



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/00277/2020 (V)

**THE IMMIGRATION ACTS**

**Heard at Field House via Teams  
On 12<sup>th</sup> January 2022**

**Decision & Reasons Promulgated  
On 31<sup>st</sup> January 2022**

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**RMM  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Zoe Harper, Counsel instructed JCWI Joint Council for the Welfare of Immigrants

For the Respondent: Mr Stephen Whitwell, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Chana (“the judge”) promulgated on 18<sup>th</sup> June 2021, who dismissed the appellant’s appeal against the decision of the respondent dated 27<sup>th</sup> November 2019 refusing her protection and human rights claim.
2. The appellant is a national of the Democratic Republic of the Congo (DRC) with a history of human rights activism and support for the UDPS. Her claimed account disclosed three periods of detention, rape and torture in 2010, 2016 and 2017. Her daughter, from whom she was separated in

2010, was subsequently granted refugee status in the UK. The appellant's claim was supported by expert medico-legal evidence from Freedom from Torture diagnosing the appellant as suffering from complex post-traumatic stress disorder (PTSD) and depressive disorder and confirming the consistency of her psychological condition with her account of torture during multiple detentions. The Secretary of State accepted the medical report in a concession recorded by the First-tier Tribunal Judge Moffatt at an earlier case management review hearing but at the subsequent substantive hearing sought to limit the concession. The appellant's account of past persecution was further supported by expert country evidence and other materials. The judge did not accept the credibility of the appellant's account and concluded that there would be no risk to her in the DRC on account of her past persecution, her sur place activities and her mental health condition.

3. It should be noted that the appellant has been granted discretionary leave on human rights grounds to remain in the UK with her daughter.
4. The grounds of appeal were set out as follows. In sum:
  - (1) Ground 1, a failure to consider the claim with reference to the Home Office concession regarding the medical report from Freedom from Torture.
  - (2) Ground 2, failure to make sustainable findings on the expert medical evidence or give this adequate consideration in the assessment of credibility.
  - (3) Ground 3, failure to consider or make findings on the expert country evidence in the assessment of credibility and of the risk on return.
  - (4) Ground 4, failure to take account of relevant evidence or consider the claim with anxious scrutiny.
  - (5) Ground 5, failure to make sustainable findings on the risks to the appellant in the DRC because of her mental health condition.
5. The grounds asserted that in relation to ground 1 a concession was recorded by First-tier Tribunal Judge Moffatt on 16<sup>th</sup> December 2021 whereby the Secretary of State confirmed that she accepted the medical report of Dr Freeman from Freedom from Torture. That concession was in line with the Secretary of State's policy which recognised the specialised expertise of the foundation and gave particular weight to its reports and limits the rejection of findings of torture made by the organisation. No further decision was issued by the Secretary of State despite directions made by the Tribunal on 16<sup>th</sup> December 2020 and 8<sup>th</sup> February 2021. On 28<sup>th</sup> May 2021, however, at the hearing, the Presenting Officer challenged the causation of the appellant's psychological condition despite the previous acceptance of the report and the fact of the Secretary of State's concession was raised as a matter before the judge. The First-tier Tribunal

determination, however, makes no reference to the Secretary of State's concession or provides any reasons for permitting the Secretary of State to limit or withdraw her concession. In accordance with **Secretary of State for the Home Department v Davoodipناه [2004] EWCA Civ 106** at [22], the Tribunal may only exercise its discretion to allow a concession to be withdrawn if there is good reason in all the circumstances and having regard to the overriding objective. In the absence of prejudice to the appellant the FtT may permit a concession by the Secretary of State to be withdrawn if in retrospect it appeared it should not have been made but it depended on the circumstances. The Tribunal erred in its approach to the Secretary of State's concession as there was no good reason to permit the Secretary of State to depart from her concession of 16<sup>th</sup> December which was properly made in accordance with her policy. The position taken by the Presenting Officer in relation to the causation of the appellant's condition was not permitted under the terms of the Secretary of State's policy, which prevented officials from making clinical judgments or speculating on alternative causation of physical or psychological injuries following evidence from Freedom from Torture. The Secretary of State's changed position including in the absence of any further decision notifying such to the appellant gave rise to procedural unfairness.

