



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/09655/2010

THE IMMIGRATION ACTS

Heard at Eagle Building, Glasgow
On 03 September 2015

Determination Promulgated
On 09 September 2015

Before

The President, The Hon. Mr Justice McCloskey
and Upper Tribunal Judge Macleman

Between

BAKER MAWEJJE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Mr A Caskie, of Counsel, instructed by Latta and Company,
Solicitors
Respondent: Mrs S Saddiq, Senior Office Home Presenting Officer

DECISION AND REASONS

1. The background to this appeal is rehearsed in the decision of the Upper Tribunal giving permission to appeal, dated 24 May 2015. This is appended hereto.
2. Having heard the arguments of both parties' representatives, we pronounced our decision at the conclusion of the hearing. In short, we allow the appeal on the basis that the decision of the FtT is vitiated by three material errors of law. These are set

out in [3] of the attached permission decision. On balance, we consider that remittal for further hearing at first instance is appropriate.

3. We observe that at the fresh hearing consideration should be given by the FtT to the assessment contained in the impugned decision of the Secretary of State dated 29 June 2010 that even if the Appellant's case were accepted, or established, at its conceivable zenith, there would be no basis for allowing his claim for asylum.

DECISION

4. We decide as follows:
 - (a) The decision of the FtT is set aside.
 - (b) We remit the appeal to a differently constituted FtT for the purpose of fresh hearing and decision.
 - (c) Having regard to the nature of the errors of law found, we preserve none of the FtT's findings.
5. Given the protracted history of this appeal, expedition is obviously desirable and we exhort the FtT accordingly.

Seamus McCloskey.

**THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER**

Date: 03 September 2015

APPENDIX

Appeal No AA/09655/2010

Upper Tribunal Immigration and Asylum Chamber

Application for permission to appeal to the Upper Tribunal

Before The President, The Hon Mr Justice McCloskey

Notice of Decision

Baker Maweje

Appellant

v

Secretary of State for the Home Department

Respondent

Having considered all documents lodged

- [1] This application for permission to appeal to the Upper Tribunal by the Appellant, a national of Uganda aged 42 years who claimed asylum unsuccessfully following arrival in the United Kingdom in June 2010, has a chequered and rather protracted history, which I summarise thus:
- (a) By a decision dated 29 June 2010 the Respondent, the Secretary of State for the Home Department (the "*Secretary of State*") refused the Appellant's application and, on the same date, made directions for his removal from the United Kingdom under section 10 of the Immigration and Asylum Act 1999.
 - (b) By its decision promulgated on 03 November 2010, the First-tier Tribunal ("*FtT*") dismissed the Appellant's appeal against the Secretary of State's decision. His case was that in the event of being repatriated to Uganda he would be at risk of prosecution and death at the hands of the UPDF (the Ugandan Army) and the CMI (a Ugandan military intelligence agency) by reason of his first hand knowledge of a military atrocity and the rape of his first wife by Ugandan soldiers. The FtT dismissed his appeal on the twofold grounds that his claim was untruthful and not credible and, in any event,

taking his case at its zenith, he would not be at risk of persecution having regard to the country guidance decision which held that LRA members and supporters who renounce violence and surrender under the terms of the 2000 amnesty will not be at risk of persecution or prosecution by the authorities.

- (c) This was followed by an application for permission to appeal to the Upper Tribunal. From the document entitled "Application for Permission to Appeal", I distil two grounds of appeal. First, the FtT's finding that the Appellant's wife was attacked, beaten and raped, but not in the circumstances asserted by her, is unsustainable in law as it fails to engage with the medical evidence, specifically the medical opinion that one of the wife's scars was "*diagnostic*" of torture and, further, involves the error of "*compartmentalisation*": Mtbanga – v – SSHD [2005] EWCA Civ 367. Second, the decision in PM had no application to the Appellant, as his case was that he is at risk of persecution by state agencies in consequence of having witnessed an episode of rape, torture and killing perpetrated by the UPDF in a Ugandan village in May 2004.
- (d) On 27 January 2011 the Upper Tribunal refused to grant permission to appeal. (This decision, inexplicably, is not included amongst the papers lodged by the Appellant's solicitors.)
- (e) The latter decision was challenged by the Appellant by a petition for judicial review, giving rise to a decision of the Court of Session (Outer House), dated 04 September 2012 (Lady Clark). The kernel of this decision emerges in the following passages:

"[21] The Upper Tribunal notes that the [FtT] refers to the medical report at [61] [and] concludes that the immigration judge's negative credibility [finding] appears to be amply reasoned. I have difficulty with this conclusion because it is not clear whether the Upper Tribunal is referring to the credibility of the Petitioner and/or his first wife

[Furthermore] the Upper Tribunal has mistakenly recorded that 'the Appellant has suffered mistreatment' and refers to the immigration judge reaching conclusions about the circumstances in which that was incurred. It is also not clear from the decision of the Upper Tribunal whether [it] has focused on the reasons given by the immigration judge for rejecting the credibility of the Appellant's first wife in the context of the medical evidence

There is no analysis of the reasoning of the immigration judge

[22] When I attempted that exercise, even with the able assistance of Counsel for the Respondent, I came to the conclusion that the

reasoning and findings of the immigration judge are impossible to understand even with prolonged detailed analysis

One should reasonably expect to find some reasons to explain why the Petitioner's first wife is found to be lacking in credibility, what are the inconsistencies found between the two witnesses (the Petitioner and his first wife) and in what respects they are considered to be important

I confess a complete failure to understand. The immigration judge proves capable of making sweeping criticisms about the lack of credibility but unfortunately I am able to understand the basis for that from the findings set out

