



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02394/2020**

THE IMMIGRATION ACTS

**Heard at Field House
On 1 December 2021**

**Decision & Reasons Promulgated
On 13 December 2021**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

**OAO
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Bundock, Counsel, instructed by Duncan Lewis
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

Introduction

This is an appeal against the decision of First-tier Tribunal Judge Mayall sent on 4 February 2021. Permission was granted on all grounds by Upper Tribunal Judge Rintoul on 13 October 2021.

Background

The appellant is a national of Nigeria born on 2 August 1991. She arrived in the United Kingdom on 28 January 2020 travelling on a six month visit visa. She claimed asylum after being detained at the airport on arrival. Her protection and human rights claim was refused on 26 February 2020. The basis of her claim is that she is a lesbian woman from Nigeria. She has been attacked and subject to abuse by her family and is at risk of serious harm on return to Nigeria. The appellant also claimed to have been raped by her uncle as a minor.

The claim was refused on 26 February 2020. The Secretary of State concedes that were it to be accepted that the appellant is a gay woman who will live in an openly gay way or would live discreetly out of a fear of persecution that she would not have sufficiency of protection or the option of internal relocation in Nigeria and will be at risk of serious harm.

The sole issue in the appeal is the credibility of the appellant. The respondent considers that the appellant did not provide a sufficient level of detail about when she discovered her sexuality, did not remember the online articles that she had read, failed to describe the emotional journey in understanding her own sexuality, that there was a conflict between her sexual orientation and her religion and that it was not plausible that she had engaged in sexual activities in her family home, knowing what would happen if her parents discovered her. It is not accepted that the appellant is a lesbian or has been mistreated by her family because the appellant returned to her family home after being mistreated. Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 also applies because the appellant did not claim asylum until after she was issued with a Notice of cancellation of leave to enter.

The Decision of the First-tier Tribunal

From pages 2 to 9 of the decision, the judge sets out the refusal letter almost verbatim. The judge then records that the appellant was not going to be called to give evidence and the appeal would proceed by way of submissions only because the appellant was relying on the expert opinion of Dr Sahota that she was not fit to give evidence because of her poor mental health.

The judge quotes extensively from the appellant's skeleton argument from pages 9 to 13.

At pages 13 to 19 the judge sets out the report by the medical expert Dr Sahota. Then from pages 20 to 30 of the decision, the judge sets out the law on the approach to medical reports quoting large passages from various authorities.

From page 30 to 33, at [31] to [43], the judge criticises the medical report and gives reasons for this. The judge concludes that he cannot place any reliance upon the report and that he cannot not be satisfied that the appellant is suffering symptoms of PTSD which would materially affect her ability to give evidence. He also finds that the medical report does not give any support to her case.

At [44] to [47] on page 33 of the decision, the judge finds since the appellant has declined to give evidence and thus avoid being cross-examined and that there is no supporting evidence other than her own account that that he “cannot be satisfied even to the lower standard set out above..... that the core of her account is correct”. The judge further notes that the appellant could have applied for an adjournment in order for her mental health to improve but failed to do so.

The Grounds of Challenge

There are three main grounds of challenge. These were somewhat confusingly set out in one order in the grounds of appeal and then re-ordered in the appellant’s skeleton argument in support of the error of law hearing. The grounds in some respects overlapped.

Ground 1 - Failure to make material clear findings, failure to consider the evidence holistically and failure to take relevant evidence into account.

The judge failed to make any findings or clear findings about the nature, extent and implications of OAO’s mental ill-health and vulnerability. Although the judge made detailed criticisms of Dr Sahota’s evidence and rejected his conclusions, this is not the same thing as making findings about the vulnerability of the appellant on the totality of the evidence. The judge did not make any clear findings about the implications of the appellant’s vulnerability in relation to the assessment of her credibility. Further, the judge failed to consider and make findings on credibility in the context of the background/country evidence. Finally, the judge failed to consider or give adequate reasons for rejecting the appellant’s evidence as provided in her detailed witness statement which addressed the reasons for refusal letter.

Ground 2 - The judge gave weight to immaterial matters.

The judge drew an adverse inference from the fact that the appellant did not give oral evidence at [44] and [47]. These adverse inferences were not open to the judge in the circumstances of this case because the appellant had been advised by a medical expert that she was not fit to give evidence. Secondly, the judge gave weight to the fact that the appellant did not make an application to adjourn the hearing and engaged in speculation for the reasons for this.

Ground 3 - Procedural irregularity and unfairness.

The judge erred in law by wholly ignoring and failing to apply the Senior President of Tribunals’ Practice Direction and the Joint Presidential Guidance Note No 2 of 2010 on vulnerable and sensitive witnesses.