#### Ground 2

6. In the alternative, the judge failed to make sustainable findings on the expert medical evidence. The judge accepted the diagnosis made by Dr Freeman of complex PTSD and depressive disorder at [36] but rejected the expert's conclusions that the condition and the degree of her symptoms would not be expected in someone who had not experienced an event of exceptionally threatening or catastrophic nature and was in keeping with her account of torture and detention. The judge erred in rejecting this assessment on the basis that the expert had relied upon what she was told by the appellant (paragraph 60). The expert had also confirmed, however, that she had relied on her clinical observations and their congruence with the appellant's account rather than on the appellant's account alone and had specifically considered the possibility of exaggeration or fabrication at paragraph 97 of the report. It has been held to be unsupportable that doctors accept accounts uncritically, **M v IAT [2004] EWHC 582 (Admin)** at [26]. The judge made findings that the condition could have been caused by stress or her immigration basis without any clinical evidential basis and contrary to the medical explanation of complex PTSD provided and it was inappropriate for Adjudicators to make clinical judgments (**SP (Kosovo) CG [2003] UKIAT 00017**) at paragraph 16).
7. The judge also failed to give proper consideration to the impact of the appellant's psychological condition in the assessment of her evidence further to **AM (Afghanistan) [2017] EWCA Civ 1123** at [21]. The judge failed to analyse or make findings on the role of PTSD, depression or associated symptoms of impaired memory and of unconscious avoidance on any perceived vagueness or inconsistency of the appellant's evidence.

The appellant's responses in fact gave differing ways of describing the same continuous facts and the judge failed to consider the medical evidence regarding the impact of the appellant's condition outside her formal asylum interviews when reaching its findings on credibility. The judge's findings in relation to the appellant's screening interview also failed to take account of the caution required in placing reliance on screening interviews, particularly in the context of vulnerable persons, see **JA (Afghanistan) v Secretary of State for the Home Department [2014] 1 WLR 4291**.

Ground 3

8. There was a failure to consider or make findings on the expert country evidence in the assessment of credibility and risk on return.
9. The judge failed to consider or make any findings on the expert country evidence dated 23<sup>rd</sup> April 2021 of Mr Muzong Kodi, a former Professor of African History from the University of Lubumbashi in the DRC and an Associate Fellow at the African Department of the International Institute for International Affairs in London, when assessing the appellant's credibility on her risk on return to the DRC. It is of note that the Secretary of State did not seek to challenge the expertise or the standing of the expert or make challenge to the evidence.
10. Dr Kodi considered the appellant's account with reference to his expert knowledge and concluded that the appellant's accounts of her activism in human rights organisations VSB and EFIDH since 1996 and her activity with the UDPS were plausible. He also considered her three periods of arrest and detention were plausible and her release through bribery.
11. The judge made no findings in relation to the expert evidence nor did she consider his evidence of the changing political context in the DRC which formed the backdrop of the appellant's account when making specific findings on the credibility of the appellant's account of having been involved in human rights activism (see paragraph 47 of the decision). The judge similarly gave no consideration to the expert evidence in the assessment of the risk of persecution and serious harm on return. The expert provided detailed evidence on the separate and cumulative risks to the appellant arising from her past detention in the DRC, her diaspora activity and the impact of her mental health condition on her ability to undergo questioning by the authorities on arrival at the airport and the risk of detention and ill-treatment.
12. Additionally, when considering the risk posed by the appellant's diaspora activity the judge overlooked the evidence of the country expert, who on considering the evidence of her overt activity in France and the UK, which was documented in published video and other evidence before the court, concluded her profile was such that she would be perceived as a threat to the DRC authorities and at risk on return. The judge failed to consider or give reasons for rejecting the expert evidence when applying the test set

out in **BM and Others (returnees - criminal and non-criminal) DRC CG [2015] UKUT 00293**.

Ground 4

13. In ground 4 the grounds asserted that the judge had failed to consider the claim with anxious scrutiny by demonstrating that every factor in favour of the appellant had properly been taken into account in accordance with **R (YH) v Secretary of State for the Home Department [2010] 4 All ER 448** at [24] and **KB & AH (credibility-structured approach: Pakistan) [2017] UKUT 00491** at [35] (in fact it says “where relevant”).
14. The appellant did not give a different account of how her daughter came to the UK when interviewed and this issue was not in fact discussed at the hearing. In rejecting the appellant’s evidence that she was arrested while working as a nurse in 2010 the judge failed to take into account the Secretary of State’s confirmation in the form of her grant minute provided to the court in compliance with directions that the appellant’s daughter had been granted refugee status in 2012 having given an account of being separated when her mother was taken away during that period. There were no reasons justifying a different position with regard to the appellant’s account of this aspect, which was consistent with that of her daughter.
15. The judge made no specific findings on the appellant’s account of her detention and torture in the DRC following her refoulement from Congo-Brazzaville to the DRC. Her detailed account including her escape was consistent with the objective country information and assessed as plausible by the country expert Dr Muzong Kodi.

