



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/14050/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business
On Thursday 25 February 2021

Decision & Reasons Promulgated
On 18 March 2021

Before

UPPER TRIBUNAL JUDGE SMITH

Between

K U M
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity order was made by the First-tier Tribunal. This is an appeal on protection grounds. It is therefore appropriate to continue that order. 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 his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellant: Ms E Sanders, Counsel instructed by Duncan Lewis & Co solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge P-J S White promulgated on 23 April 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 7 August 2018 refusing her protection and human rights claims.
2. The Appellant is a national of Democratic Republic of Congo ("DRC"). According to the Respondent, she is the person named in this appeal. According to the Appellant, her real name is [CMM]. The Appellant came to the UK on 3 December 2017 as a visitor. She claimed asylum on 6 February 2018.
3. The Appellant claims to be at risk as a result of involvement in 2011 with an independent political party, the Rassemblement pour la Defense Du Peuple Congolaise ("RDPC"). She says that she was detained and mistreated by the DRC authorities as a result of that involvement. In 2014, the Appellant says that she became involved with the Mouvement de Liberation du Congo ("MDC"). Following a MDC rally, she claims to have been abducted by persons associated with the authorities, beaten, sexually assaulted and raped. In 2017, the Appellant claims that she became involved with a church known as the Bundu dia Kongo ("BDK"). Whilst there, the church was cut off by the authorities due to the views of the leader of the church and the Appellant and her partner were trapped for two weeks. When they surrendered, the Appellant says that she was recognised due to her past political involvement, was again detained and imprisoned at Makala prison where the conditions were very harsh. She says that she managed to escape when a raid was carried out by followers of the leader of the BDK. She was assisted thereafter by an old lady and then her paternal uncle to leave the country. She says that an arrest warrant has been issued against her.
4. The Appellant suffers with psychiatric problems for which she has received treatment in the UK. She produced a report from Dr Krishna Balasubramaniam in support of her problems. He has diagnosed her with PTSD. As a result of her psychiatric difficulties, the Appellant's barrister submitted to Judge White that she should be treated as a vulnerable witness.
5. The Judge found the Appellant's claim not to be credible. He accepted that the Appellant suffers from PTSD. He did not however accept that this was caused by what she said had happened to her in DRC. At the heart of the Judge's reasoning is his finding that the Appellant is KUM and not CMM. That identity issue is central to the documents submitted in support of the Appellant's case, particularly the arrest warrant. The Judge explained at [21] of the Decision that the Appellant entered the UK on a genuine passport in the identify of KUM, which had been subject to checks when she sought entry as a visitor and when she left DRC. The

Judge also rejected other documents as not being shown to be genuine. He was not satisfied that the Appellant's expert who authenticated the documents was expert in this field. He also made findings based on the documents themselves.

6. The Appellant appeals on three grounds as follows:
 - (1) The Judge has erred in his treatment of the report of Dr Balasubramaniam. It is said that the doctor's opinion as to causation should have been treated as providing corroboration for the claim.
 - (2) The Judge has acted unfairly, improperly and unreasonably when making remarks about the giving of the Appellant's evidence in relation to the sexual assault and rape in 2014. The Judge observed at [19] that the volunteering of information during the Appellant's evidence was in contrast with the behaviour which Dr Balasubramaniam had observed. It is pointed out that the Judge is not medically qualified to offer an assessment of this nature. In any event, it is said that the Judge was wrong in his observation since the Appellant did in fact become distressed when giving evidence.
 - (3) The Judge has failed to assess the Appellant's evidence in the context of her vulnerability.
7. Permission to appeal was granted by First-tier Tribunal Judge G Wilson on 10 June 2020 in the following terms so far as relevant:
 3. In an otherwise careful decision, it is nonetheless arguable that the judge failed to adequately consider the Appellant's credibility in the context of the medical evidence in particular the diagnosis of PTSD which was accepted by the judge.
 4. This arguably material error of law having been identified, all the issues raised in the grounds are arguable."
8. By a Note and Directions sent on 4 August 2020, Upper Tribunal Judge Rimington formed the provisional view that the error of law hearing could be dealt with on the papers. However, following submissions on behalf of the Appellant, Upper Tribunal Judge Kekic, on 16 October 2020 directed that there be a remote hearing to deal with the error of law.
9. The hearing was conducted via Skype for Business. There were no technical issues affecting the hearing generally. In terms of documentation, in addition to the Decision itself, I was taken to Dr Balasubramaniam's report which appears in the Appellant's bundle before the First-tier Tribunal at [AB/61-78].
10. The matter comes before me to decide whether there is an error of law in the Decision and, if I conclude that there is, whether to set aside the Decision for re-making. If the Decision is set aside, I may either retain the appeal in this Tribunal for redetermination or remit it to the First-tier Tribunal to do so.
11. Having heard from both representatives, and following a concession made by Mr Walker on behalf of the Respondent, I found an error of law in the Decision. I

