



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/03026/2019 (V)

**THE IMMIGRATION ACTS**

Heard at Cardiff Civil Justice Centre  
On 29 July 2021  
Remotely by Microsoft Teams  
Written Submissions on 2 August 2021

Decision & Reasons Promulgated  
On 25 August 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MK  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms E Gunn instructed by Migrant Legal Project (Cardiff)  
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

## **Introduction**

2. The appellant is a citizen of Sierra Leone who was born on 18 September 1963. She arrived in the United Kingdom in June 2006 as a visitor. After her six months' leave expired, the appellant overstayed. Thereafter she made a number of applications between 25 August 2012 and September 2016 for leave to remain based, inter alia, upon a relationship in the UK and subsequently on asylum, humanitarian protection and human rights grounds. In relation to a rejected human rights claim on 11 December 2013, the appellant unsuccessfully appealed to the First-tier Tribunal (Judge Fox). Her appeal was dismissed on 29 July 2014 and she was subsequently refused permission to appeal by the First-tier Tribunal and Upper Tribunal.
3. Her final claim was made on 21 September 2016 and 26 September 2016. The appellant's claim was that she had been subject to Female Genital Mutilation ("FGM") in or about 1981. She and her family were members of the Bondo Society, an all-female secret society that practises FGM in Sierra Leone. The appellant's aunt was a Soweï, a local leader of the Bondo Society. The appellant did not wish to take over her aunt's role and replace her as a Soweï. She claimed that after she came to the UK, her estranged husband, whom she had discovered had bigamously married another woman in Sierra Leone, had informed her aunt that she (the appellant) had divulged the secrets of the Bondo Society in the UK and that, as a result, she was at risk on return, in particular from her aunt and other family members.
4. Her claim was, initially, refused on 8 September 2017 and certified without a right of appeal. However, that decision was withdrawn on 5 October 2017.
5. On 9 March 2019, the Secretary of State reconsidered the appellant's application for asylum, humanitarian protection and under Art 8 of the ECHR. In a decision on that date, the Secretary of State again refused each of the appellant's claims. The Secretary of State rejected the appellant's claim to be at risk on return to Sierra Leone from her family and members of the Bondo Society.

## **The Appeal**

6. The appellant appealed to the First-tier Tribunal. In a decision sent on 19 September 2019, Judge Lever dismissed the appellant's appeal on all grounds. The appellant was granted permission to appeal against that decision and, in a decision sent on 6 March 2020, the Upper Tribunal (UTJ Grubb) concluded that Judge Lever had erred in law in dismissing the appellant's appeal and remitted it to the First-tier Tribunal for a *de novo* rehearing.
7. That remitted hearing took place before Judge Rhys-Davies on 15 December 2020. In a decision sent on 8 February 2020, Judge Rhys-Davies dismissed the appellant's appeal on all grounds. The judge made an adverse credibility finding and did not accept that the appellant would be at risk on return to Sierra Leone, as she claimed, from her family or members of the Bondo Society.

8. The appellant sought permission to appeal against Judge Rhys-Davies' decision. Initially, permission to appeal was refused by the First-tier Tribunal (Judge Beach) on 16 March 2020. However, on renewed application for permission to the Upper Tribunal, UTJ Kekić granted the appellant permission to appeal.
9. The respondent did not file a rule 24 response.
10. The appeal was listed for a remote hearing at the Cardiff Civil Justice Centre on 29 July 2021. I was based in court while Ms Gunn, who represented the appellant, and Mr Avery, who represented the Secretary of State, joined the hearing remotely by Microsoft Teams.
11. At the hearing, I directed that the parties should, if they wished, make written submissions on ground 1 and, in particular, in respect of the decision of the Inner House of the Court of Session in HA (Afghanistan) v SSHD [2010] CSIH 28. Ms Gunn filed written submissions on 2 August 2021. Mr Avery did not file any submissions in response.
12. There is one final preliminary matter. At the outset of the hearing, I drew to the representatives' attention that I have been previously involved in the appellant's appeal as the Upper Tribunal Judge who had remitted the appeal to the First-tier Tribunal having identified an error of law in the decision of Judge Lever. Both representatives indicated that they were content that I should continue to hear the appeal.

### **The Judge's Decision**

13. In relation to the appellant's asylum claim, Judge Rhys-Davies made an adverse credibility finding. Although the appellant relied upon a supportive expert report from Ms Conteh regarding the plausibility of the appellant's account and medical report by Dr Battersby that the appellant had symptoms of PTSD, the judge relied upon a number of inconsistencies between the appellant's evidence and her evidence at an earlier appeal hearing in 2014 before Judge Fox when she had unsuccessfully appealed a refusal to grant her leave under Art 8 of the ECHR. The judge relied upon a number of matters disclosed in Judge Fox's determination and also in a witness statement from the appellant which had been part of those proceedings. Judge Rhys-Davies concluded that the inconsistencies with Judge Fox's decision "causes material damage to the appellant's credibility" (para 81) and the omission to mention in a witness statement in those earlier proceedings that three of her children had died and she had suffered grief as a result "causes significant damage to the appellant's account" (see para 85).
14. In the result, having discounted both the report of Ms Conteh and Dr Battersby, not least because neither had a copy of Judge Fox's decision, Judge Rhys-Davies did not accept the appellant's account to be credible and dismissed her international protection claim. The judge also went on to dismiss her appeal under Art 8 of the ECHR.

