



IAC-AH-SC-V1

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

Appeal Number: DA/01272/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 11 January 2016**

**Decision & Reasons Promulgated
On 28 January 2016**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

**S N D
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Watterson, instructed by Lawrence Lupin Solicitors
For the Respondent: Mr Walker, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, SND, was born in August 1977 and is a citizen of Jamaica. She appeals against the decision by the respondent to make a deportation order in respect of her. The First-tier Tribunal (Judge M J Gillespie; Mrs Lydia Schmitt) dismissed the appeal on all grounds in a decision promulgated on 19 March 2015. The appellant now appeals, with permission, to the Upper Tribunal.
2. As I told the representatives at the hearing at Field House on 11 January 2016, I find that the grounds of appeal have merit. I have concluded that

the Tribunal erred in law such that its decision falls to be set aside. I shall briefly give my reasons for that decision.

3. The first ground of appeal challenges the Tribunal's approach to the credibility of the appellant's claim to having been gang raped on account of her brother's involvement with a notorious gang in Jamaica (the Evil Blacks). The Tribunal had before it a report of Dr Cohen who found that there was "very strong evidence of multiple serious assaults having occurred" to the appellant. It was clear from the report that the injuries were the likely consequence of a violent sexual assault. Ms Watterson, for the appellant, submitted that the Tribunal had rejected the appellant's credibility before taking consideration of Dr Cohen's evidence. I agree. The Tribunal stated at [49] that it had "serious reservations as to the viability of Dr Cohen's findings" on account of the "mendacious inventiveness of the appellant upon which these findings have been formulated." The Tribunal appears to have overlooked the fact that Dr Cohen had been instructed specifically to give expert evidence in relation to physical injuries on the appellant's body. That these injuries existed appears not to have been in doubt so it is unclear why the appellant's alleged "mendacious inventiveness" should have had any affect upon the manner in which Dr Cohen described the physical injuries which she discovered on the appellant's body. This is not, of course, to say that the injuries may not have been sustained for reasons other than those described by the appellant in her evidence; the First-tier Tribunal accepted (with evident reluctance) that the appellant had, at some time, been sexually assaulted. However, the Tribunal's reasoning gives the firm impression that it had concluded that the appellant's case was without credibility even before it set about reading Dr Cohen's report. By doing so, it fell into serious error (see *Mibanga (2005) EWCA Civ 36*).
4. I observe that the language used throughout the decision does not exactly give an indication that the Tribunal has taken an open-minded, even-handed approach to the evidence. There are passages of the decision bearing headings such as "Other Indications of Falsity", "Another Example Indicative of Untruthfulness" and (more obscurely) "Belated and Colourable (*sic*) Evolution of the Allegation of Rape." The use of such language by way of the prefacing of analysis of the evidence does little to convey the impression of impartiality and open-mindedness on the part of the decision maker.
5. At [45], the Tribunal even goes so far as to find that the appellant has lied regarding advice she received from her solicitors following her conviction in a Criminal Court. The Tribunal wrote that,

"... we regard as fabrication the statement by the appellant that she has been advised legal representatives that she will not be given an effective sentence following her recent conviction but will have some suspended punishment ... we do not accept that such advice would be likely to be professionally given or communicated to the appellant."

As it transpired, the appellant did receive a suspended sentence in line with the advice of her solicitors. It is not clear from the decision why the

Tribunal considered that it was in a better position than the solicitors to second-guess the likely sentence which the appellant would receive. Once again, the impression is given of an analysis of the evidence which was subjective and possibly partisan rather than clinical and objective.

6. It was the appellant's account that she had been targeted for sexual assault on account of her brother's gangster activities with the "Evil Blacks". The Tribunal has failed to make an assessment of the risk to the appellant of returning to Jamaica as the sister of this notorious gang member. The Upper Tribunal, considering an appeal of the appellant's brother, had found that, despite his absence from Jamaica for twelve years, "he could not pass unnoticed for long in any large town in Jamaica." In consequence, the Upper Tribunal found that the brother would be at risk on return. The First-tier Tribunal in the present appeal failed properly to engage with this aspect of the appellant's case.
7. Finally, the Tribunal found that care arrangements for the appellant's child (K) would be likely to break down and that it was not in K's best interests for him to be in the care of his mother and father. As the grounds point out, that finding was entirely contrary to conclusions reached by the Family Court. The Tribunal sought to justify taking a different approach from the Family Court because "the situation has developed" [66] but, as Ms Watterson submitted, the only obvious "development" has been the appellant's most recent criminal offending which took place in April 2014, that is before the proceedings in the Family Court were concluded. I find that the Tribunal has reached a finding as regards the best interests of the child without properly explaining why that finding differs from that of the Family Court which had before it substantially the same evidence. Its failure to do so amounts to an error of law.
8. In the circumstances, I set aside the First-tier Tribunal's determination. Further detailed fact-finding is required because I also set aside all of the findings of fact of the First-tier Tribunal. It is, therefore, necessary for the matter to be returned to the First-tier Tribunal and for that Tribunal to remake the decision.

Notice of Decision

The decision of the First-tier Tribunal promulgated on 19 March 2015 is set aside. None of the findings of fact shall stand. The matter is returned to the First-tier Tribunal (not Judge Gillespie/Mrs Schmitt) for that Tribunal to remake the decision.

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 him or any member of their 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

Date 28 January 2016

Upper Tribunal Judge Clive Lane