indicated that I would therefore set aside the Decision and it was agreed that the appeal should be remitted. I indicated that I would set out the reasons for my conclusions in writing which I now turn to do.

DISCUSSION AND CONCLUSIONS

12. I begin by setting out the salient paragraphs of the Decision relied upon by the Appellant as follows:

“18. I have a psychiatric report from Dr Krishna Balasubramaniam. He saw the appellant in October 2019, with the assistance of a French interpreter. At the time that he saw her she had already been diagnosed with Post-Traumatic Stress Disorder (“PTSD”) and was receiving treatment for it. He clearly saw no reason to doubt that diagnosis, and I was not invited to consider that she does not have PTSD. He took a history of events which was broadly in line with her evidence to me; insofar as there are slight differences in her account of the start and end of the 2014 episode I do not attach any significance to that, bearing in mind the very different circumstances and that everything was, on both occasions, relayed through an interpreter. He noted that she became tearful when discussing her traumatic experiences. She described having flashbacks and nightmares about the episodes in 2014 and 2017, and avoiding cues that remind her of the original trauma. This was evidence of her PTSD. He commented that the recommended treatments are Cognitive Behavioural Therapy (“CBT”) or Eye Movement Desensitization and Reprocessing (“EMDR”), that she needed to continue the treatment she was receiving and that for therapy to be fully effective victims of trauma need to feel safe, indicating that a positive outcome to her asylum application would result in the treatment being effective. He further expressed the view that the precipitating trauma for her PTSD was the torture and rape in 2014, exacerbated by the further, similar trauma in 2017. I am bound to note that since these are the traumas she described it is hardly surprising that they should be identified as the precipitants, but that begs the question I have to decide, whether her account of events is shown, to the lower standard, to be reliable. I accept that the appellant is suffering from PTSD and that it must have been precipitated by a traumatic event, but Dr Balasubramaniam’s report does not directly help me to decide what the trauma was.

19. I also note in this context that cross-examination about the 2014 incident was very limited. The appellant was asked about whether she left the party HQ with one other person or two, it being suggested that there was some inconsistency. She was then asked a question about being, at a later stage, unconscious. In reply she began volunteering details about the rape and assault, without apparent hesitation or distress. The contrast with the avoidance and distress described by Dr Balasubramaniam was surprising.

20. Apart from Dr Balasubramaniam’s report I have a limited amount of other medical evidence. The appellant was referred to talking therapies at one point, but referred on by them to the Helen Bamber Foundation because of her complex presentation. The Foundation has supported her with trauma informed stabilization sessions, to which there has been a good response, and plans to provide trauma-focussed therapy when practicable. I have a letter dated 10th March 2020 which notes that she reports symptoms of PTSD, and frequent dizziness, nausea and headaches. She had experienced temporary loss of consciousness and

these episodes are being investigated, but no known medical explanation has thus far been found. She is also said to have an intense fear of surgery for reasons related to her traumatic past which has prevented treatment for a current medical condition. This is a matter identified in a letter of 10th September 2019 from Dr Mirnezami at the colorectal clinic at St Thomas' Hospital. That notes the appellant's account of assault, including anal rape and subsequent bleeding. On examination she was found to have skin tags and suspected of having internal haemorrhoids, although examination was poorly tolerated. These would require surgery. Again I have no reason to doubt Dr Mirnezami's findings, but I have no evidence to show whether there is, or may be, any connection between her physical condition and what she says happened to her and I cannot speculate on the point.

...