## **The Grounds of Appeal**

15. The appellant relies upon four grounds of appeal which Ms Gunn developed in her oral submissions and, in relation to ground 1, in her written submissions after the hearing of the appeal on 2 August 2021.
16. Ground 1 contends that the proceedings before Judge Rhys-Davies were procedurally unfair. It is contended that the judge relied upon inconsistencies between the appellant's evidence in Judge Fox's decision in 2014 and in her evidence in this appeal without giving the appellant an opportunity to deal with those inconsistencies. Further, the judge relied upon an inconsistency (an omission) in the appellant's evidence in her witness statement before Judge Fox and in her evidence in this appeal. It is contended that none of these matters were drawn to the attention of the appellant's representatives. Ms Gunn relied on the fact that the determination of Judge Fox had only been provided to her, by email, shortly after the beginning of the appeal hearing. She had not been provided, nor had her instructing solicitors, with the appellant's 2014 witness statement. That was only provided to them, following sight of Judge Rhys-Davies' decision, on request to the respondent. Ms Gunn submitted that neither in the Decision Letter ("DL"), nor orally at the hearing before Judge Rhys-Davies, did the respondent's representative rely upon the inconsistencies in the evidence which Judge Rhys-Davies took into account as significant in reaching his adverse credibility finding. That, Ms Gunn submitted, was procedurally unfair. The case law in support of that submission was extensively set out in her written submissions dated 2 August 2021.
17. Ground 2 contends that the judge failed properly to take into account the country export report, namely that of Ms Conteh, who considered the appellant's account to be plausible before reaching his adverse credibility finding. Ms Gunn submitted that the judge had fallen into the so-called Mibanga error (see Mibanga v SSHD [2005] EWCA Civ 367) by reaching his adverse finding and then discounting the expert evidence as being inconsistent with his already reached adverse credibility finding.
18. Ground 3 contends that the judge wrongly took into account, as damaging the appellant's credibility, her delay in disclosing her account to be at risk on return to Sierra Leone.
19. Ground 4 contends that the judge erred in reaching his adverse conclusion under Art 8, in particular para 276ADE(1)(vi) by failing to take into account the appellant's mental and physical health problems.
20. I will take each of the grounds relied upon by Ms Gunn in turn. Ground 1 is the most significant because, if established, it renders the proceedings procedurally unfair and unsustainable.

## **Ground 1**

21. Ms Gunn submitted that the judge had acted unfairly in relying upon inconsistencies between the appellant's evidence and what was said in Judge Fox's earlier

determination in 2014 which, she submitted, had not been raised by the Secretary of State in her DL, in the First-tier Tribunal review or at the hearing before the judge. In addition, she submitted that the judge had acted unfairly in relying upon the appellant's witness statement submitted in the 2014 appeal, but which had not been in evidence before Judge Rhys-Davies, to identify an omission in that statement when compared to the appellant's evidence given before Judge Rhys-Davies.

1. *The Case Law*

22. In her written submissions, Ms Gunn relied upon a number of authorities including the case of HA (Iraq) in the Inner House of the Court of Session which was raised at the hearing.
23. The relevant legal principle is that of fairness, or as it was once known "natural justice". In R v SSHD ex parte Doody [1994] 1 AC 531 at p.560, Lord Mustill (with whom the other Law Lords agreed) identified six points in relation to "fairness" which he described as "essentially an intuitive judgment". Most significantly for this appeal, and relied on by Ms Gunn, are points 5 and 6 where Lord Mustill said the following:
  5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.
  6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer".
24. That was, of course, said in the context of administrative decision making rather than in the context of judicial decision making. Nevertheless the fundamental, requirement of fairness that an individual know the "gist of the case" against them, resonates in judicial proceedings also (see, e.g. Muhandiramge (section S-LTR.1.7) [2015] UKUT 00675 (IAC) at [16]).
25. The requirement to know the "gist" of the case, is likely to encompass in a judicial context an opportunity to see and consider the evidence relied upon by the opposing party (and to the extent done so, by the judge) and to comment upon it. The point was emphatically made by Lord Kerr in his judgment in Home Office v Tariq [2011] UKSC 35 at [102]-[105] as follows:
  102. The right to know and effectively challenge the opposing case has long been recognised by the common law as a fundamental feature of the judicial process. In Kanda v Government of Malaya [1962] AC 322, 337 Lord Denning said:

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict

them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* down to the decision of their Lordships' Board in *Ceylon University v Fernando*. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side made behind the back of the other."

103. The centrality of this right to the fairness of the trial process has been repeatedly emphasised. Thus, in *In re K (Infants)* [1963] Ch 381 Upjohn LJ at pp 405-406 said:

"It seems to be fundamental to any judicial inquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account in reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial."

104. And in *Brinkley v Brinkley* [1965] P 75, 78 Scarman J said that "for a court to take into consideration evidence which a party to the proceedings has had no opportunity during trial to see or hear, and thus to challenge, explain or comment upon, seems to us to strike at the very root of the judicial process". In *Pamplin v Express Newspapers Ltd* [1985] 1 WLR 689 at 691 Hobhouse J expressed the principle in similarly forthright terms:

"The first principle is the principle of natural justice which applies wherever legal proceedings involve more than one person and one party is asking the tribunal for an order which will affect and bind another. Natural justice requires that each party should have an equivalent right to be heard. This means that if one party wishes to place evidence or persuasive material before the tribunal, the other party or parties must have an opportunity to see that material and, if they wish, to submit counter material and, in any event, to address the tribunal about the material. One party may not make secret communications to the court."

