



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

Appeal Number: AA/03289/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30 January 2015**

**Decision & Reasons Promulgated  
On 6 February 2015**

**Before**

**THE HONOURABLE MR JUSTICE GOSS  
Sitting as a Judge of the Upper Tribunal**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**A K**

**(ANONYMITY ORDER MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss T Murshed, Counsel, instructed by Freemans Solicitors

For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The applicant is a citizen of Cote d'Ivoire, of the minority Dioula ethnicity. She appeals with permission against the decision of the First-tier Tribunal Judge Herlihy dismissing her appeal against the Secretary of State's decision to set removal directions to the Cote d'Ivoire after refusing to

vary her leave to remain on the basis of asylum, humanitarian protection or human rights.

2. There was unrest in Cote d'Ivoire in 2010 and 2011, arising out of the election of President Alassane Ouattara in November 2010, and the refusal of outgoing President Laurent Gbagbo, who had been in power since 2000, to stand aside. The situation was not resolved until April 2011, when President Ouattara's forces overran the country. Gbagbo was arrested and, in November 2011, sent to the International Criminal Court to answer charges of crimes against humanity.
3. In her account of what happened to her in Cote d'Ivoire, the appellant relied on two separate incidents:

- (a) On 18 December 2010, the appellant says she and her husband were attacked and beaten in her home in Cote d'Ivoire, probably by supporters of the RHDP party, before coming to the United Kingdom. The appellant miscarried her early pregnancy, the only pregnancy she has had after years of trying, as well as suffering widespread bruising and some bleeding. Her husband suffered a broken nose and a knee injury. She described herself as having been 'beaten like a dog' and that nobody came to help her. The appellant did not report the incident to the Ivorian authorities.

- (b) In February 2011, after ignoring the call to join an 'Orange Revolution' to force President Laurent Gbagbo from power, the appellant says that she taken from her home by uniformed soldiers and detained for 27 days, kept naked, humiliated, abused and beaten. The appellant was unable to say whether her captors were Laurent Gbagbo's forces or those of President Ouattara. During her final beating in March 2011, she was hit with truncheons and kicked in the head. The beating was so severe that she lost consciousness.

The appellant later learned that she was taken to hospital on 17 March 2011, where she awoke the following day. The appellant stayed in hospital until 22 March 2011. A friend of the appellant's late sister, who worked at the hospital, arranged her to be taken to another district of Abidjan, where she was kept in hiding for ten days to recover, and then helped to flee the country. Again, the appellant did not seek to access protection from the authorities in Cote d'Ivoire.

4. The First-tier Tribunal accepted the first account as credible (see paragraph [38]), and the respondent accepts that there has been past persecution. It is unclear from the determination whether the second incident, which was clearly a very serious one if it occurred, was treated by the First-tier Tribunal judge as credible.
5. The really crucial issue in asylum and humanitarian protection cases is the risk on return, if the appellant is returned to Cote d'Ivoire. Unfortunately, the judge's findings as to future risk are internally contradictory and

unclear: at [44] he found that there was no risk to the applicant from the RHDP supporters in Cote d'Ivoire now, given the change in government, and that even if such a risk existed, sufficient protection was available. However, at paragraphs [47] and [48], the judge found that the appellant had shown substantial grounds for believing that she would face a real risk of serious harm, and that her return would risk breaching her Article 2 and 3 ECHR rights. At paragraph [60], the judge stated that he did not find that the Article 3 claim was established, and at [61], that her Article 8 claim must fail. The appeal was then dismissed on all grounds.