40. ...In oral evidence, in both cross-examination and re-examination, she said that the police forced their way in and arrested her. I attempted to clarify this point and she said there were two separate incidents. The police came in intending to arrest them, they encircled the church, she and her partner went and surrendered, but she then added that the police came in to arrest them and there was a confrontation. It was not possible to get a clear and consistent answer whether she and her partner went to the police and surrendered or the police forced their way in and arrested them, despite this being a crucial part of her account.

...

44. I have considered all of the evidence with care and in the round. I have borne in mind the low standard of proof appropriate. I have also noted the evidence of Dr Balasubramaniam, which I accept, that sufferers from PTSD may often have difficulties in recalling events and recounting details in chronological order, but the appellant does not seem to have difficulties of that kind. In the light of the matters discussed above I am not persuaded that her account is in any way reliable. I am satisfied that the documents produced, particularly the two warrants and the letter purportedly from [N], are wholly unreliable, and their production detracts further from the appellant's credibility. I am not persuaded that the passport, the one document which will have been subjected to meaningful checks, is the one that is unreliable. I am accordingly satisfied that the appellant is [KUM] as her passport shows, and that her claim to be [CMM], who may be a real person for all I know, is false. It necessarily follows that her account of what happened to her, as [CMM], is also in my judgment false. She may well have suffered some traumatic experience, to give rise to the PTSD diagnosed, but I am not satisfied that it is the experience described or that, whatever it may have been, it gives rise to a well-founded fear of persecution on return."

13. Dr Balasubramaniam is a forensic psychiatrist. He is a Fellow of the Royal College of Psychiatrists and holds qualifications in general adult and forensic psychiatry. He has practised as a psychiatrist for 27 years. The Judge did not doubt his competence or expertise. Dr Balasubramaniam interviewed the Appellant on one occasion on 1 October 2019 for the purposes of completing the report. He had access to her medical records and documentation relating to her asylum claim. The Judge did not find any inconsistency between the Appellant's account as given to the doctor and that given to the Home Office and to him.

14. In terms of her presentation, Dr Balasubramaniam recorded at [5.1] of his report that “[the Appellant] became tearful when we were discussing her traumatic experiences, and she was also anxious and had negative thoughts about her future when we were discussing her asylum status”. When describing the Appellant’s symptoms of PTSD at [6.1] of the report, Dr Balasubramaniam said the following:

“[KUM] is suffering from Post-Traumatic Stress Disorder (ICD-10 Code 43.1). This is evidenced by flashback experiences of the traumatic events, such as intrusive memories and nightmares of her traumatic experiences of the rape and imprisonment. She also avoids cues that remind her of the original trauma, she avoids activities and situations that may bring back memories of the trauma. [KUM] told me that she has a sense of numbness, such as emotional blunting, and she also has physical reactions such as sweating and rapid heartbeat when reminded of the trauma.”

15. At [6.3] of his report, Dr Balasubramaniam had this to say about the Appellant’s account:

“On consideration of the causation of [KUM]’s PTSD, I have concluded that the main cause of her symptoms is from the trauma that she suffered in 2014, when she was kidnapped and raped several times that resulted in her losing her unborn baby. Then in 2017, [KUM]’s symptoms worsened after she was kept as prisoner in the church and Makala prison.”

GROUND ONE

16. This ground of challenge is best summarised at [8] of the grounds as follows (by reference to what is said in the concluding sentences of [18] of the Decision):

“The Judge therefore considers that Dr Balasubramaniam’s opinion as to causation has no bearing on his findings of fact, as the Appellant’s trauma could just as well have been caused by experiences other than the ones she describes. However, this is incorrect as a matter of law because the opinion of a properly qualified expert as to the causation of psychiatric illness constitutes independent evidence. There is no suggestion that Dr Balasubramaniam is not such an expert. Whilst the question of credibility is, ultimately, for the Tribunal, it is an error not to treat such an expert’s opinion on causation as providing corroboration.”