105. Exceptions to the rule that a party to the proceedings must be informed of every detail of his opponent's case have, of course, been recognised. But it is essential to be aware of the starting point from which one must embark on the inquiry whether the principle of equality of arms (which is such a vital hallmark of our adversarial system of the trial of contentious issues) may be compromised. As a general – indeed, basic – rule, those who are parties to litigation need to know what it is that their opponent alleges against them. They need to have the chance to counter those allegations. If that vital entitlement is to be denied them, weighty factors must be present to displace it. And it is self evident that he who wishes to have it displaced must show that there are sufficiently substantial reasons that this should happen. Put shortly, he who thus avers must establish that nothing less will do."

26. In the context of appeals in international protection, immigration and human rights cases, case law has developed relating to the fairness of proceedings when a judge, often in the context of credibility, takes points not relied upon by the opposing party (usually, therefore, the Secretary of State) in reaching adverse findings against an appellant. Those cases have, in some instances, arisen where an appellant is unrepresented (and therefore does not have the assistance of a lawyer) and/or the respondent is not herself represented and highlight the dangers of a judge 'descending into the arena' if he or she raises points not taken at the hearing by the parties. Ms Gunn referred me to a number of decisions in her written skeleton

argument including the Court of Appeal's decision in Maheshwaran v SSHD [2002] EWCA Civ 173; the Court of Session decision in Koca v SSHD [2005] 1 SC 487; and the IAT decisions in WN (Surendran; credibility; new evidence) DRC [2004] UKIAT 00213 and AA (Credibility, Totality of evidence, Fair trial) [2004] UKIAT 152.

27. The relevant principles derived from the case law are helpfully explored by the Inner House of the Court of Session in HA(Iraq) (Lords Reed, Hardie and Mackay of Drumadoon).

28. At [1] the Inner House identified the legal issue:

"... the critical question is whether the immigration judge was entitled to base his conclusion to some extent upon a matter which had not been raised during the course of the hearing before him."

29. The Court identified that the applicable principle was 'fairness'. At [4], the Court said this:

"[4] .... [The judge] must however act fairly. What fairness requires has been considered by the Tribunal and by the courts in numerous cases, a few of which we shall shortly turn to. It is however necessary to emphasise, before doing so, the relevance of certain general observations made by Lord Mustill in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at page 560, in a speech with which the other members of the House expressed their agreement. As Lord Mustill observed, what fairness requires is essentially an intuitive judgment. Although it is possible to identify a number of general principles, they cannot be applied by rote identically in every situation: "what fairness demands is dependent on the context of the decision". An overall judgment must therefore be made in the light of all the circumstances of a particular case. That said, guidance can be obtained from decided cases, provided careful attention is paid to any relevant factual circumstances, and judicial *dicta* are not taken out of context."

30. The Court recognised (at [5]) the context in which immigrations appeals, now before the First-tier Tribunal, took place:

"[5] In relation to the context in which the Tribunal operates, a number of salient features were identified by the Court of Appeal in *Secretary of State for the Home Department v Maheshwaran* [2004] Imm AR 176 at paragraph 3:

"Those who make a claim for asylum must show that they are refugees. The burden of proof is on them. Whether or not a claimant is to be believed is frequently very important. He will assert very many facts in relation to events far away most of which no one before the adjudicator is in a position to corroborate or refute. Material is often adduced at the last minute without warning. From time to time the claimant or the Home Secretary are neither there nor represented and yet the adjudicator carries on with his task. He frequently has several cases listed in front of him on the same day. For one reason or another not every hearing will be effective. Adjudicators can not be expected to be alive to every possible nuance of a case before the oral hearing, if there is one, starts. Adjudicators in general will reserve their determinations for later delivery. They will ponder what has been said and what has not been said, both before the hearing and at the hearing. They will look carefully at the documents which have been produced. Points will sometimes assume a greater importance than they appeared to have before the hearing began or in its earlier stages. Adjudicators

will in general rightly be cautious about intervening lest it be said that they have leaped into the forensic arena and lest an appearance of bias is given."

31. The Court acknowledged that a judge is not necessarily limited to the evidence and the issues relied upon or raised by the parties, although fairness may require the parties (particularly the appellant) be put on notice of such 'new' issues. At [6]-[9]:

"[6] One factor which has been emphasised in numerous cases is the specialist nature of the Tribunal (see e.g. *AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678). This has implications for procedure before the Tribunal: although the procedure is adversarial (*R v Secretary of State for the Home Department, ex parte Abdi* [1996] 1 WLR 298 at page 301 per Lord Mustill), the Tribunal is not confined to a consideration of the evidence and submissions presented to it by the parties. In that regard, the observations made by Sedley J and cited in *Secretary of State for the Home Department v Abdi* [1994] Imm AR 402 at page 412, in relation to adjudicators appointed under the previous legislation, remain apposite:

"Adjudicators are not recruited from the Clapham omnibus. They are skilled and specialised office-holders carrying out an independent and, in many respects, judicial function of profound importance to the individuals who come before them ... From case to case they will build up a fund of information about different third countries. It would be wrong, of course, for them to decide cases upon the basis of private information of this kind; but it would also, in my judgment, be wrong for them to ignore such information and close their minds to everything except the evidence that the Home Office chose or the applicant was able to put before them."

