



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00845/2019

THE IMMIGRATION ACTS

Heard at Field House
On 10 October 2019

Decision & Reasons Promulgated
On 22 October 2019

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

BKE

(ANONYMITY DIRECTION CONFIRMED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A Mackenzie, Counsel, instructed by Duncan Lewis Solicitors

For the Respondent: Mr. I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of Judge of the First-tier Tribunal Sullivan ('the Judge') sent to the parties on 14 August 2019 by which the appellant's appeal against a decision of the respondent to refuse to grant international protection was dismissed.
2. Designated Judge of the First-tier Tribunal Macdonald granted permission on all grounds.

Anonymity

3. The Judge issued an anonymity direction. There was no request from the representatives to set aside this direction and so I confirm the following direction:

Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the content of the protection claim being made public.

Background

4. The appellant is a national of Nigeria. She sought leave to enter this country as a visitor in 2011 seeking to visit her fiancé, 'LC'. This application was refused on 19 September 2011. She subsequently secured entry clearance as a Tier 4 (General) Migrant enjoying leave to enter until 13 May 2014. Prior to her arrival, but after her application for entry clearance, LC suffered a heart attack and fell into a coma. He died on 31 January 2013, after the appellant's arrival in this country on 30 December 2012,
5. The appellant applied for and secured leave to remain as a Tier 4 (General) Migrant until 13 February 2016, but such leave was subsequently curtailed on 16 December 2014 after her sponsoring college surrendered its Tier 4 licence. Her leave to remain expired on 17 February 2015.
6. The applicant claimed asylum on 1 March 2017 detailing that she was a victim of trafficking and forced labour in Nigeria and Ghana. She stated that her mother died when she was aged around 5 and she then lived with a succession of relatives many of whom ill-treated her. She ran away and travelled to Lagos where she initially lived on the streets and was subjected to rape. She travelled to Ghana when she was aged 19 or 20 and worked in a restaurant. She was given menial tasks and paid very little. Living conditions were poor. She was subsequently introduced to prostitution and earned money in this manner from 2008 to 2010. In 2010 she met LC on an online dating website. He visited her in Ghana and secured a flat for her. He placed £10,000 in her account to enable her to satisfy the financial requirements of her Tier 4 (General) application.
7. On 18 September 2019 the appellant was referred to the National Referral Mechanism as a potential victim of trafficking and slavery. On 2 September 2017 there were found to be reasonable grounds that she was a victim, but on 29 October 2018 the Competent Authority assessed that there were not conclusive grounds to show her to have been a victim of trafficking.
8. The respondent refused the application for international protection by way of a decision dated 23 January 2019. The respondent did not accept the appellant's credibility identifying multiple discrepancies in her account.

Hearing before the FtT

9. The appeal came before the Judge sitting at Taylor House on 16 July 2019. The Judge determined that the appellant was not a victim of trafficking or that she was forced into prostitution in Ghana and so did not meet the requirements for international protection.
10. The appellant relied upon a report from Dr Stephen Ginn, consultant psychiatrist, who, having considered medical reports previously prepared with regard to the appellant, confirmed the pre-existing diagnosis of a depressive order. Dr Ginn further concluded that the appellant suffered from dysthymia (mood disturbance) with sub-threshold depressive symptoms of an underlying emotionally unstable personality disorder. The Judge accepted the diagnosis of dysthymia. She further accepted at [23] that the appellant suffers from some symptoms of depression and anxiety.
11. The Judge was not satisfied that the appellant meets all the criteria for a diagnosis of PTSD, that she suffers from a major depressive disorder or that at the date of assessment there was a significant suicide risk. The Judge was not satisfied that the existing symptoms were due to a history of forced prostitution.
12. The appellant further relied upon a statement from Dr Benjamin Lawrence, Professor of History at the University of Arizona and editor-in-chief of the African Studies Review, dated 26 August 2018. Professor Lawrence opined, *inter alia*, that the appellant is at extreme risk of being re-trafficked in both Nigeria and Ghana, observing at [175] of his statement, 'I would venture that no single individual case I have ever previously examined from Nigeria would be as vulnerable as [Ms. E].' He further opined at [179] of his statement:

'[Ms E's] physiological and mental health issues substantially increase her risk and jeopardy. [Ms E] faces a very low (possibly as low as 5% based on the information above that 95% of mentally ill are treated by traditional healers) chances of receiving adequate prescribed psychiatric care, as recommended by Dr. Ginn in his psychiatric report. She faces a very high risk of chaining or other inhuman treatment ... if as is also highly likely, her treatment is confined to traditional healers and traditional medicine. She faces a very high likelihood of experiencing stigma and discrimination based on her condition.'