Ground 5

16. In relation to ground 5 the grounds asserted that the judge accepted the appellant’s serious mental health condition would worsen significantly if she returned to the DRC, leaving her in a deteriorated mental health state requiring both social and psychological treatment (paragraph 80) but found that there was no credible evidence that appropriate psychological treatment could not be obtained in the DRC (paragraph 80) but did not consider or give any reasons for rejecting the expert evidence regarding the treatment of mental illness in the DRC (see appellant’s bundle paragraph 59) or the evidence from the General Immigration and Refugee Board of Canada which identified that psychotherapy and psychiatric treatments were almost non-existent in the DRC and even medication to alleviate psychological suffering could not be found (appellant’s bundle 169).
17. In considering the risk of the deterioration in mental health or shortened life span the judge failed to consider the correct test in **AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17** as regards the threshold for a breach of Article 3 on human rights. The judge

relied instead on the approach taken in the older case **N v SSHD [2005] UKHL 31**, which has now been superseded.

18. The judge also made findings on a risk to the appellant of stigma, discrimination and ostracism on account of her mental health.
19. At the hearing Ms Harper accepted that the appellant had been granted leave on human rights grounds and therefore the Tribunal was restricted in its consideration of ground 5 although she submitted that the content of the grounds (the health condition) did feature in the refugee protection and humanitarian protection claims.
20. Mr Whitwell relied on the Rule 24 response and specifically noted that the minute note which had been provided to the Tribunal identified, in relation to ground 4, that the daughter was given leave on the basis that she faced a real risk of harm on return to the DRC as an orphaned street child and without family. That was very different from supporting the appellant's claim as it was set out.
21. In terms of ground 1 and the concession the respondent had indicated that they accepted the medical report, but it was the *causality* which needed to be considered. It would make no sense to challenge it in the reasons for refusal and it was only the diagnosis which was accepted. The characterisation by Judge Moffatt, in his directions, was not inconsistent with accepting the diagnosis alone. However, Mr Whitwell acknowledged that there was nothing said about the concession in Judge Chana's decision. If the appellant was taken by surprise on the day of the hearing an adjournment could have been requested.
22. Mr Whitwell submitted in relation to ground 2 that the judge accepted that the appellant had PTSD but rejected the report as the medical expert relied on what the appellant had told him. Looking at the determination in the round, it was a lengthy determination in excess of 80 paragraphs and had referred to the appellant's vulnerability and made positive findings on mental health. The judge had rejected the majority of the appellant's account and she had asserted that she had not had any problems in the DRC until 2016 and there was a very long period in which she had not experienced those problems and her account lacked clarity on the trigger events and how the DRC authorities came to notify her. This was not a screening interview which was taken after an arduous journey and the comparison with the asylum report was open to the judge and the findings on credibility were open to her.
23. He accepted that the expert report was not referenced but the expert report in essence relied on the credibility of the appellant. His assessment was based on a positive factual finding on credibility including that of Mr Patrick but it should be noted that his evidence was rejected by the judge. The judge had applied the relevant country guidance and was not obliged to give reasons for not departing from it. The judge specifically found the appellant had no formal role within her political activities.