In that case (per Steyn LJ at page 420), and in subsequent cases (e.g. *Gnanavarathan v A Special Adjudicator* [1995] Imm AR 64), it was accepted that the adjudicator was entitled to rely on matters within his own knowledge, provided such matters were disclosed to the parties so as to afford them a fair opportunity to deal with them.

[7] Similarly, the Tribunal may identify an issue which has not been raised by the parties to the proceedings, but it will be unfair, ordinarily at least, for it to base its decision upon its view of that issue without giving the parties an opportunity to address it upon the matter. That point is illustrated by the decision of this court at an earlier stage of the proceedings in relation to the first appellant, reported as *HA v Secretary of State for the Home Department* 2008 SC 58. As we shall explain, the first appellant's claim for asylum is based on an account of having had a relationship in Afghanistan with the daughter of an army commander, who became pregnant as a result of the relationship. At an earlier stage of the proceedings, an immigration judge rejected the credibility of the first appellant's account in part because no evidence had been given of the precautions taken by the couple against pregnancy: an issue which had not been raised by the respondent, or by the immigration judge himself at the hearing. The court stated, at paragraph 30 of its opinion:

"[T]here is in our opinion force in the submission that it was unfair of the immigration judge, if he found in the absence of evidence about precautions against pregnancy ground for regarding the evidence about the relationship as implausible, not to put that point to the appellant to give him an opportunity to put forward evidence on the point. If he had done so, the appellant might, or might not, have been able to allay his concern, but the procedure would have been fair."



The court also noted that the immigration judge had speculated, in the absence of evidence, about the way in which the couple would have been likely to have acted in relation to precautions against pregnancy. The court was critical of the immigration judge's doing so, partly because there was no indication that he was alive to the possible relevance of cultural and other differences between the United Kingdom and Afghanistan.

[8] As an expert body, the Tribunal is entitled to reject evidence notwithstanding that the evidence has not been challenged before it. Fairness may however require it to disclose its concerns about the evidence so as to afford the parties an opportunity to address them. That point is illustrated by the decision in *Kriba v Secretary of State for the Home Department* 1998 SLT 1113, where the applicant had relied on a letter from Amnesty International which was not challenged by the respondent and which had been relied on by the Immigration Appeal Tribunal in another case shortly beforehand. The adjudicator however attached no weight to the letter, describing it as anecdotal and inadequately sourced. The applicant was not given an opportunity to adduce additional evidence to support what was stated in the letter. Lord Hamilton granted an application for judicial review, stating at page 1116:

"The weighing of the evidence before him is a matter for the special adjudicator and the fact that evidence is unchallenged by the presenting officer does not of itself oblige the special adjudicator to accept it. In the present case, however, where the evidence was not only unchallenged and uncontradicted but came from an apparently responsible source and was a vital element in this part of the petitioner's case, it was, in my view, procedurally unfair wholly to reject it without first affording to the petitioner an opportunity to adduce support for it."

In the particular circumstances of that case, the applicant could reasonably proceed on the basis that there was no need for him to adduce evidence on this vital point besides the letter, given that the letter was unchallenged and came from a source which was generally treated as reliable (and had recently been treated as reliable in relation to that very letter), unless he was put on notice of the adjudicator's concern.

[9] Even where a point is expressly conceded by one party, the Tribunal is not obliged to accept the concession; but in that situation, as was observed in *Maheshwaran* at paragraph 4,

"... it will usually be unfair to decide the case against the other party on the basis that the concession was wrongly made, unless the Tribunal indicates that it is minded to take that course."

32. However, the Court concluded that there was no 'general obligation' to give notice to the parties but, nevertheless, fairness might require it. At [10]-[13] the Court said this:

"[10] There is, on the other hand, no general obligation on the Tribunal to give notice to the parties during the hearing of all the matters on which it may rely in reaching its decision. That point is illustrated by the decision of the Court of Appeal in *Sahota v Immigration Appeal Tribunal* [1995] Imm AR 500, where the applicant sought asylum on the basis that he had been arrested and tortured on a number of occasions by the police of his native country. He stated in evidence that the police had wanted to know the whereabouts of his brother, who belonged to a proscribed organisation. His brother had eventually been killed by the police. He (the applicant) feared that he too would be killed if he returned. The adjudicator accepted the applicant's account but refused his

appeal on the basis that there was no evidence of a continuing risk to the applicant following his brother's death. The applicant sought leave to apply for judicial review on the basis that there had been a breach of natural justice, since the adjudicator had not asked the applicant why he continued to fear persecution following his brother's death. Leave was refused. Kennedy LJ, with whose judgment Sir Thomas Bingham MR and Millett LJ expressed agreement, said (at pages 504-505):

"I for my part can see no reason why the adjudicator should have done more than she did. The applicant was seeking to persuade her, the onus being on him, that he, at the time when the decision fell to be made, had a well-founded fear of persecution. He pointed to the fact that in the past his brother was a member of a proscribed organisation, but that did not answer the problem which he had to face, namely why the fear should exist after the brother was no longer alive. I do not see why the adjudicator should have asked him more specifically. Apparently he dealt with the matter himself in evidence in relation to this particular matter. Of course, there are cases, and there are authorities which show, that a determining body such as an adjudicator should not decide an issue on some matter which has not been properly canvassed in evidence. But this whole question of the fear of the applicant, and the basis of that fear, was in fact the subject matter of proceedings before the adjudicator. ..."