13. The Judge concluded, at [26] - [28] of the decision:

'Having considered all of the evidence and noting the assessments of the two doctors I accept that the appellant suffered ill-treatment at the hands of relatives when she was a child. This included the imposition of chores and corporal punishment but not, given the certificates at pages 477 and 478 of the appellant's bundle, deprivation of education. I am not satisfied that this brings the appellant within the 1951 Convention. I find that there is no obligation on the appellant to return to live with relatives and that having lived independently in the United Kingdom, worked to support herself, found places to live there, successfully shared accommodation with others, undertaken training in the

United Kingdom, engaged in voluntary and church activities there is nothing to show that she could not safely do the same in Nigeria or that it would be unreasonable to expect her to relocate within Nigeria should she wish to avoid her relatives there. I am not satisfied that any of them has the means, motivation or inclination to try to trace her now.

I am not satisfied that the appellant is a victim of human trafficking or that she was forced into prostitution in Ghana. That was the basis of her asylum claim. I am not satisfied that she was trafficked or forced into prostitution there.

I am not satisfied that the appellant has no contact with any family or friends in Nigeria; for example, in her latest witness statement she refers to two childhood friends and their current circumstances. I am not satisfied that she would be without company or support in Nigeria. I am not satisfied that there is a real risk that in Nigeria she would be trafficked for the first time. I find that she has not shown that she would be at real risk in Nigeria of being trafficked or otherwise persecuted. The appellant has not discharged the burden of proving that she is a refugee ...'

Grounds of Appeal

14. The grounds of appeal were authored by Mr Mackenzie, who represented the appellant before the Judge, and can be summarised - with reference to particular paragraphs - as:

1) The Judge failed to consider whether, on the basis of the accepted facts, the appellant was at risk of being trafficked on return to Nigeria.

'In this case, the Judge, despite rejecting her account of past trafficking, accepted a number of factors potentially making the appellant vulnerable in future, including poor mental health which, on the Judge's findings, created 'a volatile risk of suicide', and estrangement from her family. Further or alternatively, she failed to make findings on the witnesses who corroborated the appellant's account that she was so estranged (if authority is needed for the proposition that the evidence of corroborative witnesses must be assessed and taken into account, see e.g. AK (Failure to assess witnesses' evidence) Turkey [2004] UKIAT 00230): [9]

2) The Judge failed to consider whether the appellant, having been accepted to be mentally ill and at risk of suicide, would be subject to ill-treatment in the course of traditional or other treatment in Nigeria.

'The evidence before the Tribunal, in particular the report of Professor Benjamin Lawrence of the University of Arizona, indicated that mentally ill people in Nigeria were at risk of dangerous and degrading traditional treatment and/or social ostracism (for avoidance of doubt, NO (Afghanistan) v. SSHD [2016] EWCA Civ 876 makes clear that this kind of argument is not a 'health' or 'medical' challenge of the sort dealt with in cases like N v. UK (2008) 47 EHRR 39): [11]

'The Judge did not accept Professor Lawrence's view that the appellant had been trafficked, but she did not reject (or indeed make any findings at all on) his evidence of the risks to which mentally ill people are exposed in Nigeria': [13]

- 3) The Judge's findings of credibility were vitiated by misunderstandings of the evidence.

'It is well-established that a material misunderstanding of the available evidence can constitute an error of law: E & R v. SSHD [2004] EWCA Civ 49; [2004] INLR 268. The Judge's reasons for rejecting the appellant's account of past trafficking, as set out at [25] of her judgments, were based on a number of errors and misunderstandings of the facts, without which she could have reached a different view. In particular:

...

The Judge's findings do not reflect what the appellant said about the period when she was coerced into prostitution, which was that she was only allowed outside to look for me (asylum interview, Q162, RB B32). It was not her evidence that she was not allowed out at all. That evidence was not inconsistent with being able to join dating apps or to meet her late Italian partner, [LC].

