



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/03320/2014

THE IMMIGRATION ACTS

Heard at Bradford
On 7th November 2014

Decision and Reasons Promulgated
On 11th November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS KEHINDE AKEWUSOLA

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Home Office Presenting Officer
For the Respondent: Mr M Tettey, Counsel instructed by Parker Rhodes Hickmotts Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of Judge Ince who, following a hearing on the 6th August 2014, allowed the respondent's appeal against the decision to refuse her application for asylum and to remove her from the United Kingdom.

2. Permission to appeal was granted by Judge Warren L Grant on the 18th September 2014. The grant accurately summarise the Secretary of State's grounds of appeal. However, as we shall see, it by no means accurately represents the actual contents of Judge Ince's determination.

3. Paragraph 2 of the grant reads as follows –

The grounds assert correctly (*sic*) that having referred himself in some detail to the guidance set out by the Tribunal Devaseelan (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka* [2002] UKAIT 00702 the First-tier Tribunal Judge then failed either to regard as a starting point the adverse credibility findings made by the Tribunal in a determination dismissing the appellant's asylum appeal on 13 July 2012 or to give reasons for departing from that determination. [My emphasis]

4. In fact, nothing could be further from the truth. Judge Ince had in fact both treated the determination of Judge Birkby as his starting point and thereafter given detailed and cogent reasons for departing from its findings. The falsity of the claim to the contrary, both in the grounds and the grant of permission to appeal, may be illustrated only by quoting extensively from Judge Ince's determination.

5. At paragraph 39, Judge Ince summarised both the reasoning and the outcome of Judge Birkby's determination of the respondent's earlier appeal –

39. The Appellant appealed and her appeal was heard by Judge Birkby on 8 June 2012. I note that she was unrepresented but accompanied by a McKenzie friend, a Ms Pennington. In a determination signed on 20 June, Judge Birkby dismissed the Appellant's appeal. He noted that the Appellant had not been truthful with the UK Immigration authorities; that her account of being mistreated by Umaru was inconsistent with the details given when the VAF was lodged (that she was a student living in Lagos) and her explanation (that she had nothing to do with the arrangements) evasive; that there were inconsistencies about whom she was visiting in the UK (her brother or uncle); that she did not know things that she would be expected to know (such as where her twin brother Taiwo went to school, how many wives Umaru had, and what her parents did for a living); and that it was implausible that Umaru, who had severely abused the Appellant, would allow her to go to the UK to do some wedding shopping when this would have allowed her to escape. Judge Birkby also commented that although the Appellant claimed to have suffered injuries, there was no medical report to corroborate such.

6. Judge Ince's self-direction and reasons for departing from the above findings can be found at paragraphs 52 to 65 of his determination –

52 I begin by reminding myself that the decision of Judge Birkby is the starting point and that although it is not binding upon me, I am not hearing an appeal against it. Although no new incidents have taken place, I do have medical evidence that was not before Judge Birkby, such evidence persuading the Respondent to treat the matter as a fresh claim. It is not suggested by the Respondent that the scarring on the Appellant's body was inflicted in the four month period between the hearing before Judge Birkby in June 2012 and her examination by Dr Lord in October 2012 (and there is no suggestion in Dr Lord's report that the scarring was so recent) and therefore, although this was evidence that could have

been before Judge Birkby, I do not treat it with the “greatest circumspection”. Moreover, I take account of the fact that the Appellant was unrepresented before Judge Birkby and therefore may not have placed appropriate emphasis on certain aspects of her claim or thought about the importance of volunteering certain explanations.