The court thus accepted that the applicant had had a fair opportunity to present his case. There was no unfairness in the adjudicator's concluding that the evidence led was insufficient to discharge the onus, without raising its insufficiency in the course of the hearing.

[11] Another decision which is of assistance, as it concerns another type of situation which frequently arises in practice, is *R v Immigration Appeal Tribunal ex parte Williams* [1995] Imm AR 518. In that case, the adjudicator had made adverse findings on credibility on the basis of discrepancies between the account of material events which the applicant had given in evidence and the account which he had given in his asylum application and in his asylum interview. Leave to apply for judicial review was sought on the basis of procedural impropriety: it was argued that the adjudicator should have reminded the applicant of his earlier accounts. Leave was refused. Harrison J noted that the applicant had been represented by counsel at the hearing and had had the opportunity to deal with discrepancies between his oral evidence and what had been said in his asylum application or in his interview. The adjudicator was not bound, as a matter of natural justice, to point out the inconsistencies.

[12] There is in general no unfairness in proceeding in that way, since an applicant can generally be expected to be aware that the Tribunal will have to assess his credibility, and the consistency of the account he has given in evidence with any previous accounts contained in the documents before the Tribunal will plainly be relevant to that assessment. As the Court of Appeal observed in *Maheshwaran* at paragraph 5:

"Where much depends on the credibility of a party and when that party makes several inconsistent statements which are before the decision maker, that party manifestly has a forensic problem. Some will choose to confront the inconsistencies straight on and make evidential or forensic submissions on them. Others will hope that 'least said, soonest mended' and consider that forensic concentration on the point will only make matters worse and that it would be better to try and switch the tribunal's attention to some other aspect of the case. Undoubtedly it is open to the tribunal expressly to put a particular inconsistency to a witness because it considers that the witness may not be alerted to the point or because it fears that it may have perceived something as inconsistent with an earlier answer which in truth is not inconsistent. Fairness may in some

circumstances require this to be done but this will not be the usual case. Usually the tribunal, particularly if the party is represented, will remain silent and see how the case unfolds."

[13] Given the judicial nature of the Tribunal's function, it is generally inappropriate for it to become involved in challenging the evidence placed before it. As Moses J observed in *R v Special Adjudicator, ex parte Demeter* [2000] Imm AR 424 at page 430:

"The appeal should be, and is, adversarial. It is important that the special adjudicator should avoid, if possible, giving any appearance of entering into the arena by challenging the account that the applicant gives himself."

There are however circumstances where, as a matter of fairness, the Tribunal cannot remain silent in the face of the evidence presented to it. One example of such circumstances has already been given, in the case of *Kriba v Secretary of State for the Home Department*. Other examples can be found amongst the reported decisions, and we shall refer to some in a moment. It is however necessary to emphasise that such circumstances are fact-sensitive. The Tribunal is not under a general obligation to air its concerns about the evidence presented to it, even if the evidence is unchallenged. The point is illustrated, in relation to an adverse finding on credibility based on discrepancies between an applicant's account, by such decisions as *Ex parte Williams* and *R (Hyseni) v Special Adjudicator* [2002] EWHC 1239 (Admin). It is also illustrated, in relation to a finding based on the vagueness of an applicant's evidence, by the decision in *Hassan v Immigration Appeal Tribunal* [2001] Imm AR 83, in which Buxton LJ remarked at paragraph 18:

"Particular complaint is made that the adjudicator should not have concluded that the applicant's evidence was vague, without in some way warning him that he was going to come to that conclusion and asking him to improve matters. I have to say I simply cannot understand that complaint. The finding that the adjudicator made, that the evidence was vague, was one that he came to having heard everything that the applicant and his representative wished him to hear. It was the sort of conclusion that anybody who has to adjudicate on evidence is entitled to come to. The idea that the applicant not having satisfied the adjudicator in the course of the hearing, the adjudicator was under some obligation to ask him to start again is, in my view, plainly unfounded."

This general approach is consistent with that adopted by the courts in relation to other types of adversarial procedure. In the context of criminal proceedings, for example, the court stated in *Hunt v Aitken* 2008 SCCR 919 at paragraph 17:

"Counsel's final argument was that it had been procedurally unfair for the justice not to disclose his doubts about Mrs Hunt's evidence: since the Crown had not challenged specifically that aspect of her evidence (although her credibility and reliability in general had been challenged), the complainer's solicitor had had no opportunity to address the issue in his closing submissions. We are unable to accept that contention. A judge hearing a case is not obliged to interrupt the proceedings whenever he has doubts about the credibility or reliability of a piece of evidence; nor is he obliged to provide the parties with a list of his concerns about the evidence so that they can be addressed during submissions."

We also note the remarks made by Lord Diplock, in a different but not entirely unrelated context, in *Hoffmann La Roche & Co AG v Secretary of State for Trade & Industry* [1975] AC 295 at page 369."

