



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

Appeal Number: AA/11116/2014

THE IMMIGRATION ACTS

**Heard at North Shields
On 21 October 2015
Prepared on 22 October 2015**

**Determination Promulgated
On 28 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

**M. D.
(ANONYMITY DIRECTION MADE)**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms <, Counsel, instructed by Halliday Reeves Law Firm

For the Respondent: Mr Kingham, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant entered the United Kingdom as a visitor when she was a child, and she claimed asylum on 17 July 2009 with the help of her social worker. Although herself a citizen of Guinea, she claimed asylum in the company of a cousin who was a citizen of Liberia. Both girls had entered the UK in the company of other family members who were citizens of Guinea, and they had then both been taken into the care of their local authority as a result of concerns about their welfare. Both denied contact with their family members in the UK

thereafter. Although initially they were placed with foster parents together they were subsequently separated, and thereafter had no contact with one another.

2. The Appellant's application was refused by the Respondent on 28 November 2014, as was that of her cousin, and in consequence removal decisions were made in relation to them, this Appellant to Guinea, and her cousin to Liberia.
3. The Appellant and her cousin each then appealed to the Tribunal against the removal decision. Although their cases were in many respects entirely distinct those appeals were linked for hearing together, and thus their appeals were heard together on 17 July 2015. The Appellant's appeal was allowed on both asylum and humanitarian protection grounds by decision of Judge Robson, promulgated on 19 August 2015, although the appeal of her cousin was dismissed on both asylum and human rights grounds.
4. The Respondent's application to the First Tier Tribunal for permission to appeal did not point out the error of law in the Judge's decision to allow the appeal on both human rights and humanitarian protection grounds. The application did argue however that the Judge had reversed the burden of proof in relation to whether the Appellant had any extended family in Guinea, and had failed to identify, (i) how she could be at risk of harm from an extended family she denied existed, (ii) why her membership of a particular social group should give rise to problems upon return if it had not given rise to any in the past, and, (iii) any findings upon whether adequate state protection existed for her in Guinea.
5. That application was granted by Judge Grimmett on 7 September 2015.
6. The Appellant has filed no Rule 24 Notice.
7. Thus the matter comes before me.

The hearing

8. When the appeal was called on for hearing Ms Cleghorn raised the question of whether the appeal should be heard without reference to the appeal pursued by the Appellant's cousin against the decision to dismiss her appeal. I pointed out that there was nothing on the Tribunal file maintained in relation to the Appellant's cousin to suggest either that she had applied for permission to appeal the Judge's decision, or that this had been granted to her. Whilst Ms Cleghorn had not been furnished with any document to support the claim, she told me that she had been given to understand that permission to appeal had been granted to the Appellant's cousin, and that the Upper Tribunal had directed that the appeals should remain

linked. I stood the matter down so that she could take specific instructions.

9. When the hearing resumed Ms Cleghorn informed me that her instructions were that no decision had yet been made upon the application made by the Appellant's cousin for permission to appeal. I reminded her that the Tribunal file did not record any application for permission to appeal, which she was unable to explain.
10. After some discussion the parties agreed that the issues raised by the Appellant's appeal, and by the appeal of her cousin were distinct, and that I should proceed with the error of law hearing in relation to the Appellant alone.

Error of Law; humanitarian protection?

11. It is plain, and the Appellant does not seek to suggest otherwise, that the Judge would have made a material error of law if his decision had been to allow the appeal on both human rights and humanitarian protection grounds, as the concluding passage states under the heading "Notice of Decision". The issue for me is whether this was simply a typographical slip, or whether only one, or both, of those decisions must be set aside and remade in consequence.
12. I am satisfied that when the decision is read as a whole, the Judge's intention as expressed in paragraph 128 of the decision, was to allow the appeal on asylum and human rights grounds by reference to Article 3; he made no reference to any humanitarian protection claim in the course of his analysis of the evidence, or to any Article 8 claim, and it is not suggested before me that the evidence before him would have permitted him to allow the appeal on either of those limbs. Accordingly I accept that the declaration that the appeal is allowed on humanitarian protection grounds is a typographical error which must be set aside. Absent any other error of law in the decision it is agreed by both parties that I should simply remake that decision so as to dismiss the appeal on humanitarian protection grounds.

Error of Law?