Rule 24 Response

The Secretary of State filed a Rule 24 response in which she defended the decision. It is said that the judge’s assessment of the medical evidence giving rise to his conclusion that he did not place any great reliance on the medical report is unchallenged. It is not for the judge to decide whether to adjourn the

appeal for the appellant's mental health to improve in order for her to give oral evidence. This was a matter for the appellant having taken legal advice. The judge was confronted with a case of disputed credibility but the appellant elected not to give oral evidence nor to request an adjournment. The judge had a responsibility to assess the medical evidence and to determine what, if any, adverse weight should be afforded by the failure of the appellant to make herself available for cross-examination. Although the judge did not make a specific finding on whether the appellant was a lesbian or not, the judge's finding that he did not accept the appellant's credibility is sufficiently clear that he did not accept that she was a lesbian.

Discussion and Decision

Ground 3/overlaps with ground 1

I will not set out the entire Joint Presidential guidance Note No 2 of 2010. I will refer to the relevant passages only. At [2] of the Note it is said:

“Although some individuals are by definition vulnerable others are less easily identifiable. Factors to be taken into account include

- mental health problems
- social or learning difficulties
- religious beliefs and practices, sexual orientation, ethnic social and cultural background
- domestic and employment circumstances
- physical disability or impairment that may affect the giving of evidence.”

There is also a note on page 1 which states:

“Some individuals are vulnerable because of what has happened to them e.g. they are victims of trafficking or have sustained serious harm or torture or are suffering from PTSD.

At [3] of the note it is said:

“The consequences of such vulnerability differ according to the degree to which an individual is affected. It is a matter for you to determine the extent of an identified vulnerability, the effect on the quality of the evidence and the weight to be placed on such vulnerability in assessing the evidence before you, taking into account the evidence as a whole.”

Further, it says at [14]:

“Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.”

And at [15]:

“The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind.”

The associated Practice Direction states:

“a child, vulnerable adult or sensitive witness will only be required to attend as a witness and give evidence at a hearing where the Tribunal determines that the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so”.

Mr Whitwell’s primary submission in respect of this ground is that the primary responsibility for identifying vulnerable individuals lies with the party calling them and not with the judge.

There was a Case Management Review hearing on 1 September 2020 before First-tier Tribunal Judge Dempster. Prior to that hearing, the appellant adduced medical evidence from Dr Sahota that she was not fit to give evidence because of her poor mental health and a skeleton argument. The skeleton argument stated:

“8. A is due to be assessed by a psychiatrist, Dr Satinder Sahota in the last week of August 2020 with a view to him producing a report by mid-September. He will also consider whether any reasonable adjustments are required, but his report is not likely to be available by the CMRH scheduled for 1 September 2020. Representations about any reasonable adjustments required can be made once his report is finalised. There is already some evidence that A is a **vulnerable witness** (see paragraph 10 below). If Dr Sahota identifies any condition which supports the conclusion that she is vulnerable it may well be the case that a face-to-face hearing is more appropriate than a remote hearing.(my emphasis)

...

10. As indicated above, A is due to be assessed by Dr Sahota at the end of August. He will assess A’s mental health and scarring in the context of GP medical records identifying mental health issues (including indications of A suffering from a depressive disorder, being suicidal and having been prescribed antidepressant/antipsychotic medication) and a Rule 35 report identifying scars attributed to relevant events.”

It was agreed that given that the appellant had started to take medication, a further updating medical report should be obtained to identify “whether the appellant requires any special measures or reasonable adjustments in the substantive hearing”.

The follow-up assessment was produced on 7 December 2020. In this report Dr Sahota gave the opinion that the appellant was not fit to attend court due to

symptoms of trauma having a significant impact on her capacity to participate and her vulnerability to stress. He also noted that her symptoms were improving through antipsychotic medication and after a further twelve weeks of treatment he anticipated that she would be fit to attend court. It was on the basis of this evidence that the appellant did not tender herself for cross examination.

The judge was very critical of this report and concluded that the appellant was not suffering from PTSD. He commented

“Even had I been satisfied that she was suffering symptoms of PTSD it is by no means clear that these were triggered by the events upon which her claim is based rather than the rapes which she also described.”

The grounds do not challenge the judge’s criticisms of Dr Sahota’s report nor the judge’s finding that he “cannot place any great reliance on the report”.

Evidence before the judge of vulnerability

In her asylum interview and witness statement the appellant gave evidence that at about the age of 14, she was sexually abused and repeatedly raped by her aunt’s husband. He threatened to kill her if she told her aunt or any family member what happened. She stated that she became pregnant and gave birth to twins who were taken from her by her mother. She states at paragraph 13:

“As a result of the repeated rapes I became pregnant and was unable to tell my aunty and family who was responsible because I was afraid and traumatised by the torture and treatment I went through at the hands of my aunty’s husband, Lanre. With the support from my mum I gave birth to twin babies which are with my mum now. There is nothing I can do to take away the pain I still live through now and the nightmares and flashbacks I still have to this day.”