33. The Court then (at [14]) considered the issue in the context of a case where points were taken by a judge in a decision which were not raised at the hearing where the respondent was unrepresented:

"[14] As we have indicated, however, circumstances can arise in which the Tribunal cannot fairly adopt the passive role which a judge or a jury would ordinarily adopt. Such circumstances are particularly apt to arise in situations where the Secretary of State is unrepresented at the hearing before the Tribunal. The difficulties which can arise in securing a fair hearing in such circumstances have long been recognised by the Tribunal itself: see *MNM v Secretary of State for the Home Department* [2000] INLR 576. They were also recognised by this court in *Koca v Secretary of State for the Home Department* 2005 SC 487. That was a case in which the adjudicator had rejected the credibility of an aspect of the applicant's account on the basis of what she considered to be discrepancies between the evidence given by the applicant at the hearing and his earlier statements. The court quashed the decision on the ground that the reasoning was inadequate, but added *obiter* remarks in relation to procedural fairness on which reliance was placed in the second of the present appeals. In particular, the court said at paragraph 20:

"It is, we consider, an important feature of this case that the respondent was not represented at the hearing before the adjudicator. There was no cross-examination as such whereby any such inconsistencies, contradictions or discrepancies might well have been highlighted. ... On one reading of the material before the adjudicator ... it does not really involve any contradiction on the claimer's part but, as counsel for the respondent himself described it, a 'development of his evidence'. Again, with regret, we have to say that the reasoning of the adjudicator in relation to this matter is somewhat opaque. In any event if, as seems to be the case, any perceived contradiction or inconsistency in the claimer's position was going to form a significant reason for rejecting his appeal then, in the particular circumstances of this case, it appears to us that fairness required that, prior to the issue of her decision, she gave the claimer or his representative an opportunity to comment upon, or seek to explain, it."

In that passage, and later in the same paragraph, the court made it clear that its observations reflected the particular circumstances of the case, which included the fact that the respondent had not been represented at the hearing and the fact that the matter which occasioned the adjudicator's concern might be capable of clarification or explanation. The *dicta* in that case should not therefore be understood as laying down any general rule inconsistent with the approach adopted in *Maheshwaran* and in the present appeals."

34. I would identify a number of points from HA and the cases referred to by the Inner House:

1. Fairness is a fact-sensitive, and context specific, issue which requires a court or tribunal to make an intuitive judgment. The obligation to act fairly arise in respect of both parties in IAC proceedings.
2. As a general rule, a party has a right to know the 'gist' of the case against them including what evidence is being relied upon by the opposing party in their case and by the judge in reaching a decision.
3. A judge is not absolutely prohibited from taking into account in their decision issues raised by the evidence which has not been relied upon, or raised by either party, prior to or at the hearing.

4. However, in doing so the judge must act fairly. That may entail giving the parties notice of the issues which the judge has identified in order to give them an opportunity to deal with the issue, including through submissions and leading other evidence.
5. There is no general rule, however, that a judge must do this because the proceedings *may* nevertheless be fair, for example, if the issues are obvious on the evidence. It is more likely to be unfair if the judge relies on a substantial issue which has not previously been raised, e.g. doubting the appellant's credibility for the first time or the reliability or genuineness of a document.
6. However, in raising issues at the hearing not taken by the parties, it may be unfair for a judge to raise those matters if to do so places the judge 'in the arena', in effect taking over the role of the advocate for the opposing party. If to raise a new matter would result in unfairness, it may be more difficult for a judge to rely upon, those unraised matters, in the decision adversely to one party.

## 2. Discussion

35. Ms Gunn accepted that a number of matters relied upon by Judge Rhys-Davies in reaching his adverse credibility finding had been raised either in the DL or in the FtT review by the respondent. Consequently, the finding by Judge Fox in 2014 that the appellant's relationship with her partner in the UK was not genuine was relied on in para 81 of the DL and by the judge, for example, at para 89 of his decision. Likewise, in the FtT review, the respondent relied on the fact that in the 2014 determination Judge Fox had found the appellant not to be credible in respect of her Art 8 claim on two points, namely her evidence in the past determination that her daughter died due to pregnancy problems, and that she had been sacked from her job as a police officer which were inconsistent with her evidence in the present appeal. Those were referred to, and relied on by, Judge Rhys-Davies at para 86 of his decision. Ms Gunn accepted that the judge was entitled to rely upon these matters.
36. However, Ms Gunn submitted that the reliance upon three matters in paras 87, 88 and 90-91 of his decision were matters that had never been relied upon by the Secretary of State either in her DL or at the hearing before Judge Rhys-Davies. They were inconsistencies as to (1) when the appellant had lost contact with her children (para 87 of the decision); (2) whether the appellant had been estranged from or lost contact with her children (para 88 of the decision); and (3) that the appellant's previous evidence was that she had been asked about re-employment in the police force in Sierra Leone whereas in the current case she said she had been in contact with her colleagues since she left (paras 90-91 of the decision). Ms Gunn submitted that it was unfair for the judge to rely upon these points which were not "obvious" and went beyond the content of the credibility points raised by the respondent in the Decision letter and FtT review and the appellant was not on notice as to their relevance to the appeal.