17. I am unpersuaded by the reliance placed on the Court of Appeal’s judgment in R (oao AM) v Secretary of State for the Home Department [2012] EWCA Civ 521. That was concerned with a medical report as to scarring. Since that is evidence of physical injury, a medical expert can provide more definitive evidence as to likely causes which in turn is likely to provide stronger corroboration (or not) of an account. It stands to reason that determination of the cause of mental trauma depends to a greater extent on the account given and, for that reason, on the credibility of the person giving the account. As was said by Forbes J in Virjon B v Special Adjudicator [2002] EWHC 1469 (Admin) (on which judgment the Appellant also relies), a doctor can give an opinion that the symptoms exhibited are

“consistent” with the trauma described and many doctors with experience of taking accounts from trauma victims “must be taken to be well used to assessing the truth or otherwise of assertions made by patients”. However, and with respect to the Judge in that case, the credibility or otherwise of the account of the trauma is likely to be a secondary consideration for a psychiatrist whose focus is on diagnosis of the mental illness caused by the trauma and how to treat it. It also goes without saying that Immigration Judges are also well used to assessing credibility or otherwise of the evidence given by appellants.

18. Ms Sanders also drew my attention to the helpful summary given by the Court of Appeal on the issue of evidence from medical experts in the recent case of MN and others v Secretary of State for the Home Department [2020] EWCA Civ 1746 (“MN and others”) as follows:

“21. In our view the law as appears from those authorities (so far as relevant to the issues in these appeals) can be summarised as follows:

- (1) The decision whether the account given by an applicant is in the essential respects truthful has to be taken by the tribunal or CA caseworker (for short, the decision-maker) on the totality of the evidence, viewed holistically – *Mibanga*.
- (2) Where a doctor's opinion, properly understood, goes no further than a finding of "mere consistency" with the applicant's account it is, necessarily, neutral on the question whether that account is truthful – see *HE (DRC)*, but the point is in truth obvious.
- (3) However, it is open to a doctor to express an opinion to the effect that his or her findings are positively supportive of the truthfulness of an applicant's account (i.e. an opinion going beyond "mere consistency"); and where they do so that opinion should in principle be taken into account – *HK; MO (Algeria)*; and indeed, though less explicitly, *Mibanga*. In so far as Keene LJ said in *HH (Ethiopia)* that the doctor in that case should not have expressed such an opinion (see para. 117 (1) above), that cannot be read as expressing a general rule to that effect.
- (4) Such an opinion may be based on physical findings (such as specially characteristic scarring). But it may also be based on an assessment of the applicant's reported symptoms, including symptoms of mental ill-health, and/or of their overall presentation and history. Such evidence is equally in principle admissible: there is no rule that doctors are disabled by their professional role from considering critically the truthfulness of what they are told – *Minani; HK; MO (Algeria); SS (Sri Lanka)*. We would add that in the context of a decision taken by the CA on a wholly paper basis, a doctor's assessment of the truthfulness of the applicant may (subject to point (5) below) be of particular value.
- (5) The weight to be given to any such expression of opinion will depend on the circumstances of the particular case. It can never be determinative, and the decision-maker will have to decide in each case to what extent its value has to be discounted for reasons of the kind given by Ouseley J at para. 18 of his judgment in *HE (DRC)*.
- (6) One factor bearing on the weight to be given to an expression of opinion by a doctor that the applicant's reported symptoms support their case that they were persecuted or trafficked (as the case may be) is whether there are other possible causes of those symptoms. For the reasons explained by Ouseley J (*loc. cit.*), there may very well be obvious other potential causes in cases of this kind. If the expert has not considered that question that does not justify excluding it altogether: *SS (Sri*

Lanka). It may diminish the value that can be put on their opinion, but the extent to which that is so will depend on the likelihood of such other causes operating in the particular case and producing the symptoms in question.”