Later in her statement, the appellant details various assaults on her by her family. She also states at paragraph 60 of her statement that she was diagnosed with schizophrenia in Nigeria after being taken to a psychiatric hospital. She said that at this time she was very depressed and would scream and shout for no reason. Her clothes were torn, and she was dirty. She was prescribed medication including sertraline and haloperidol.

At paragraph 116 of her statement, she said:

“In regard to managing my mental health conditions, I have seen my GP here in the UK several times, the last time was two weeks ago and my medication was reviewed and increased from 50mg to 100mg sertraline and quetiapine. I have also been seen twice by Dr Sahota for expert medical reports.”

The appellant also gave evidence in her asylum interview and statement that she had only been in limited education, having attended school for five years only.

There was further independent evidence of the appellant’s mental health problems before the First-tier Tribunal. This included:

The GP notes at pages 162 to 165 of the appellant's bundle. These referred to a telephone call from a relative on 15 April 2020 in which it is said that the appellant was crying, shouting and talking to herself. It is recorded that she does not speak English, she has a history of schizophrenia and depression, was on sertraline and haloperidol at home but this stopped a month ago, "she is not sleeping, crying, talking to herself, seeing people, they are telling her to kill herself, she states that she wants to kill herself". It is recorded that there was crying in the background. The aunt was advised to call 999. On 17 April 2020, two days later, the appellant was described as having a depressive disorder and was prescribed sertraline 50mg tablets, 25mg and was advised to book a review.

The appellant was referred for a psychiatric review and on 27 May 2020 her presentation was assessed as "consistent with PTSD with trauma-related auditory hallucinations". She was discharged into primary care.

On 20 July 2020 Southwark Assessment Liaison Team conducted a psychiatric review which noted "low mood, talking to herself, flashbacks and a heightened startled response". She was prescribed sertraline, an antidepressant, and quetiapine, an antipsychotic.

The above psychiatric review and Southwark Assessment Liaison Team review were referred to at [3.6.8] and [3.6.9] of Dr Sahota's report based on letters from the Psychological Medicine and Integrated Care dated 20 July 2020 and 27 May 2020. These letters were not produced in the original appellant's bundle but were produced in support of the error of law hearing with the Rule 15(2A) notice. However, it is clear that Dr Sahota was referring to independent evidence which he had sight of and he listed the letters in the appendix to his report.

It was not in dispute that the appellant had been prescribed with antipsychotic and antidepressant medication and was under the care of the Community Mental Health Team.

In the decision the judge notes that the appellant had claimed to be raped as a 14-year-old and that she had described bad memories and nightmares. The judge referred to the appellant reporting to the Southwark Assessment Liaison Team that she had periods of low mood, talking to herself and flashbacks. He refers to the fact that her mental health was not good following the birth of her children and her evidence in her witness statement was that as a result of the rapes she was afraid and traumatised by the torture and treatment she had gone through at the hands of her aunt's husband and that she is still suffering nightmares and flashbacks to this day. The judge also pointed out that the reference to trauma in the telephone call from the relative to the GP referred to the rape. The judge recorded at [39];

"I note that she has reported suffering from psychotic symptoms whilst in the United Kingdom, (auditory and visual command hallucinations). These seemed to have occurred when she was not being treated with

antipsychotic medication, haloperidol having been stopped when she left Nigeria, and that these seem to have ceased after being prescribed an antipsychotic in the UK. Some of the symptoms described in Dr Sahota's first report seem similar to the negative symptoms of schizophrenia".

The judge says at [40]:

"It is of some note that she was apparently diagnosed with schizophrenia in Nigeria, at a time when she had, on her account, already suffered horrific abuse at the hands of her family as a result of her sexuality."

The judge's ultimate conclusion at [43] is that he does not accept that the appellant suffers symptoms of PTSD.

In short, there was ample evidence before the judge, (besides from Dr Sahota's report) that the appellant had significant mental health problems and had claimed to be the victim of rape.

Despite this there was no finding anywhere in the decision about whether the appellant is a vulnerable witness. Mr Whitwell did not seek to persuade me otherwise.

I am satisfied that the judge wholly ignored and failed to apply the Senior President of Tribunals' Practice Direction and the Joint Presidential Guidance Note No 2 of 2010. I note the comments in AM (Afghanistan) v SSHD [2017] EWCA Civ 1123 that the Practice Direction and Guidance Note "are to be followed and failure to follow them 'will most likely be a material error of law'.

