



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/08623/2014

**THE IMMIGRATION ACTS**

Heard at Manchester Piccadilly  
On 5 November 2015

Decision Promulgated  
On 13 November 2015

Before

**DEPUTY UPPER TRIBUNAL JUDGE BIRRELL**

Between  
N M M

(ANONYMITY DIRECTION MADE)

Appellant

and

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Schwenk counsel instructed by Broudie Jackson & Cantor  
For the Respondent: Mr A McVitie Senior Home Office Presenting Officer

**DECISION AND REASONS**

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. Due to the sensitive nature of the issues in this case I am satisfied that it is an appropriate case for an anonymity order to be made.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Nicol promulgated on 22 July 2015 which dismissed the Appellant's appeal against a refusal of asylum on all grounds .

### Background

3. The Appellant was born on 26 March 1975 and is a national of the Democratic Republic of the Congo.
4. On 3 June 2013 the Appellant applied for asylum on the basis that she would be at risk on return to the DRC as she is a lesbian.
5. On 8 October 2014 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons:
  - (a) It was not accepted that the Appellant was a lesbian due to the discrepancies in relation to when the Appellant first realised that she was attracted to women and how her relationship with her girlfriend developed. There were also discrepancies in relation to the background material as to how gay people conduct themselves in the DRC.
  - (b) It was not therefore accepted that the Appellant was attacked and threatened because of her sexuality.
  - (c) Her account that she returned to make a complaint to the police after being raped by police officers is not credible.
  - (d) The Appellant failed to mention in her screening interview or asylum interview that she had previously been sexually assaulted in the United Kingdom.
  - (e) There were no grounds on which the Appellant should be granted discretionary leave.

### The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Nicol ("the Judge") dismissed the appeal against the Respondent's decision. The Judge found :
  - (a) It was regrettable that the asylum interview was not recorded.
  - (b) He did not accept that she was a lesbian.
  - (c) Even if the Appellant had a friendship with a female it was not a sexual one.
  - (d) The Appellant's account of coming to the United Kingdom on a visit visa was vague.
  - (e) The only evidence that the Appellant was pregnant as a result of a rape is from the Appellant.
  - (f) There were no compelling circumstances to warrant a grant of leave outside the Rules.
7. Grounds of appeal were lodged arguing :
  - (a) The Judge failed to take into account the evidence which suggested that she suffered mental health problems prior to the loss of her child arising out of the trauma of events in the DRC.

- (b) The Judge failed to consider whether the interview was unlawful in that it was not recorded although a request was made in writing in advance of the interview and it was therefore contrary to Asylum Policy Instructions.
  - (c) The Judge failed to consider the evidence adduced in relation to the impact of sexual violence on disclosure during asylum interviews.
  - (d) The Judge failed to consider whether the Appellant would have been perceived to have been in a sexual relationship with a female in the DRC.
  - (e) The Judge suggested that the Appellant could relocate without specifying where she could relocate to.
  - (f) The Article 8 assessment is inadequate and fails to consider the Appellant having had a stillborn daughter while in the United Kingdom.
8. On 17 August 2015 First-tier Tribunal Judge Robertson gave permission to appeal on all grounds.
9. At the hearing I heard submissions from Mr Schwenk on behalf of the Appellant that :
- (a) The Judge failed to consider all of the medical evidence. The judge concluded that the Appellant's symptoms of trauma arose out of the birth of a stillborn baby and failed to consider the evidence that suggested it predated the birth of her child.
  - (b) The Judge failed to consider whether the interview carried out in contravention of the Respondent's own policy was lawful. The Judge did not record in the decision how he had decided to treat the interview although it was put in issue by the Appellant's representatives who referred to the case of Dirshe 2005 EWCA Civ 421 and there was clearly a discussion about of prior to evidence being called. The Judge failed to consider the impact of a 7 hour interview on a traumatised who expressed fears at the beginning and end of the interview.
  - (c) The Judge failed to consider not only whether the Appellant was a lesbian but also whether she would be perceived to be one.
  - (d) The Article 8 assessment was extremely brief and failing to incorporate any consideration of the Appellant being traumatised and having lost a child through stillbirth.
10. On behalf of the Respondent Mr McVitie submitted that :
- (a) The tribunal did consider the question of how to treat the interview record in the light of it not having been recorded and he relied on the record of proceedings made by Mr Tan which he produced today which he suggested showed that it was agreed by counsel that the interview record should be read together with the letter of amendments sent by the legal representatives after the interview and this meant the interview was lawful. Therefore any issues in relation to the interview were settled at the start of the hearing.

- (b) It was never argued before the first tier that the Appellant might be perceived to be a lesbian.

**Finding on Material Error**

11. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.
12. The failure of the First-tier Tribunal to address and determine what weight to attach to the record of interview taking into account the written request for recording made by those representing the Appellant and the Respondent's own policy constitutes a clear error of law. It was clearly an issue raised in correspondence by those representing the Appellant and they referred to the case of Dirshe (C1 and E1 of the Respondent's bundle). It was also a matter that was discussed at some length prior to the evidence being called. Mr McVitie produced at court the record of the discussion made by the HOPO in the First-tier Mr Tan. The Judge's own Record of Proceedings is unfortunately almost completely illegible but he did not address the issue in his decision and make clear the arguments made before him in relation to the weight to be attributed to the interview record and how he resolved them. He describes the decision as regrettable but this does not amount to a resolution of how he approached the interview. It is also unclear from the remainder of his decision therefore when he refers to discrepancies in 'the evidence' whether he is talking of the contents of the interview, witness statements or oral evidence. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.
13. In relation to the argument that the Judge failed to adequately address the medical evidence both as to whether the Appellant was suffering from mental health issues prior to the stillbirth and thus how this may have impacted an assessment of the credibility of her account of events in the DRC and the weight to be given to inconsistencies in her evidence I am satisfied that this ground is made out. The Judge makes no reference to anything other than the report of Dr Malik and indeed in relation to that makes no findings about the Appellant's mental health either in relation to credibility or Article 8. The judge makes no reference to the evidence of the Counsellor Trish Dooley at F1 of the Respondent's bundle or the evidence at 9-33 of the Appellant's bundle and I am satisfied that there is nothing in his findings from which it can be inferred that he has taken it into account.
14. The Article 8 assessment is wholly inadequate and there is no assessment either there or anywhere else in the decision of the Appellant's mental health problems or the issue of the stillborn baby as compelling circumstances.
15. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set aside in its entirety as I am satisfied that the findings were inadequate and unclear on a number of key features in the case.
16. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25<sup>th</sup> of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

*(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or*

*(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.*

17. In this case I have determined that the case should be remitted because the Appellant did not have a fair hearing due to the failure to make clear and well reasoned findings on key issues relating to the interview and the Appellant's mental health issues. In this case none of the findings of fact are to stand and the matter will be a complete re hearing.
18. I consequently remit the matter back to the First-tier Tribunal sitting at Manchester to be heard on a date to be fixed before any other Judge except Judge Nicol and Judge Birrell.
19. Under Rule 14(1) the Tribunal Procedure (Upper Tribunal) rules 2008 9as amended) the Appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order for anonymity was made in the First-tier and shall continue.

Signed

Date 11.11.2015

Deputy Upper Tribunal Judge Birrell