37. Further, Ms Gunn submitted that at para 85 the judge had been wrong to rely on the omission in the appellant's 2014 witness statement that she had made no mention of the deaths of three of her children, of suffering with grief as a result, and of the visit being arranged to help her recuperate at all.
38. Ms Gunn submitted that the judge had found the inconsistencies with Judge Fox's determination was such that it "causes material damage to the appellant's credibility" and that the omission in the appellant's 2014 witness statement "causes significant damage to the appellant's account as it goes to the heart of why she came to the UK in the first place". Ms Gunn submitted that as regards the latter, that evidence had not been part of the case.
39. In response, Mr Avery submitted that the judge had been entitled to rely upon the inconsistencies with the evidence derived from Judge Fox's earlier determination. He submitted that that determination had been referred to in the DL and, as regards the 2014 witness statement, he submitted it was wrong to say that was not part of the evidence in the appeal as it had been part of the evidence before Judge Lever when the international protection appeal was first heard in the First-tier Tribunal. Mr Avery submitted that the 2014 determination had been provided to the appellant's counsel during the hearing and she had not sought an adjournment. The discrepancies in the evidence were clear and had counsel, on reading Judge Fox's determination, wished to address those inconsistencies by evidence or submissions, she could have done so but had not.
40. There is no doubt that the judge had an obligation to act fairly. In principle, that meant that the appellant should have had a reasonable opportunity to deal with points which the judge relied upon in his decision in reaching an adverse credibility finding. It is significant that none of the three points raised by Ms Gunn and relied upon by the judge in paras 87, 88 and 90-91 were relied upon by the respondent in the DL or at the hearing. Mr Avery did not suggest otherwise.
41. Judge Fox's 2014 determination was not available to counsel until the course of the hearing when it was emailed to her. However, she did not seek an adjournment and was content to proceed with the appeal having considered it. Of course, in doing so, counsel was, not unsurprisingly, perhaps lulled into a 'sense of false security' that its relevance at the hearing was no greater than that relied upon by the respondent both in the DL and FtT review.
42. This was not, however, a case where an issue, for example credibility, was raised for the first time in the decision by the judge. Both parties were well aware that the credibility of the appellant was in issue. As the case law makes plain, it is not necessarily incumbent upon a judge to raise with the parties (in particular the appellant) points which concern the judge and which may form part of his reasoning but are not relied upon by the respondent at the hearing. Of course, good practice would be to do so. As the Immigration Appeal Tribunal noted in WN at [28]:

"As we have said elsewhere, it is a matter of judgment whether to omit [to put points of concern to an appellant] is unfair or whether to do so risks appearing to be unfair as a

form of cross-examination. On balance, the Adjudicator's major points of concern are better put, especially if they are not obvious".

43. Of course, the first point concerns the role of a judge in a case where, if the judge does not put the points to the appellant, in the absence of a representative on behalf of the respondent, those points will not be drawn to an appellant or his legal representatives' attention. That danger is altogether less potent where both parties are represented at the hearing. A judge can much more easily, and without the appearance of 'descending into the arena', raise points of concern with the legal representatives who will then, if they wish, have an opportunity to deal with them either through evidence or submissions.
44. In this appeal, there is a very real danger that the appellant's counsel was unintentionally misled into believing only points being taken by the respondent were relevant to the judge's consideration of the appellant's credibility.
45. As Lord Mustill identified in Doody, what is fair or unfair is "essentially an intuitive judgment". Here, Judge Rhys-Davies took a number of points previously not raised, or relied upon at any time, by the respondent. He did so despite the fact that the respondent did rely on those points arising from Judge Fox's determination and the appellant's evidence at the hearing. These were points which the judge clearly considered to be "material" to the appellant's credibility (as he said in para 81 of his decision). It is not, in my judgment, determinative of whether these points - on a full and considered basis - would be "obvious". Further, it would not have resulted in him 'descending into the arena' had he raised these issues with counsel and the Home Office Presenting Officer.
46. For reasons that are unclear, the appellant's counsel did not have the 2014 determination until the day of the hearing. Of course, as I have said, she did not seek an adjournment but that was, no doubt, on the basis that she felt able to deal with the points being relied upon, and arising out of, that 2014 determination, by the respondent. The additional points were significant for the judge and, in my judgment, it was unfair to rely upon them without giving the appellant an opportunity to deal with those points, through counsel, by way of other evidence or submissions.
47. As regards the 2014 witness statement, that was a document which the appellant's counsel did not have at the hearing. It appears that it had been provided to the First-tier Tribunal together with the 2014 determination. It was not, however, sent to counsel on the day of the hearing with the 2014 determination. Indeed, and Mr Avery did not seek to argue to the contrary, it would appear that its contents (and perhaps even its existence) was unknown to the appellant's representatives until it was referred to by Judge Rhys-Davies in his determination. As I understand it, the legal representatives sought a copy of it at that point and it formed part of the appellant's grounds of appeal. It is not entirely clear to me how this train of events occurred given that the appellant's legal representatives were also her representatives at least at the hearing before Judge Lever. It would appear, from Judge Lever's decision, that he had both a copy of Judge Fox's decision and the

appellant's witness statement of 18 March 2014 (see para 4 of his decision) but the latter does not seem to have formed any part of the appellant's evidence or to have been relied upon by the respondent at the remitted appeal eventually heard by Judge Rhys-Davies. It may be that the Judge Rhys-Davies believed (albeit wrongly) that the 2014 witness statement was part of the case before him as put forward by the parties. However, in fact, it was not.

48. Principally, a judge should determine an appeal based upon the evidence presented by the parties (subject to the possibility of taking judicial notice of evidence or relying fairly on other evidence). As the Upper Tribunal said in AM (fair hearing) Sudan [2015] UKUT 656 at [7(ii)]:

"If a judge is cognisant of certain evidence which does not form part of either party's case, for example as a result of having adjudicated in another case or cases, or having been alerted to something in the news media, the judge must proactively bring this evidence to the attention of the parties at the earliest possible stage, unless satisfied it has no conceivable bearing on any of the issues to be decided. If the matter is borderline, disclosure should be made. This duty may extend beyond the date of hearing, in certain circumstances".