13. The Appellant identified no fear of a risk of harm from the authorities in Guinea in the event of her return to that country.
14. The Appellant's claim was based upon a fear of non state agents, against whose actions it was said the state would be unable to offer her protection, and which she could not avoid by the expedient of internal relocation.
15. The risk of harm from non-state agents who were members of her family was said to arise because; (i) she was at risk of being perceived to be an apostate, (ii) she was at risk of being subject to a forced marriage, and (iii) she was at risk of being harmed in response

to the fact that she had given birth out of wedlock to a child. Only one of these elements of her case was dealt with specifically by the Judge, who rejected the claim that she would be subject to a forced marriage, although it is very difficult to discern any reasoning for that conclusion.

16. The risk of harm from non-state agents who were not her family was said to arise in the following way; (i) upon the Appellant being perceived to be an apostate, (ii) upon the Appellant being perceived to lack family protection and thus being vulnerable to sexual assault.
17. It is common ground between the parties that the Judge failed to deal with the Appellant's claim that she faced a real risk of harm upon return to Guinea because she is a genuine convert to Christianity from Islam. Thus it was argued she would genuinely wish to pursue her Christian faith, and in turn she would be at real risk of being perceived to be an apostate, and in turn she would face a real risk of persecution either from members of her own family, or from members of the general population. Both representatives were agreed that this amounted to a material error of law.
18. The Appellant's evidence to the Judge was that she had never lived with her parents in Guinea, or that if she had done so it was only in infancy and she did not recall it. The evidence before the Tribunal in the form of her passport and her VAF did however show that at the least she must know who her parents were. The Respondent argued that the clear indication was that despite her claim to the contrary, she did have family members living in Guinea, and thus she did have family members to turn to for support in the event of return to that country. The Respondent disputed the Appellant's claim to face a risk of harm from them, and her claim that she would be rejected by them, notwithstanding the evidence of the circumstances in which she had to be taken into care.
19. The Respondent criticises the Judge's statement "there is however no evidence before me to disprove her claim that she has no family to turn to for family support", and points out that the Judge has failed to make any clear finding on whether there were close family members living in Guinea at the date of decision, and if so who they were. The Respondent argues that the language used by the Judge in paragraph 120 amounts to a reversal of the burden of proof, but I am not satisfied that the matter is quite as simple as that. This was not a case in which the Appellant had given an account that was rejected in its entirety as a fiction, and it was not possible for the Appellant to prove a negative, particularly when on any view she left Guinea as a child and *prima facie* was estranged from the family members living in the UK. Whilst the Judge could, perhaps, have phrased the matter better, in my judgement all that he was really saying in paragraph 120 was that there was nothing to indicate to him that this aspect of her evidence was a fiction.

20. The Respondent argues that the Judge's approach [120-17] appears to have been to conclude that it did not matter whether she did, or did not, have family in Guinea because she would be rejected by them as a girl who had given birth to a child outside marriage, so that upon return she would be a single woman with a young child, but without any family support. It is argued that this approach was on any view flawed as too simplistic, but that it would also appear to stem in large part from the highly selective quotation from the October 2004 report of the IRB of Canada, to be found in the skeleton argument provided to the Judge by the Appellant's representative. Read as a whole it is argued that this report is evidence that the rejection of young unmarried mothers by their families is a practice confined to only radical Muslim families, and there was no evidence to suggest that her own family fell into that category [ApB p65].
21. If the Judge's approach had been to conclude in paragraph 120 that the Appellant had no family members living in Guinea, then it would follow that he would indeed have fallen into error in the event that he had concluded that the Appellant faced a risk of harm from members of her extended family living in Guinea (whether because she had given birth to a child as an unmarried woman [125] or for any other reason). If, as she had claimed, there were no members of the extended family living in Guinea, then there could be no risk of harm from such individuals.
22. If the Judge's approach was to conclude that members of the extended family who lived outside Guinea posed a risk to the Appellant, then he signally failed to explain which individuals he was referring to, and whether, or how, he concluded that any member of her extended family who did not live in Guinea would know whether she had been returned to Guinea, or, would be able to trace her. The Appellant's own evidence was that there had been no contact with any of the family members in the UK for many years since she had been taken into care. The only exception was the cousin in the UK who was her fellow asylum seeker. (It is not entirely clear, but the Judge appears to have accepted that they had enjoyed no contact save for the purposes of the application and appeal process since a decision had been made to place them separately with foster carers.)
23. It is however tolerably clear in my judgement that the Judge did not accept that the Appellant was at risk of harm from her father [124], although that has to be taken in its proper context, which was the Appellant's claim that her father was dead.
24. Having considered the decision at some length, and with the assistance of the submissions of both representatives I am satisfied that paragraphs 125-7 of the decision only make sense if they are to be read as a finding that the Appellant faced a risk of harm from members of the general population as an unmarried woman with a child. The difficulty with the brevity of the Judge's approach to the

reasoning that led to this finding is his failure to adequately address the issue of whether she would at least have access to the support of her mother, and his failure to make any reference to the guidance of the Tribunal in AN & SS (Tamils - Colombo - risk) Sri Lanka CG [2008] UKAIT 00063. In that decision the Tribunal held that it was appropriate to take into account the availability of financial support from the Respondent to a returnee, through the Voluntary Returns Programme;

