



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00279/2020

THE IMMIGRATION ACTS

Heard at Field House (Remotely)
On: 16 April 2021

Decision & Reasons Promulgated
On 29 April 2021

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

FOU
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Moriarty, counsel instructed by Duncan Lewis & Co
Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Kemp MBE, promulgated on 3 November 2020. Permission to appeal was granted by on Upper Tribunal Judge Plimmer on 27 January 2021.

Anonymity

2. Such a direction was made previously and is reiterated below because this is a protection claim.

Background

3. The appellant arrived in the United Kingdom on 18 November 2019 with leave to enter as a visitor. He applied for asylum after his leave to enter was cancelled. The appellant's protection claim is based on his involvement with a political group, the Biafra Group and his fear of the Nigerian authorities as a result of his activities.
4. The Secretary of State made a decision, dated 18 December 2019, to refuse the appellant's claims for asylum and humanitarian protection, principally owing to inconsistencies between the accounts he had given. While the respondent accepted that the appellant was a Nigerian national who belonged to the Igbo tribal group, his claim of experiencing difficulties from the Nigerian authorities was rejected. In addition, the appellant's delay in seeking asylum until after his leave to enter was cancelled was considered to damage the credibility of his claim.

The decision of the First-tier Tribunal

5. At the hearing before the First-tier Tribunal, it was common ground that the principal issue was that of the credibility of the appellant's protection claim. Two medico-legal reports by the same author were before the Tribunal, one scarring and one psychiatric. Submissions were also made under Article 3 on medical grounds owing to the appellant's mental state which included a risk of suicide.
6. The First-tier Tribunal concluded that the appellant's scarring was a result of accidental injury rather than as a result of an attack by assailants at a political event. Otherwise, the judge found many aspects of the appellant's claim to be implausible or lacking credibility and concluded that he was of no adverse interest to the Nigerian authorities. The judge did not accept that there was a risk of suicide and concluded that the appellant would be able to access any required treatment for his mental health in Nigeria.

The grounds of appeal

7. The grounds of appeal criticised, firstly, the judge's findings of inherent implausibility. Secondly, the treatment of the scarring report. Thirdly, the findings as to the availability of appropriate medical treatment in Nigeria and lastly, the freestanding Article 3 assessment.
8. Permission to appeal was granted on grounds one and two, with permission being refused on grounds 3 and 4.
9. No Rule 24 response was received from the respondent.

The error of law hearing

10. From the outset, Mr Moriarty stated that there was no ongoing challenge to the refusal of the Upper Tribunal to grant permission in respect of the third and fourth grounds.
11. Mr Clarke confirmed that the respondent had not sent a Rule 24 response however, he conceded that there were material errors in the decision of the First-tier Tribunal. In particular, he drew attention to the judge's misunderstanding as to how the appellant's injuries were said to have been caused and indicated that this alone was sufficient for the appeal to be conceded. In addition, he criticised the judge's misunderstanding of the background material and a series of unsustainable credibility findings. He invited me to set aside the judge's findings on the protection claim and send the appeal back to the First-tier Tribunal. He suggested that the judge's record of proceedings could be agreed by the parties for use at any future hearing.
12. Mr Moriarty agreed with Mr Clarke's submissions and confirmed that there was no intention to reopen the freestanding Article 3 claim. He was reluctant to make any concessions regarding the record of proceedings, which he had not seen, and which led to the judge's erroneous findings. He too sought a de novo hearing at the First-tier Tribunal.
13. At the end of the hearing, I announced that the judge made material errors of law and that the protection claim alone would be remitted to the First-tier Tribunal for a de novo hearing. I was not prepared to make any directions regarding the record of proceedings given the errors made in this case concerning credibility issues.

Decision on error of law

14. As indicated above, I concur with the parties' view that the judge made material errors of law as set out in the detailed grounds, specifically grounds one and two. My reasons, expressed briefly given that both parties were in agreement, are as follows.
15. The first ground takes issue with the judge's many conclusions which relied on aspects of the appellant's claim being inherently implausible. Examples of the problematic, unreasoned, findings include that it was implausible that the appellant survived a violent attack; that it was implausible that his attackers would have left him alive and that it was implausible he was able to hide from the Nigerian authorities for a period of time or indeed leave the country. The judge also appears to have misunderstood the background material and formed the impression that the Nigerian government had issued an order to kill [23] Biafran activists whereas the CPIN report establishes that there is a range of ill-treatment meted out to those involved in the Biafran cause.
16. The judge materially erred in rejecting the majority of the appellant's account on the basis of implausibility and failed to apply the guidance in HK [2006] EWCA Civ 1037, specifically:

29. Inherent probability, which may be helpful in many domestic cases, can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases. Much of the evidence will be referable to societies with customs and circumstances which are very different from those of which the members of the fact-finding tribunal have any (even second-hand) experience. Indeed, it is likely that the country which an asylum-seeker has left will be suffering from the sort of problems and dislocations with which the overwhelming majority of residents of this country will be wholly unfamiliar. The point is well made in *Hathaway on Law of Refugee Status* (1991) at page 81:

"In assessing the general human rights information, decision-makers must constantly be on guard to avoid implicitly recharacterizing the nature of the risk based on their own perceptions of reasonability."

17. The second ground concerned the judge's treatment of the scarring report. The judge was under the mistaken impression that the appellant's injuries were caused by machetes and guns and noted at [19] the absence of significant injuries.
18. The appellant addressed his injuries in his witness statement, explaining that he sustained knife injuries. In addition, the author of the scarring report lists a series of injuries which he was of the opinion were "*consistent with*" or "*highly consistent with*" the appellant's account of being attacked with a small blade. The judge further erred in concluding that the appellant's nine separate injuries, which ranged from his face to his left foot, were "*more consistent*" with accidental falls. While the scarring report rightly considered whether the scars could have been caused in any other manner, it was not open to the judge to find the injuries were caused accidentally in the absence of expertise or any other evidence to that effect.
19. Both parties were in favour of a remittal to the First-tier Tribunal. While mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010, it is the case that the appellant has yet to have an adequate consideration of his protection appeal at the First-tier Tribunal and it would be unfair to deprive him of such consideration.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside, solely in relation to the protection appeal.

The protection appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Birmingham IAC, with a time estimate of 4 hours by any judge except First-tier Tribunal Judge Kemp MBE.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

Date: 21 April 2021

Upper Tribunal Judge Kamara