49. In my judgment, those words fall to be applied to the judge's reliance, in this appeal, upon the appellant's 2014 witness statement and the absence from that statement of certain aspects of her account which she now relied upon. The judge treated that omission as "caus[ing] significant damage" to the appellant's account as it went to the heart of the reason why she came to the UK (see para 85 of the decision). In my judgment, if Judge Rhys-Davies wished to rely upon this point, based upon the 2014 witness statement, fairness required him to raise the matter at the hearing with the parties (or after the hearing if it occurred to him subsequently) in order that they (in particular the appellant) had a fair opportunity to deal with it. Not only was it an evidential point not relied upon by the respondent in the course of the appeal, the witness statement itself was not relied upon by either party.
50. For those reasons, in my judgment, the judge materially erred in law in dismissing the appellant's appeal (in particular in reaching his adverse credibility finding) by unfairly depriving the appellant of an opportunity to deal with a number of points which were material to his credibility finding.

### 3. Conclusion

51. In my judgment, the unfairness of the proceedings makes the decision, as a whole, unsustainable. The judge's unsustainable adverse credibility finding cannot be isolated so as to affect only his decision to dismiss the appeal on asylum grounds. The risk that it had an adverse impact upon his decision to dismiss the appellant's appeal under Art 8 cannot be properly discounted. The judge made a number of adverse findings, not accepting evidence put forward by the appellant, at paras 118 and 120 for example. In the light of that, in my judgment, the decision as a whole must be set aside and re-made *de novo*.



## Grounds 2-4

52. Strictly, therefore, it is not necessary to address the substance of the remaining grounds relied upon by the appellant. It should not, however, be assumed that I would necessarily have accepted that those grounds were established.
53. I would only make the following observations on ground 2. The Mibanga point relied on in ground 2 presents considerable difficulties for the appellant. The vice identified in Mibanga is that a judge must not ‘compartmentalise’ the issue of credibility by reference to only some of the evidence and exclude consideration of other evidence (such as medical or expert evidence).
54. The Upper Tribunal helpfully summarised the case law and proper approach in QC (verification of documents; *Mibanga* duty) China [2021] UKUT 33 (IAC) at [39]–[57]. At [57], the UT said this:
- “To sum up, the judicial fact-finder has a duty to make his or her decision by reference to all the relevant evidence and needs to show in their decision that they have done so. The actual way in which the fact-finder goes about this task is a matter for them. As has been pointed out, one has to start somewhere. At the end of the day, what matters is whether the decision contains legally adequate reasons for the outcome. The greater the apparent cogency and relevance of a particular piece of evidence, the greater is the need for the judicial fact-finder to show that they have had due regard to that evidence; and, if the fact-finder’s overall conclusion is contrary to the apparent thrust of that evidence, the greater is the need to explain why that evidence has not brought about a different outcome.”
55. The judge plainly, in form, dealt with evidential credibility issues at paras 81–93, the medical and expert evidence at paras 95–101, other documentary evidence put in evidence by way of support at paras 102–106 and then, finally, at paras 107–111 the delay in the appellant making a claim for asylum under s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. As I pointed out to Ms Gunn during her submissions if (looking at the structure of the judge’s decision) she was correct that the judge made an adverse credibility finding at paras 81–93 and only then considered the relevance (to discount) the medical and expert evidence, that could equally be said of the judge’s consideration of the relevance of the delay in the appellant’s claim for asylum which he did not deal with until paras 107–111. However, that was clearly a relevant factor for the judge in reaching his ultimate adverse credibility finding.
56. What the judge did in this case was identify at paras 81–93 reasons why, looking at the appellant’s evidence, there were inconsistencies in it damaging of her credibility. At paras 95–101, the judge dealt with the medical evidence of Dr Battersby and the expert evidence of Ms Conteh gave detailed reasons why it did not assist the appellant to establish that her evidence was credible, not least because neither expert had been provided with Judge Fox’s decision. As the case law identifies, a judge has to start somewhere and conclude ultimately whether an appellant’s evidence is to be accepted based upon their credibility. Providing the judge does not reach a final

decision on credibility without taking into account, so far as relevant, the medical and other expert evidence relied upon, the judge will not fall into error if he or she identifies issues in an appellant's evidence which call into question its credibility. The Mibanga error, if any, lies in the "artificial separation amounting to a structural failing, and not just an error of appreciation, in dealing with credibility entirely separately from the medical evidence" (see Mibanga per Buxton LJ at [30] and S v SSHD [2006] EWCA Civ 1153 at [23]-[24] per Rix LJ). I am satisfied that the judge did not fall into that error.

57. Nevertheless, I accept ground 1 and, for the reasons I have given, the judge materially erred in law in dismissing the appellant's appeal, in particular, in reaching his adverse credibility finding. His decision cannot stand.

### **Decision**

58. The decision of the First-tier Tribunal involved the making of an error of law. That decision cannot stand and is set aside.
59. Given the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judges Lever and Rhys-Davies. None of Judge Rhys-Davies' findings are preserved.

Signed

*Andrew Grubb*

Judge of the Upper Tribunal  
16 August 2021