- 53 I see no reason not to accept Dr Lord’s findings. The Respondent has argued that the Istanbul Protocol has not been followed but this is challenged by Dr Lord. I am aware that Dr Lord is an experienced forensic physician who has submitted many reports in this jurisdiction and I have not been made aware of any Tribunal criticism of her work. It is correct that there may be alternative explanations for some of the scarring found by her, which therefore may not have arisen in the way described by the Appellant, but some of the evidence is clearly persuasive. For instance, the evidence of FGM is clear and the absence of stitching found by Dr Lord is highly supportive of the Appellant’s description of how it was carried out, with scissors and with no treatment afterwards. I also note that some of the scarring was in places which are usually protected from random or accidental contact, which supports the Appellant’s description of deliberate infliction, and the evidence of the burn mark on her leg also being corroborative of how the Appellant says it came about. Of course, it is always possible that many of the scars could have had an innocent explanation but I have to assess the likelihood of them occurring in the way suggested. Dr Lord’s report does therefore, (and here I disagree with Ms Brewer’s submission on the point) take us significantly further and is corroborative of the Appellant’s account.
- 54 I note the reasons given by the Respondent for not believing the Appellant. She argues that there are discrepancies between what the Appellant says her situation was in Nigeria and what the VAF revealed. We do not know exactly what her VAF stated because it has not been produced in these proceedings, nor do we know why the application was refused. There is the computerised summary of the visa application but the information therein is minimal. However, it does confirm that the passports of the Appellant and of her brother were issued at different times, which supports the Appellant’s account that they were brought up separately, or at least treated differently – they were twins and if they were living together one would expect a passport application for both to be made at the same time. Moreover, if what the Appellant says was true, and the trip was organised by her mother without the Appellant’s knowledge, then the details of who the family were supposed to be visiting in the UK would be unknown to her. Her evidence about the trip to Lagos when it appears that the VAF was lodged simply states that she had her photograph taken and signed something – there is no evidence that she was asked to read the document she signed. Accordingly, it is conceivable that she was unaware of the precise details in the VAF.
- 55 The Respondent also argues that the suggestion that Umaru would allow the Appellant to go abroad, thereby giving her an opportunity to escape from him and his abuse, is implausible. I agree that at first blush it is implausible. However, there is evidence before me that tempers this first impression. The Appellant has explained that she had “calmed down” and at least gave the appearance of having accepted her situation. She did not quarrel with Umaru, she “had made her peace with him”, and she willingly had sex with him, obeyed him and gave him everything he demanded. Moreover, I note that the last time that she had tried to escape was 2 or 3 months after Khalid was taken from her, and thus around September 2006, when she was aged 18. Moreover, when she was allowed to leave the compound to go to Lagos in November 2007 with her mother, she made no

attempt to escape. Although Umaru's men followed them, it seems that they were not escorting them in the true sense of being at their side all the way. This in turn could well have demonstrated to Umaru that she was accepting of her situation. Accordingly, by the time the Appellant came to leave Nigeria in or around March 2009, some 2½ years after her last escape attempt and when she was no longer a teenager, being almost 21, and when she had been consistently obedient, it may well have been the case that Umaru believed that she had been "tamed" (for want of a better word) and that she would not attempt to escape. In any event, she was not going to the UK alone but with her mother, who was complicit in her captivity, as escort. Accordingly, I conclude that this scenario is not as implausible as it might seem.

- 56 As for the apparent implausibility of Umaru wanting to marry her when he already had control over her, I note that the Appellant suggests a motive (that he wanted to carry on making money from her) but also says that this was a question better asked of him since he was the one who wanted to marry her. The reality is that the Appellant does not know why Umaru wanted to marry her and is speculating. Ms Wilkins suggests other possible motives, namely that, according to the objective evidence, Nigerian husbands have permission to beat their wives and there is also evidence that when confronted with a domestic violence complaint, the police often tell victims to go home and be a "good wife". However, there may be more basic motives, such as that Umaru liked her, or felt guilty about mistreating her in the past or wanted her to remain in his life since she had demonstrated that she was obedient and had been brought under control, or "tamed". The contradictory emotions expressed, or actions taken, by domestic violence abusers, being kind one moment and violent the next, is well known. I therefore place little weight upon this apparent implausibility.
- 57 There were some inconsistencies in her account before me – she did mix up the details of how she initially managed to escape from the compound between the two events. However, I note her explanation, that these attempted escapes took place a long time ago, in 2006, around eight years ago, and take such into account. Moreover, it must not be forgotten that both attempts resulted in significant violence to her, being beaten on the first occasion and branded on the second, and therefore I also take account of the fact that recalling such events was likely to be uncomfortable at the very least and potentially traumatic. I note the evidence of her GP on this point. I therefore give less weight to these discrepancies.
- 58 I also note that the Appellant did not mention earlier aspects of her fear of returning to Nigeria, such as her fear that her daughter would suffer FGM as she did herself. She explained that she had forgotten to mention it. However, I note that in her first asylum claim and appeal she was unrepresented and when she was represented, reference was made in the further submissions in March 2013 to the potential for "harm" to Mercy if she went to Nigeria, which, given that the medical report from Dr Lord confirmed that the Appellant had undergone FGM, would have indicated to anyone who read the submissions in conjunction with the report, that there was a potential for the process being repeated on Mercy. No new statement from the Appellant was submitted with the further submissions (at least, there is none before me, and no documents from the subsequent Judicial Review application have been produced) and the only evidence direct from her since her evidence to Judge Birkby is her appeal statement, where she does raise it as an issue of concern. I therefore do not give this omission any significant weight. In any event, I have no doubt that, as she had herself been subjected to FGM, it would only be natural for her to at least

be fearful of the same fate being inflicted upon her daughter, even if she did not express that fear.