24. Ms Harper submitted that the report of Dr Kodi was central to the assessment and simply ignored.

### **Analysis**

25. There are two grounds of appeal, grounds 2 and 3, which I consider central to the challenge, and which have merit. The first relates to the application of the vulnerable witness guidelines Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance, and **AM (Afghanistan)**. The judge did refer to the medical report and accepted (putting the causality on one side for a moment) that the appellant had PTSD and mental health difficulties. Although she did cite the vulnerable witness guidance at the outset of the decision her analysis of the evidence, particularly when referring to the evidence as being discrepant and vague, failed to show that she had actually applied the witness guidelines or indeed **AM (Afghanistan)** and what impact if any the appellant's mental health may have had on her evidence, when assessing credibility. In other words, what effect did her mental health have on the giving on evidence both over time and in court.
26. Although the judge identified that there was discrepancy between the screening interview and the asylum interview I take Mr Whitwell's point that the appellant was not interviewed after an arduous journey but once again, the mental health of the appellant does not appear to have been factored into the consideration overall and the consistency between the two interviews and should have to be looked at very carefully in the light of the appellant's mental health difficulties, which by the Secretary of State.
27. The second ground which I consider to be fundamental is the omission of consideration of the expert report, from Dr Kodi. Neither his qualifications nor the actual content of his report was challenged by the Secretary of State. I appreciate entirely that it is for the judge to assess credibility, but the expert report was an important element in assessing the appellant's evidence and its veracity and further, the risk on return to the DRC for the appellant. The report set out possible continuing problems for the appellant notwithstanding the change in regime and her asserted membership of APARECO.
28. As the Court of Appeal identified in **Detamu v Secretary of State for the Home Department [2006] EWCA Civ 604:**

*"19. Bearing in mind how significant Dr Trueman's evidence was, for my part I cannot be confident that the conclusion was not just likely to have been the same, but must have been the same. Undoubtedly, as I have endeavoured to demonstrate, there were a number of matters where many fact finders would have been not only suspicious but may perhaps have disbelieved the appellant. It was important before reaching any conclusion as to the truth of the appellant's evidence to look at the evidence as a*

*whole and not piecemeal. The evidence included not only the objective evidence, but the evidence of an expert. It is difficult, I accept, but necessary for an immigration judge to give reasons for disbelieving one who seeks refugee status, but the reasons are important not only for the discipline which it imposes upon the fact finder, but also so as to distinguish those reasons which go to the core of the claim and those which are only peripheral. Only by a clear statement of reasons is it possible to distinguish between lies told by an applicant to bolster a genuine claim, and lies which are fatal in undermining his or her case.*

20. *It is inevitable, when advancing a case that the decision must have been the same despite an error of law in the approach or conclusion as to fact, that those seeking so to contend will focus on isolated evidence, but that understandable approach must not disguise the fact that the evidence has to be looked at as a whole.*

21. *In all the circumstances, I am not satisfied that the decision would have been and must have been the same despite the error of law. It may well have been that the discrepancies as to dates, for example, could have received a more charitable construction if the adjudicator had believed that this applicant was a member of the OLF."*

29. In this instance the judge gave no view at all on the weight to be attached to the expert report, whether contrary to country guidance or not, because it was not mentioned. That was a material error.

30. The two grounds (2 and 3), I have identified which have obvious merit fundamentally undermine the findings on credibility and also undermine the assessment of the risk on return to the appellant. I have therefore not gone on to consider the remaining grounds because the decision should be set aside. I remark on Ms Harper's response to Mr Whitwell's reliance on the fact that the judge stated that the appellant had not departed the DRC until 2016 but as Ms Harper noted, it was the appellant's case that she was not initially engaged in political activities significant enough to bring her to the notice of the DRC authorities.

31. There was much discussion on the concession apparently made by the Secretary of State at the Case Management Review hearing and prior to the substantive hearing and there was consideration of the direction given by Judge Moffatt dated 16<sup>th</sup> December 2021. He stated as follows

*'It is noted that the Respondent has indicated that they accept the Appellant's medical report (pp 39-62 of Appellant's bundle of evidence)'*

The determination of the judge in this instance makes no ruling on the concession which was said to have been withdrawn at the First-tier Tribunal hearing. The appeal will be remitted to the First-tier Tribunal (on



agreement with the parties in the event that an error of law was found) and therefore the matter of the concession should be addressed by the judge dealing with this case in the First-tier Tribunal. The law in relation to concession and the authorities thereon is set out recently in **AK (Sierra Leone) [2016] EWCA Civ 999**. It will be for the Tribunal to make a decision on any concession at the resumed hearing in the FtT and I shall say no more about that. As Ms Harper acknowledged in relation to ground 5 the appellant has been granted discretionary leave and the challenge was limited to asylum and humanitarian protection grounds.

32. I find an error of law for the reasons given and set aside the decision of the First-tier Tribunal.

### ***Notice of Decision***

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

### **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 Helen Rimington

Date 19<sup>th</sup> January 2022

Upper Tribunal Judge Rimington