1. Much has been made of the undue harshness which AN will face as a single mother without accommodation or employment and without friends or family to turn to in Colombo, but this is to leave out of account what even Dr Smith acknowledges to be the very generous support package offered by the IOM to voluntary returnees. After "*smoothing the re-entry process*" the IOM provides "*a comprehensive package of support for five years after arrival*", which includes "*five years shelter guaranteed*." We do not think it is open to the appellant to say that, if she loses her appeal, she will not take advantage of this package, and to argue from that refusal that she will face destitution in Colombo which, accordingly, is not a place to which she can reasonably be expected to relocate.

25. In the light of that guidance it was not open to the Appellant to argue that in the event of her return to Guinea she would not take advantage of whatever package of assistance was then available to voluntary returnees, or argue that she would face destitution upon return. That would have a material impact upon any assessment of the risk of a breach of her Article 3 rights upon return as a woman with an infant child to care for.

Conclusion

26. I have in these circumstances considered whether or not to remit the appeal to the First Tier Tribunal for it to be reheard, as requested by the Respondent. In the circumstances of the appeal I am satisfied that this is the correct approach, and I note Ms Cleghorn's acceptance of many of the criticisms of the Judge's approach. In circumstances such as these, the effect of the errors of law has been to deprive the parties of the opportunity for their case to be properly and fairly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 25 September 2012. Moreover the extent of the judicial fact finding exercise that is required is such that having regard to the over-riding objective, it is appropriate that the appeal should be remitted to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 25 September 2012.
27. Having reached that conclusion, with the agreement of the parties I make the following directions;
- i) The decision upon the appeal is set aside and the appeal is remitted to the First Tier Tribunal for rehearing. No findings of

fact are preserved. The appeal is not to be listed before Judge Robson.

- ii) No interpreter is required for the hearing of the appeal.
- iii) The appeal is no longer to be linked to appeal AA/11101/2014.
- iv) The Respondent shall by 5pm on 22 November 2015 file and serve;
 - 1. any evidence to be relied upon to rebut the Appellant's claims about the risks of harm she would face upon return to Guinea, and,
 - 2. any evidence to be relied upon of the immigration status within the UK of the family members who are believed to have brought the Appellant to the UK.
- v) The Appellant shall by 5pm on 22 December 2015 file and serve;
 - 1. any evidence to be relied upon concerning the paternity of her baby, and the immigration status of the father, since she maintains a claim that her baby is a British citizen,
 - 2. any evidence to be relied upon to demonstrate that she has no family in Guinea to whom she could turn for support,
 - 3. any evidence to be relied upon to demonstrate that she is at risk of serious sexual violence from members of the general population upon being perceived to be a young woman without family support, against which the state affords no adequate protection,
 - 4. any evidence to be relied upon to demonstrate that she is genuinely a convert to Christianity,
 - 5. any evidence to be relied upon to demonstrate that she is at risk of serious harm as one who may be perceived to be an apostate from members of the general population, against which the state affords no adequate protection
- vi) The appeal is to be listed on the first available date at the North Shields hearing centre after 1 January 2016 for full hearing with three hours allowed. It is not suitable to be a float, and it is not reserved to any particular judge.
- vii) The Anonymity Direction previously made by the First Tier Tribunal is preserved.

Decision

28. The decision promulgated on 19 August 2015 did involve the making of an error of law sufficient to require it to be set aside and the appeals to be reheard. Accordingly the decision upon the appeal is set aside and the appeal is remitted to the First Tier Tribunal with the following directions;

- i) The decision upon the appeal is set aside and the appeal is remitted to the First Tier Tribunal for rehearing. No findings of fact are preserved. The appeal is not to be listed before Judge Robson.
- ii) No interpreter is required for the hearing of the appeal.
- iii) The appeal is no longer to be linked to appeal AA/11101/2014.
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- vii) The Anonymity Direction previously made by the First Tier Tribunal is preserved.

Deputy Judge of the Upper Tribunal JM Holmes
Dated 22 October 2015