[24] The medical report concludes that [the injury on the inner thigh] is diagnostic of torture and there is also evidence to the effect that some of the injuries are highly consistent with the account of the Petitioner's first wife

[25] There is no suggestion in this case that the Petitioner or his wife were cross examined on behalf of the Respondent on the basis that these injuries were caused by domestic violence or by some random arbitrary mob involved in ethnic violence. This is the competing theory however accepted by the immigration judge

[28] I find [this] difficult to understand

What the immigration judge appears to conclude is that because there are alternative explanations (domestic violence or random ethnic violence) that is good reason to reject the Petitioner's first wife's account of the circumstances. I cannot follow the logic of such reasoning, particularly where there is no evidence relating to the circumstances of the present case that, for example, this may be a case of domestic violence

[30] The immigration judge then reaches her conclusion 'However, even applying the lower standard of proof, I do not believe that she was attacked in the circumstances she claims'. I can only say that I am left bewildered by this analysis

[34] We have in this case a woman who the immigration judge accepts as a victim of terrible violence and rape. The victim has described that and the context to the immigration judge. We are told by the immigration judge that the victim is found to be incredible about the circumstances ***In my opinion the reasons given by the immigration judge are plainly inadequate and perverse***

The immigration judge does not even address the issue of the medical evidence about torture which may of course have a bearing on the credibility of the Petitioner's first wife

I have no hesitation in concluding that the Upper Tribunal is plainly wrong and that their reasons for refusing an appeal do not survive scrutiny. The immigration judge in this case, in my opinion, has fallen into serious error in her assessment of credibility of the Petitioner's first wife and I consider that should have been obvious to the Upper Tribunal."

[My emphasis.]

Concluding, Lady Clark states:

"I uphold the plea of the Petitioner and grant the Petitioner permission to appeal to the Upper Tribunal."

- (f) I interpose here the observation that although Lady Clark purported to grant permission to appeal to the Upper Tribunal, this was constitutionally impermissible, as only the FtT or the Upper Tribunal has capacity to make such order. While the papers do not disclose the full sequence of events in the wake of the first decision of the Court of Session (another unacceptable omission), I deduce that the next step was a further application to the Upper Tribunal for permission to appeal. Regrettably, neither this application nor the ensuing decision has been provided by the Appellant's solicitors – to add to the developing litany of errors and omissions noted above. It is possible, notwithstanding, to discover indirectly that the Vice-President made a decision refusing the application which contains the following passage:

"The judge examined the evidence of the Appellant and his wife and concluded, for reasons given there [viz in paragraphs 61 to 90] that she did not believe it, even when applying the appropriate standard of proof in asylum matters. Her conclusions do not show any error of law. She was clearly and unarguably entitled to reach them for the reasons she gave."

- (g) Sequentially, the next step was a further judicial review petition to the Court of Session. This criticises the Vice-President's refusal decision for failing to adopt the analysis and opinion of Lady Clark and, indeed, contends that the latter was not even considered.
- (h) Next, the Court of Session having ruled that the Appellant had overcome the applicable threshold, the judicial review application was conceded by the Advocate General for Scotland and the decision of Vice-President Ockelton (his second refusal decision) was "*reduced*" ie quashed or set aside, in

consequence. This concession is recorded in a “minute”. It is based on an acknowledgement that the Vice-President had failed to consider the opinion of Lady Clark in making his second refusal decision.

- [2] In consequence of the last mentioned step detailed above, by order dated 11 February 2015 Lord Boyd of the Court of Session (Inner House) remitted the Appellant’s application for permission to appeal to the Upper Tribunal for reconsideration.
- [3] The application for permission to appeal falls to be determined according to the well established test of whether the determination of the FtT is arguably erroneous in law in a material manner. I consider that this test is satisfied. In my opinion, there are three arguably material errors of law in the determination of the FtT:
- (i) The finding that the Appellant’s spouse gave evidence not worthy of belief is inadequately reasoned: see MK (Pakistan: Duty to Give Reasons) [2013] UKUT 00641 (IAC), at [7] – [12] especially.
 - (ii) There is a failure to engage with the medical evidence, adequately or at all. Linked to this defect, there is a further associated failure to make a clear and unequivocal finding relating to the spouse’s injuries or, alternatively, an irrational and unreasoned finding in respect thereof at [92]: MK at [12].
 - (iii) The invocation of and reliance upon the country guidance decision entails a misunderstanding of the core of the Appellant’s asylum claim and a consequential misdirection in law.
- [4] Permission to appeal is granted accordingly.

Directions

- (i) The Appellant’s solicitors will serve on the Respondent’s representative and file with the Upper Tribunal a comprehensive appeal bundle – to include the materials noted above to be missing – within 21 days of the date of this order.
- (ii) The Secretary of State’s Rule 24 response will follow within a further 21 days.

- (iii) Given the vintage of this case, the hearing will be expedited and it will be listed before me in July 2015, on a date to be notified.

Bernard McCloskey.

Signed: _____

**The Honourable Mr Justice McCloskey
President of the Upper Tribunal, Immigration and Asylum Chambers**

Dated: **24 May 2015**

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the Applicant, Respondent and any interested party / the Applicant's, Respondent's and any interested party's solicitors on (date):

Solicitors:

Ref No.

Home Office Ref:

Notes for the Applicant

- To continue the proceedings a further fee of £700.00, or an Application for Fee Remission if appropriate, must be lodged within 9 days of the date this order was sent (see above). Failure to pay the fee or lodge such an Application within that period may result in the proceedings being struck out.
- You are reminded of your obligation to reconsider the merits of your judicial review application on receipt of the respondent's evidence.