appellant's credibility based upon the whole of her account of how she came to the UK and about her treatment at the hands of the soldiers and how she came to escape from them, fairness dictates that it should have been put to her in cross-examination. It is not sufficient that the reasons for disbelieving her account were given by the Secretary of State when her claim was initially refused, because thereafter she produced detailed witness statements in which she addressed the adverse credibility findings made by the Secretary of State. If those explanations were not going to be accepted, we would have expected the matter to have been put by the presenting officer to the appellant fairly and squarely when she gave her evidence in the witness box. That procedural unfairness, coupled with the lack of proper or adequate reasoning for not believing her, seems to us to fatally undermine this determination in terms both of its content and its fairness.
14. We should record that Mr Duffy was very realistic in his submissions before us this morning. Although he could point to aspects of the determination which could be upheld, he did not feel it possible to argue that there was no material error of law in the determination. He is to be commended for taking that entirely realistic stance in relation to a determination which in our judgment is simply so flawed that it cannot be allowed to stand.
15. There was a final point which relates to the claim under Article 8 ECHR. We are less persuaded by that. However, if this matter is going to have to go back to the First-tier Tribunal for re-hearing, as we find it must, then it is appropriate that all matters be left open.

Decision

16. For the reasons given above, we find that there were material errors of law in the determination in the respects alleged in grounds 2, 3 and 4 of the grounds of appeal. We will quash the determination and remit the matter to the First-tier Tribunal for re-hearing on all grounds previously raised before it by the appellant, including Article 8.

Signed

Date 17 November 2014

Mrs Justice Andrews

Anonymity

We make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant on the basis of serious harm arising from the facts of her protection claim.