- 59 I have considered the issue of Section 8. With regard to not claiming asylum at the airport, I take account of the fact that she was with her mother when she arrived in the UK and that her main concern was escaping from her, not claiming asylum. There is no evidence before me that prior to her arrival in the UK the Appellant had any knowledge of the concept of asylum, or how to claim it. I therefore give this little weight.
- 60 As for misleading the Immigration Officer when she was arrested for the bus pass incident by giving a false name, I take account of the fact that she had been told by Sunday always to use that name and, although he was no longer a factor in her life, this was the name by which she was known at the GP's surgery, she was still living a relatively isolated existence and had not at that stage taken or received any legal advice. I consider that this is an understandable explanation and again, give it little weight. I note Ms Wilkins' submission that the Appellant appears to have gone from one abusive relationship to another and therefore can understand how she might have accepted Sunday's advice on the point, notwithstanding his abuse of her.
- 61 Finally, the Respondent argues that the Appellant only claimed asylum after being served with the IS151A form. Again, at that stage she was unrepresented but she very soon thereafter sought legal advice and made an asylum claim. This is commensurate with her being unaware of the procedures surrounding this process. I do not attach much weight to this aspect either.
- 62 What does strike me as impressive is that, throughout this process from initial claim in 2012 to the hearing before me, the Appellant has given a consistent account in relation to the core aspects of her claim, namely being separated from her close family from a very early age; being treated differently from her male twin brother; being "given" to Umaru; being consistently raped, beaten and mistreated; attempting to escape on two occasions; becoming pregnant and giving birth to Khalid, who was taken from her; of coming to the UK for wedding shopping; of escaping from her family in the UK and of being initially assisted by and then abused by Sunday. Although additional details have been given of various aspects of this account from time to time, it has remained consistently the same.
- 63 I was also impressed by the significant detail given by the Appellant when asked to expand on certain incidents, details which I do not consider would be present in a fabricated account. I note also that she ascribed some of the scarring to assaults by Sunday which on the face of it would have not been in her interests since they occurred in the UK. This suggests to me that the Appellant had no intention to exaggerate the abuse given to her by Umaru.
- 64 Moreover, we now have corroboration of her account, from her GP's and from Dr Lord's report, as outlined above.
- 65 Consequently, looking at all the evidence in the round, noting that the standard of proof is low and reminding myself that there will be very few asylum claims where there will not be areas of doubt and uncertainty, I conclude that the Appellant has discharged the burden of proof upon her and has told the truth about what happened to her in Nigeria and since leaving her home country. In short, although there have been some inconsistencies and potential implausibilities, there is no good reason not to believe her account.

7. In view of this comprehensive and detailed explanation for Judge Ince's decision to depart from the findings of Judge Birkby, one cannot help but wonder whether the judge who granted permission to appeal had actually read it; had he done so, it is difficult to see how he could have granted permission in the terms that he did, or indeed at all.
8. The Secretary of State's grounds additionally challenge Judge Ince's reasoning insofar as it was based upon the medical evidence contained within the report of Dr Lord. This challenge assumes that Dr Lord's opinion concerning the cause of the respondent's injuries depended entirely upon her acceptance of the truthfulness of the respondent's explanation for them [see paragraph f of the grounds]. Based upon this assumption, the Secretary of State argues that Judge Ince failed to take account of the fact that Judge Birkby had found that the respondent's account was untrue. The respondent asserts that support for this argument can be found in the following passage in the determination of Judge Birkby –

The appellant claims she has scars on her person, although there is no medical report. **Whether or not those scars exist, I am not satisfied those scars would have been caused at the hands of either Umara or Sunday, or any other man.** [Emphasis as added at paragraph d of the Secretary of State's grounds of appeal]

9. However, this argument singularly fails to distinguish between (i) the mechanism of injury, and (ii) the identity of the perpetrator. Dr Lord could not and did not express any opinion in relation to the identity of the perpetrator. Only the respondent knows who inflicted the injuries upon her. However, Dr Lord is eminently qualified to comment upon the manner of their infliction, and it was in relation to *this* issue that she had expressed her opinion. Moreover, she had found that evidence of the following injuries was "diagnostic" (that is to say, *conclusive*) of the mechanism of injury described by the appellant: genital mutilation without subsequent stitching, scars on her back and flank (the consequence of laceration), and scars to the angles of her jaw (the consequence of full thickness injury). Moreover, the burn scar on her left ankle was "typical" and "highly consistent" with the respondent's account of being burnt with a metal rod which had been heated up in a fire. These medical conclusions, and others, were summarised by Judge Ince at paragraph 41 of his determination. Thus, whilst Judge Birkby's findings appeared to leave open the possibility that the injuries were self-inflicted, it was entirely open to Judge Ince to conclude that this possibility was unrealistic in light of medical evidence before him concerning the *manner* of their infliction. Indeed, it would have been arguably perverse for Judge Ince to have found otherwise.
10. I would finally observe that carelessness in granting permission to appeal not only leads to the resources of the Upper Tribunal being wasted, but it also fails to recognise and respect the generally high standard of work that is produced by the First-tier Tribunal of which the present determination is a conspicuous example.

Notice of Decision

11. The appeal is dismissed.

Anonymity not directed.

Signed

Date **10th November 2014**

David Kelly
Deputy Judge of the Upper Tribunal