19. In this case, it might be said that, at [6.3] of his report, Dr Balasubramaniam is expressing a view that the Appellant’s account of the cause of her trauma is, as she has reported, the events that befell her in DRC. It might be said that he is there saying that he is persuaded of the credibility of the account and not simply that it is consistent with her symptoms. However, I do not read that paragraph in the way suggested. In my view, what Dr Balasubramaniam is doing in that paragraph is distinguishing between the events in 2014 which he considered to be the main cause of the symptoms and those in 2017 which exacerbated those symptoms. He is not expressing a view of the credibility of either account. In any event, he offers no critical evaluation of the credibility of the Appellant’s account.
20. Even if I am wrong in that reading, I would not have found an error under this heading based on the Judge’s assessment of the report at [18] of the Decision. Having indicated (consistently with my reading of [6.3] of the report) that the expert finds the 2014 events to have precipitated the trauma and the events of 2017 to have exacerbated them, the Judge points out that whether those events were in fact the cause of the trauma is the very question he has to decide, in other words “whether her account of events is shown, to the lower standard, to be reliable”. That is consistent with the point made at [1] of the summary in MN and others above. The Judge does not say that he gives no weight to Dr Balasubramaniam’s report in that context. He accepts that the Appellant’s PTSD the fact of which is not disputed must have been caused by some trauma but that the report does not “directly” assist in identifying what is that trauma. In other words, it is part of the evidence to be considered but no more. On my reading of [6.3] of the report which appears to be consistent with Judge White’s reading of it, that is not an erroneous approach.

GROUND TWO

21. I am however persuaded that there is an error identified by the Appellant’s ground two. This ground concerns the comment made in the final two sentences of [19] of the Decision. My reasons for finding an error in this regard are as follows.
22. First, as pointed out at [9] of the grounds, Dr Balasubramaniam did not say that the Appellant was unable to discuss the traumatic events which are said to have led to her PTSD. As is said at [6.1] of the report, she might seek to avoid discussing it. However, in the course of an appeal where those events lay at the heart of the issues to be considered, she clearly could not avoid discussing them. As such, the fact of having volunteered details might just as easily be a sign that she wished to provide information as quickly as possible to avoid lengthy examination about the events.

23. Second, the physical symptoms which Dr Balasubramaniam recounts at [6.1] of his report are not ones which would necessarily be readily observed (for example, a rapid heartbeat). As the Appellant points out, the Judge is not medically qualified to assess presentation in this way.
24. Third, and in any event, the extract from Ms Sanders' notes of the hearing show that the Appellant did exhibit signs of visible distress when discussing these events and the Judge in fact gave her a break to recover at that point.

GROUND THREE

25. I am also persuaded that there is an error identified by the Appellant's ground three. As is pointed out in the grounds, although the Judge accepted that the Appellant suffers from PTSD, there is no self-direction about the consideration of her evidence as a vulnerable witness in line with what is said in AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 or the Joint Presidential Guidance Note No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance.
26. At [6.8] of his report, Dr Balasubramaniam comments that the Appellant "may have memory difficulties and may have difficulties in recollecting events in a chronological order". As the Appellant points out, the Judge has failed to consider that as a possible explanation when looking at inconsistencies or implausibility of the Appellant's evidence, for example at [40] of the Decision as cited above. The Judge notes what is said at [6.8] of the report at [44] of the Decision but goes on to say that "the appellant does not seem to have difficulties of this kind". As Ms Sanders pointed out, that is inconsistent with what is said at [40] of the Decision that "[i]t was not possible to get a clear and consistent answer" about events which were said to be "a crucial part of her account". There is no consideration of the potential impact of memory difficulties when assessing the Appellant's evidence.
27. As Ms Sanders accepted, at the heart of this appeal lies an identity issue. If, as the Judge found, the Appellant is not who she says she is (which depends largely on what a Judge makes of the documentary evidence and not her oral evidence) then it is unlikely that her account can be considered credible. Nonetheless, the Appellant did give oral evidence which was taken into account by the Judge when reaching his conclusion based on all the evidence. For that reason, I am satisfied that the error made when assessing the oral evidence is or may be material to the outcome.
28. Finally, I record that Mr Walker's concession on behalf of the Respondent was that the Judge had erred because he had dealt with the medical evidence in a way which was contradictory and had applied his own opinion which he was not qualified to give. He conceded that the main part of the Appellant's claim was backed up by the medical evidence so the Judge had failed properly to take into account that medical evidence.

CONCLUSION

29. For those reasons, I conclude that grounds two and three disclose errors of law in the Decision and I therefore set the Decision aside in its entirety. The credibility of the protection claim will therefore need to be considered completely afresh. For that reason, I agreed with the representatives that this appeal should be remitted for a de novo hearing.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge P-J S White promulgated on 23 April 2020 is set aside in its entirety. No findings are preserved. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge P-J S White.

Signed *L K Smith*
Upper Tribunal Judge Smith

Dated: 5 March 2021