The appellant did not deny studying in Ghana: on the contrary, it was her case that she had studied in Ghana, after meeting [LC] and ceasing to work as a prostitute. Indeed, the Judge's finding at [25(c)] contradicts that at [25(b)], where it is correctly recorded that she was claiming that she did study in Ghana ('she was also able, she says, to attend classes in Ghana)': [15]

15. DJFtT Macdonald granted permission to appeal by an order dated 10 September 2019 observing:

'The grounds of application contend that the Judge failed to consider the risk of future trafficking, failed to consider the risk of harm as a mentally ill person and erred in the assessment of credibility.

While the Judge made a number of findings rejecting her account of being trafficked in the past and negative credibility findings at paragraph 25 it is arguable, for reasons given in the grounds, that the Judge did not fully consider the appellant's explanations which might amount to an arguable error in law.'

16. No Rule 24 response was filed by the respondent.

Decision

17. At the commencement of the hearing I discussed matters with Mr Jarvis and Mr Mackenzie. In his usual thoughtful and helpful manner Mr Jarvis accepted on behalf

of the respondent the material error in law alleged by ground 2. He further confirmed the respondent's position that though not raised in the grounds of appeal such material error was exacerbated by the failure of the Judge to adequately consider additional medical evidence provided by Dr Jolliffe in relation to the rapid increase in symptoms of PTSD, depression and anxiety should the appellant be returned to Nigeria.

18. Whilst Mr Jarvis indicated that he was prepared to argue against the merits of several of the issues identified within ground 3 he accepted upon consideration that the appellant's arguments at paragraph 15 of the grounds of appeal in relation to findings made at paragraph 25(b) and (c) of the decision, which are identified at [14(3)] above, were material errors of law. Such failures as to findings of fact adversely affected the consideration of core elements of the appellant's stated history and were accepted to be material errors of law.
19. In such circumstances both representatives informed me that the parties considered the Judge's decision to be flawed by legal error such that it should be set aside.
20. The concessions made on behalf of the respondent are appropriate in the circumstances. The Judge has sought to consider a complex appeal before her with care. However, the risk to the appellant, flowing from her mental health concerns, of being re-trafficked and/or subject to such poor health care upon return to Nigeria as to breach her article 3 rights was at the forefront of this appeal and for the reasons identified in ground 2, and accepted by the respondent, there was inadequate consideration of this central issue such as to amount to a material error of law. Many of the complaints as to findings of fact in ground 3 do not identify errors of law, save for the two identified at [14(3)] above and such material failings adversely infect core findings of fact. In the circumstances I allow the appeal on grounds 2 and 3 and so am not required to consider the merits of ground 1.

Remittal

21. As to remaking the decision and given the fundamental nature of the material error identified, I observe the submissions made by both Mr. Jarvis and Mr. Mackenzie that clear findings of fact will have to be made when this decision is remade. Both advocates submitted that the appeal should be remitted to the First-tier Tribunal if a material error of law was established. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal that reads as follows at paragraph 7.2:

'The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal'

22. I have reached the conclusion that it is appropriate to remit this matter to the First-tier Tribunal for a fresh decision on all matters. The appellant has enjoyed no adequate consideration of her asylum claim, to date and has not yet had a fair hearing.
23. The First-tier Tribunal and the parties should be aware that the Court of Appeal has granted permission to appeal in the matter of AA (Sierra Leone) v. Secretary of State for the Home Department (C5/2019/0327) as to whether those who are severely mentally ill can form part of a particular social group for the purposes of the 1951 UN Convention on the Status of Refugees and the hearing of this appeal is presently listed for 18 December 2019. It may be that the appellate matter is concluded by consent, or the hearing is adjourned, and so at the present time the parties should expect the hearing of this remitted appeal to proceed. However, the First-tier Tribunal will no doubt be aided by being informed as to proceedings before the Court of Appeal.

Notice of Decision

24. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the judge's decision promulgated on 214 August 2019 pursuant to Section 12(2)(a) of the Tribunal Courts and Enforcement Act 2007.
25. This matter is remitted to the First-tier Tribunal for a fresh hearing before any judge other than Judge of the First-tier Tribunal Sullivan.
26. No findings of fact are preserved.
27. The anonymity order is confirmed.

Signed: *D O'Callaghan*

Upper Tribunal Judge O'Callaghan

Date: 21 October 2019