Contrary to the submission of Mr Whitwell, I am of the view that the appellant's representative clearly brought to the attention of the First-tier Tribunal at the Case Management Review hearing in the skeleton argument that the appellant was potentially a vulnerable witness. Notwithstanding that the judge rejected the evidence of Dr Sahota in respect of the appellant suffering from PTSD because of assaults on her by her family, there was ample other uncontested evidence before the judge to which he referred throughout the decision, that the appellant had been raped and sexually abused as a child, had suffered trauma as a result of that, had been diagnosed with schizophrenia, was taking antidepressant and antipsychotic medication and had episodes when she was talking to herself, screaming, shouting and felt suicidal and that her mental health had been recently improving with medication.

Further, the appellant had claimed to have low literacy skills, having had little education.

I am satisfied that these vulnerabilities had been drawn to the judge's attention and that the judge simply failed to deal with the question of whether the appellant was a vulnerable witness. I am also satisfied that the judge had sufficient evidence before him to have identified this issue for himself. There is no finding or reference as to whether the appellant is a vulnerable witness in the entire determination, notwithstanding the limited weight given to Dr Sahota's report. The judge has failed to explain if he considered the appellant to be a vulnerable witness and if not, why not. This is a material error of law in accordance with AM (Afghanistan).

In my view there was sufficient evidence before the judge to find that the appellant was a vulnerable witness. This is a matter of procedural fairness and the failure of the judge to deal with this is sufficient on its own for the decision to be set aside in its entirety.

I am also satisfied that this failure to identify any vulnerability led on to a further error. It is said in the Practice Direction that the Tribunal must determine for itself how the vulnerability of an appellant affects the evidence or how any inconsistencies in an account can be explained by such vulnerability. In the appellant's case her schizophrenia or trauma may have accounted for her failure to give a coherent and consistent account of past events, but the judge gave no consideration to this.

Having rejected the appellant's medical evidence, he simply finds that because she did not give oral evidence that she has not made out her case.

Where an appellant is vulnerable, the onus is on the judge to give more weight to the background evidence in accordance with the Guidance Note and AM (Afghanistan) in which it is said that an appellant's account of his fears and the assessment of his credibility must also be judged in the context of the known objective circumstances and practices of the state in question and a failure to do so can constitute an error of law because in making asylum decisions the highest standards of procedural fairness are required.

I am also satisfied that the judge erred by failing to consider and make findings about credibility or otherwise in the context of the country evidence in accordance with this guidance.

Finally, I am also satisfied that the judge failed to consider that evidence that had been tendered by the appellant. I am satisfied that the grounds of appeal are wide enough to encompass this error. The conclusion of the judge at [44] is that since the appellant had not tendered herself for cross-examination, he could not place any weight on her evidence at all. However, the appellant had provided evidence in her asylum interview and her witness statement which the judge had a duty to assess, regardless of whether she had tendered herself to give oral evidence. In her witness statement, the appellant gave detailed responses to the respondent's objections and the judge had no regard to these whatsoever.

I am in agreement with ground 3 that the judge has erred by failing to have regard to the Guidance note and Practice Direction in relation to vulnerable witnesses and that as a result this decision is vitiated by an error which is material to the outcome of the appeal. Had the judge made a finding that the appellant was a vulnerable witness and assessed her evidence against that background in line with the principles in AM (Afghanistan) the judge may well have come to a different conclusion.

I am also satisfied that ground 1 is made out because the judge failed to take into consideration the appellant's evidence, assess it against the background information, look at the responses she gave to the respondent's reasons for

refusal and take into account how any vulnerability on her behalf might have affected her evidence or accounted for inconsistencies.

Since I have found that the decision is vitiated by material error, I do not go on to consider the remaining grounds of appeal.

I set aside the decision of First-tier Tribunal Judge Mayall in its entirety on this basis.

Disposal

Both parties agreed that it would be appropriate to remit this appeal to the First-tier Tribunal to be heard de novo. While mindful of the Statement of the Senior President's Practice Statement of 10 February 2010, it is the case that the appellant has yet to have an adequate consideration of her asylum appeal at the First-tier Tribunal and it would be unfair to deprive her of such considerations. In addition, there may be a need for updated medical information as to the appellant's mental health, given the judge's criticisms of the medical report before him.

Decision

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

The decision of the First-tier Tribunal is set aside in its entirety with no findings preserved.

The appeal is remitted de novo to the First-tier Tribunal to be reheard by any judge except First-tier Tribunal Judge Mayall.

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 her or any member of her 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 R J Owens

Date 6 December 2021

Upper Tribunal Judge Owens