6. We note that there was a preliminary issue in the First-tier Tribunal as to whether the appellant should give evidence, her representative asserting that she was a vulnerable witness, which should have alerted the judge to the need to consider the *Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance* (the Presidential Guidance). The appellant's assertion of vulnerability was supported by medico-legal evidence from Freedom from Torture that she has post-traumatic stress disorder and depression, that she has suicidal ideation with at least some planning of how she might carry it into effect, and that she would find it difficult to give reliable evidence by reason of the fear she would experience.
7. No reference was made in the First-tier Tribunal decision to the Presidential Guidance, in particular paragraphs [10]-[15] thereof which give guidance on the conduct of hearings and the assessment of credibility where a witness is vulnerable by reason of age, mental health difficulties, social or learning difficulties, or a number of other matters identified at paragraphs [2]-[3] thereof. It does not appear to us that the judge was guided by the principles therein set out when deciding how to deal with the cross-examination, in particular.
8. It may be that the appellant's mental health difficulties contributed to credibility problems in her evidence, but it is difficult to assess whether that is the case because the judge's credibility findings are contradictory and unclear. We observe, however, that failure to address himself to the Presidential Guidance may have led the judge into error in his control of the cross-examination. It is not intended that the appellant should give evidence at the hearing to remake the First-tier Tribunal decision.
9. The appellant's principal challenges to the decision of the First-tier Tribunal were that:
  - (i) The First-tier Tribunal failed to consider that she was a vulnerable witness or apply the Presidential Guidance when considering credibility;
  - (ii) Although the First-tier Tribunal determination sets out the principles in *J v Secretary of State for the Home Department* [2005] EWCA Civ 629 (2005) and also the case of *Y and Anor (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 362 and in *N v.*

*Secretary of State for the Home Department* [2005] UKHL 31, upheld in the European Court of Human Rights in *N. v. The United Kingdom* - 26565/05 [2008] ECHR 453, they are not properly applied;

- (iii) The determination is inadequately reasoned, with particular reference to paragraphs [37]-[39], [44] and [47]; in particular
  - (i) The assessment of the appellant's objective and subjective fear on return is inadequate, and there is no proper assessment of the risk of serious harm, potentially engaging Article 3 ECHR; and/or
  - (ii) The assessment of Articles 3 and 8 is inadequate, having regard to the *J* and *N* principles.

10. Having regard to the lack of clarity as to the judge's findings set out at paragraph 5 above, we find that the reasons challenge is made out and that the decision will have to be made again in the First-tier Tribunal. We have not found it necessary to make a decision on the Presidential Guidance issue, nor on whether the *J* and *N* principles are properly applied in the decision under challenge.

### **Conclusions.**

- 11. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law, in that the reasoning was inadequate as set out at paragraph 90(3) in the judgment of Lord Justice Brooke in *R (Iran) & Ors v Secretary of State for the Home Department* [2005] EWCA Civ 982.
- 12. We set aside the decision of the First-tier Tribunal, and remit it to the First-tier Tribunal for remaking. The First-tier Tribunal's credibility finding as to the incident in December 2010 shall be preserved.

### **Anonymity.**

- 13. The parties are reminded that an anonymity order remains in force until further order, pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No report of these proceedings, in whatever form, either during the proceedings or thereafter, shall directly or indirectly identify the appellant. Failure to comply with this order may be treated as contempt of court.

### **Directions.**

- 14. We make the following directions to assist in remaking this decision in the First-tier Tribunal:
  - (1) The appeal is remitted to the First-tier Tribunal for remaking, with a time estimate of two hours, not to be listed before First-tier Tribunal Judge Herlihy.

- (2) The parties are invited to agree what other findings of fact are uncontested and to serve an agreed Schedule of facts and Chronology (indicating what areas remain in dispute) on the First-tier Tribunal not later than 7 days before the hearing to remake the decision.
- (3) It is not expected that there will be any oral evidence at the appeal hearing. If, contrary to the indication to that effect given at today's hearing, the appellant and her advisers consider that she is fit to give evidence, an application to the Tribunal on notice supported by medical evidence may be made on 7 days' notice. If the appellant gives evidence, she will require a French interpreter.
- (4) Additional directions for the rehearing may be given at the hearing centre where the appeal is listed for hearing.
- (5) Liberty to either party to apply to discharge or vary any of the above directions.

Signed

Date **30 January 2015**

Upper Tribunal Judge Gleeson